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Judicial Reform at the Lowest Level: A Model Statute for Small Claims Courts

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SPECIAL PROJECT

Judicial Reform at the Lowest Level: A Model Statute for Small Claims Courts

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INTRODUCTION

Although small claims courts have existed in various United States jurisdictions only since the early twentieth century, procedures for adjudicating small claims in other countries have been developing for centuries and have caused debate among legal theorists since the late 1800's. General agreement exists that the judicial system should provide a realistic opportunity for the redress of all grievances, whether large or small. Substantial problems have arisen, however, in developing a system to achieve fair adjudication of the small claim without expense, delay, or technicality. The need for such a system is compelling. There are few Americans, whether businessmen, employees, or professionals, who have not been confronted with faulty goods, fraudulent sales tactics, long-overdue debts, or other dishonest, injurious acts that can make survival in modern America an exercise in frustration. But for those citizens who decide to file a lawsuit to obtain redress, however, the state courts present a confusing array of courtrooms, complicated forms, procedural technicalities, and even greater frustration. The obvious answer to the problem is "get a lawyer," but when the claim is for a small amount, the high cost of legal representation forces the potential litigant to try to bury his frustration and forget about the entire unhappy experience. This scenario need not occur, however.

A small claims court in which the citizen may sue in his own behalf can be a quick, inexpensive, and effective means of redress.

The purpose of this Special Project is to analyze the development of procedures for adjudicating small claims, with particular emphasis on the State of Tennessee, and to suggest statutory revisions that may be of value in improving the quality of justice at the lowest level of the judicial system. The Project study commences with an historical survey of the origins of small claims theory and the various court attempts to apply the theory that have been made in the United States during the last half-century. The result of this analysis will be a characterization of a model small claims court. The development and operation of Tennessee procedures for adjudicating small claims will then be examined within the limits of this characterization. Although Tennessee has no small claims court as such, the general sessions courts have been the primary courts for adjudicating claims for small amounts. The general sessions courts will be evaluated to determine whether they presently function adequately as small claims courts. The last section of the Project will comprise a study of the policies to be considered in drafting a small claims statute. Although the model statute is designed in light of the particular constitutional, statutory and political characteristics of the Tennessee court system, it is hoped that by illuminating the proper goals of small claims procedure and the various methods of achieving those goals, this Project will be useful to other states in reforming their small claims procedures.

PART ONE

HISTORICAL DEVELOPMENT OF SMALL CLAIMS COURT THEORY

I. ORIGINS OF THE CONCILIATION CONCEPT

Conciliation efforts prior to trial have been utilized in other nations as a major tool in settling small civil disputes quickly and fairly. The Scandinavian judicial system, historically less concerned with the *stare decisis* effect of prior recorded decisions than its English counterpart, was perhaps by nature more at ease with the idea of requiring conciliation attempts as a prerequisite to formal court procedures.¹ In 1797, Norway officially adopted a system of community conciliation tribunals² to provide an informal atmosphere in

1. Grevstaad, *Courts of Conciliation*, 68 ATLANTIC MONTHLY 405 (1891).

2. The purpose of the community council in Norway was to increase the access of citizens to a decisionmaker without requiring resort to formal court procedure. If the attempt at conciliation was unsuccessful, appeal to the Norwegian district court was available. Orfield, *Norwegian Law*, 23 TEMP. L.Q. 257, 292-93 (1950).

which claims could be pursued without the observation by litigants of complex technical procedures or formal pleading rules.³ The judges functioned as conciliators, and their duties included active inquiry into the circumstances of each case and encouraging mutually agreeable settlement between the parties. Characterized as a "forum of common sense unfettered by technicality,"⁴ the system frequently accomplished inexpensive and speedy resolution of small disputes. Similarly, Denmark established a nation-wide system of conciliation courts in a 1795 statute.⁵ The Danish tribunals were comprised of three appointed members, who mediated small civil cases in private sessions.⁶ The statute required the conciliation court to consider any claim submitted within fourteen days, unless both parties agreed to a continuance, and the conciliation procedure was a prerequisite to the initiation of a civil suit in the district courts.⁷ Neither Norwegian nor Danish courts admitted evidence of unsuccessful conciliation attempts at a later trial. Both systems achieved notable success and have remained substantially unchanged since their inception. A 1920 study indicated that approximately eighty percent of all small civil cases brought before the Norwegian and Danish conciliation tribunals resulted in an agreed settlement.⁸

Although it has never expressly provided for conciliation courts comparable to those existing in Scandinavia, German law developed a small claims procedure that afforded opportunity for conciliation through a simplified and informal trial. In Germany the judge traditionally has been the preeminent figure at trial—actively inquiring into the facts and questioning the parties and witnesses prior to decisionmaking.⁹ For civil cases with an amount in controversy less than a set jurisdictional limit, the German District Court developed a very informal procedure: no formal pleadings were required; no binding rules of evidence existed; the judge was free to suggest solutions or remedies directly to the parties; and the judge conducted the examination of witnesses.¹⁰ Because of the judge's dual function as examiner and conciliator, he could guide the parties through the small claims suit and fashion relief appropriate to

3. *Id.* at 293.

4. Grevstaad, *supra* note 1, at 403-04.

5. See Ostenfeld, *Danish Courts of Conciliation*, 9 A.B.A.J. 747 (1923).

6. *Id.* at 748.

7. Smith, *The Danish Conciliation System*, 11 J. AM. JUD. Soc'y 85, 89 (1927).

8. Harley, *Conciliation Is Succeeding*, 4 J. AM. JUD. Soc'y 70, 72 (1920).

9. Pound, *The Administration of Justice in the Modern City*, 26 HARV. L. REV. 302, 318-19 (1913).

10. The German procedure is described in von Lewinski, *Courts and Procedure in Germany*, 5 ILL. L. REV. 193 (1910).

each case.¹¹ The simplicity of this procedure resulted, by 1900, in almost half of the small claims cases brought in German district courts being tried without counsel on either side, keeping the costs of the actions at a minimum.¹²

Thus, statutes in Denmark and Norway, and active German courts using simplified procedures established forums in which conciliation of minor civil disputes was possible. The beneficial characteristics of these forums included fair and prompt consideration of a litigant's claim although the potential monetary award was small, an opportunity for settlement or adjudication without formal court procedure, and minimal expense in maintaining the action.

II. THE JUSTICE OF THE PEACE SYSTEM AS A PREDECESSOR TO SMALL CLAIMS COURTS

England established the first statutory justice of the peace system in 1360,¹³ during its transition from a feudal society to a unified monarchy. The functions of the justice of the peace included both administrative and judicial duties, but jurisdiction over all civil suits was vested in county courts.¹⁴ As the system matured, several statutes increased the administrative duties of the justices, and during the Tudor period justices assumed criminal jurisdiction over certain actions for conversion of personal property and intentional damage to real property.¹⁵ The justices were primarily the representatives of the crown for each community. While his authority came from statutory grants, a justice's discretion in the performance of his duties was subject to little direct control within his own territory.¹⁶ Seldom educated in the law or the administration of justice, the English justice was usually a local nobleman, and his office was highly respected.¹⁷ Justices were compensated by fees assessed

11. See Lauer, *Test Conciliation in City Court*, 8 J. AM. JUD. Soc'y 175, 177 (1925).

12. Von Lewinski, *supra* note 10, at 195.

13. 34 Edw. 3, c. 1.

14. A brief summary of the jurisdiction of the early English justice of the peace is found in R. POUND, *ORGANIZATION OF COURTS* 7-8 (1940). The civil jurisdiction at the lower court level in England was vested in a system of county courts that generally followed formalized procedure. 1 W. HOLDSWORTH, *HISTORY OF ENGLISH LAW* 192 (1926).

15. See Maudsley & Davies, *The Justice of the Peace in England*, 18 U. MIAMI L. REV. 517, 518-19 (1964). Although a "small claims court" was established in London as early as 1606—probably to relieve the city courts of the many civil actions brought by merchants—English justices of the peace never assumed similar jurisdiction. See D. GOULD, *STAFF REPORT ON THE SMALL CLAIMS COURTS* 3 (Nat'l Inst. Consumer Justice, Aug. 15, 1972) [hereinafter cited as *NICJ REPORT*]; 34 COLUM. L. REV. 932, 933 n.7 (1934).

16. Unless restricted by a prerogative writ from a higher court, the English justice was very much a "law unto himself." Maudsley & Davies, *supra* note 15, at 525.

17. The justices were appointed and were almost always members of the local gentry,

against litigants, following the practice of the common law courts.¹⁸ The lack of legal training and the mode of compensation of justices has led many legal historians to question both the competency of the average justice and the efficacy of the system in general.¹⁹ Although the English justice of the peace functioned primarily as a lower level criminal judge and as an administrative official, his place in Anglo-American legal history is important because it provided a model on which the American colonies based their justice of the peace systems.

Familiar with the traditional role of the English justice of the peace and faced with travel and communication problems that necessitated the establishment of some readily accessible authority capable of resolving local disputes, many American colonies provided for justices of the peace.²⁰ In addition to the administrative authority and minor criminal jurisdiction of his English counterpart, however, the American justice often had civil jurisdiction over claims not exceeding a low monetary limit.²¹ Early in the colonial period the Plymouth Colony provided for the annual selection of two men in each community to settle local controversies involving claims of three pounds or less, and in 1640 Massachusetts granted its justices jurisdiction over all civil actions within a forty-shilling jurisdictional limit.²² Thus, in America the justice of the peace became the adjudicator of minor civil disputes as well as an administrator and peacekeeper.

During the mid-nineteenth century the number of states with justices of the peace increased,²³ and by 1915 forty-seven of forty-eight states provided for justices in their constitutions.²⁴ While jus-

commanding community respect. Palmer, *The Vestigial Justice of the Peace*, 47 A.B.A.J. 380, 384 (1961).

18. The fee system has long been criticized. Maitland wrote, "A great deal of our legal history is to be explained by the fact that for centuries the judges were paid by fees; more business therefore meant more money and they had a keen interest in attracting litigants to their courts." F. MAITLAND, *CONSTITUTIONAL HISTORY OF ENGLAND* 135 (1908).

19. Most of the criticism of the English justices centered on either a dislike for the amount of ministerial and administrative power they wielded, or abuses of discretion encountered in experiences with particular justices. Several examples appear in Palmer, *supra* note 17, at 380-83.

20. In colonial America the justice could act as a true conciliator; the objective was to "decentralize the administration of justice so as to bring justice to every man in a sparsely settled community." Pound, *supra* note 9, at 307.

21. 1 Plymouth Colony Records, *cited in* R. POUND, *supra* note 14, at 32.

22. Later state constitutions sometimes incorporated specific details of justice's duties within the constitution itself. In this regard see the discussion of the West Virginia Constitution in Silverstein, *Small Claims Courts versus Justices of the Peace*, 58 W. VA. L. REV. 241, 246-47 (1956).

23. INSTITUTE OF JUDICIAL ADMINISTRATION, *THE JUSTICE OF THE PEACE TODAY* 1 (1965).

24. *See id.* at 16, and tables following thereafter.

tice of the peace systems varied with respect to civil jurisdictional limit, tenure of justices, and means of selection, the basic function of the American justice was uniform: he performed various administrative and ministerial duties; he sat as a criminal judge over traffic and other misdemeanor cases; and he was charged with the responsibility of deciding small civil cases at the local level. The fee system remained his primary source of compensation.²⁵ The geographical limitations of a justice's power and the general impracticality of appealing the types of cases he decided meant that little control was exercised over the wide-ranging discretion he enjoyed in the performance of his statutory functions.²⁶

With the approach of the twentieth century, criticism of existing American justice of the peace systems greatly increased. Although justices appeared to function best in rural areas where their stature as preeminent local authorities helped override the effects of occasional legal errors in decisionmaking,²⁷ the number of justices in towns and cities increased greatly as urban populations grew. As a result, many justices found themselves competing for business with municipal officials.²⁸ These officials often were authorized to perform administrative and ministerial duties that had previously been in the domain of the justices, and municipal criminal courts were created to handle misdemeanor cases.²⁹ More importantly, the denser population in cities resulted in an increased number of small civil claims concentrated in the same area. The shortcomings of systems that relied on individual justices thus became much more visible and highly publicized. Untrained in the substantive law, many justices simply did not satisfactorily perform their civil adjudicatory function. Therefore, the prospective litigant with legally valid claims or defenses could not be confident that they would be understood and applied,³⁰ and a growing public distrust of the institution of justice of the peace resulted. Furthermore, the fee system

25. The various fee schemes developed in American jurisdictions are reviewed and a statutory reference table is provided in *id.* at 16, and tables following thereafter.

26. Vanlandingham, *The Decline of the Justice of the Peace*, 12 KAN. L. REV. 389, 392 (1964).

27. For example, as West Virginia developed, many authorized justice positions in urban areas simply became vacant due to the lack of interested candidates. Silverstein, *supra* note 22, at 242.

28. The duplication of authority occurred because although municipalities generally were empowered to establish city courts and administrative offices by statute, the justices of the peace usually were constitutionally authorized, and thus could be abolished or modified only by a state constitutional amendment.

29. See SMALL CLAIMS STUDY GROUP, CENTER FOR AUTO SAFETY, LITTLE INJUSTICES: SMALL CLAIMS COURTS AND THE AMERICAN CONSUMER 29 (Mar. 1972) [hereinafter cited as NADER STUDY].

30. See Scott, *Small Causes and Poor Litigants*, 9 A.B.A.J. 457 (1923).

of compensation exposed justices to charges that they rendered judgments in favor of claimants simply to insure the continued receipt of the claimants' "business" in the future.³¹ Indeed, the fee system bore the brunt of the most intense criticism—many alleged that "J.P." meant "Judgment for the Plaintiff."³² In fact, many justices compensated on the fee system did compile records showing an unusually high number of judgments for the plaintiff.³³

The problems noted above led to greater public distrust of justices, and dissatisfaction with the institution in general. Because of his authority to decide civil cases without legal training, the duplication of his duties by municipal officials, and charges of favoritism, the American justice of the peace was attacked and ridiculed.³⁴ The demand for judicial reform increased as existing systems failed to change in any material respect during the early twentieth century.

III. THE DEVELOPMENT OF SMALL CLAIMS COURTS IN THE UNITED STATES

A. *Early Small Claims Courts*

In a 1913 article³⁵ Roscoe Pound proposed a revision in state procedures for processing the tremendous volume of small claims. He argued that citizens who seldom came into direct contact with the formal judicial structure needed access to a system that would equitably resolve small civil actions with a minimum of formality and expense. As a solution, Pound suggested a forum in which the judge assumed an expanded inquisitorial role, the clerk aided litigants in filing simple, common-sense complaint forms, and litigants proceeded pro se in an informal atmosphere encouraging mediation or conciliation, resulting in quick and inexpensive justice. In 1924

31. Sunderland, *A Study of the Justices of the Peace and Other Minor Courts*, 21 CONN. B.J. 300, 332 (1947).

32. R. H. SMITH, *JUSTICE AND THE POOR* 42 (3d ed. 1924).

33. A study in 6 Michigan counties over a 2-year period during 1929-1931 showed that of 933 civil judgments rendered by 16 justices of the peace, 926 (99.2%) were for the plaintiff. Over the same time period in the same counties, plaintiffs were successful in only 65% of county court civil cases. 4th Ann. Rep. Jud. Council of Mich. 170 (1934), *cited in* Sunderland, *supra* note 31, at 333. The Tennessee justices of the peace exhibited a similar statistical favoritism for plaintiffs. See note 101 *infra* and accompanying text.

34. See R.H. SMITH, *supra* note 32, at 42-43; Virginia abolished its justice of the peace system in 1942. VA. CODE §§ 4987 a-p (1942).

35. Pound suggested that there were several major deficiencies in the then-existing American judicial system. One of the needs he saw was to "make adequate provision for petty litigation in communities where there is a huge volume of such litigation which must be dealt with adequately on pain of grievous denial of justice." Pound, *supra* note 9, at 310. He found no justification for formalized court procedure with retained counsel and all the attendant expense in small claims cases, where the potential recovery could hardly pay for the process. *Id.* at 319.

another proponent of reform, Reginald Heber Smith, examined the legal problems of the urban poor, including apartment dwellers who encountered difficulties with landlords and creditors, and employees who had valid complaints against employers able to hire and fire at will.³⁶ To deal with these problems, he asserted the need for an alternative forum in which the "poor" litigant could afford to seek relief. Other proponents of reform of small claims procedure favored the incorporation of conciliatory principles within the existing court structure rather than the establishment of a separate court to handle small claims alone.³⁷

Soon after the publication of Pound's article in 1913, the Cleveland municipal court established by rule of court a conciliation branch that was, in effect, a specialized court for small claims.³⁸ In the Cleveland system no compulsory process existed; the judge held sessions in private, and he had the duty to mediate whenever possible. The primary objectives of this court were to provide a forum for claims of less than thirty-five dollars, to reach a mutually agreeable settlement of the claim, to unclog the municipal court system through removal of small claims from other dockets, and to encourage judicial settlement of small claims through provision of an attractive forum.³⁹ Heavily used by residents soon after its inception, the Cleveland conciliation branch was adjudged a success by observers and provided the impetus for the enactment of similar systems in other jurisdictions.⁴⁰

Instead of establishing a small claims forum by rule of court, Kansas provided by statute in 1913 for "small debtor's courts" in its three most heavily populated cities.⁴¹ Although designated as debtor's courts, the Kansas forums were designed to process small civil claims through conciliation procedures similar to those utilized in Cleveland. Although the statutory creation of small claims courts lacked the flexibility of establishment by rule of court, it had the benefit of a direct legislative stamp of approval.⁴² Using this statu-

36. R. H. SMITH, *supra* note 32, at 15-16.

37. *E.g.*, Randall, *Conciliation as a Function of Judge*, 18 KY. L. REV. 300 (1930).

38. The Chicago municipal court had established a simplified procedure for civil actions as early as 1906, but did not develop a specialized small claims division until 1916. R. POUND, *supra* note 14, at 266; *Informal Procedure in Chicago*, 2 J. AM. JUD. SOC'Y 23 (1918).

39. The first Chief Justice of the Cleveland municipal court described the court's procedure in Dempsey, *Conciliation in the City of Cleveland*, 9 A.B.A.J. 749, 750 (1923).

40. *See* Levine, *Conciliation Court of Cleveland* 2 AM. JUD. SOC'Y 10 (1918); Smith, *Small Claims Court for Massachusetts*, 4 J. AM. JUD. SOC'Y 51 (1920).

41. Northrop, *Small Claims Courts and Conciliation Tribunals: A Bibliography*, 33 L. LIB. J. 39, 40 (1940); *see also* Oglesby & Carr, *The Small Claims Courts in Texas*, 3 KAN. L. REV. 238 & n.1 (1955) (concerning primarily the Kansas courts).

42. Statutorily enacted courts may be easily expanded, for the state legislatures have

tory method, Oregon became in 1920 the first jurisdiction to extend its small claims procedure to every county.⁴³

The early small claims courts in America appear to have been based primarily on the policy objectives favored by Pound. These court systems incorporated aspects of conciliatory procedures from the Scandinavian systems and were intended to increase public confidence in the overall judicial system by providing a forum in which litigation would proceed quickly to a just conclusion although the amount in controversy was small.

Smith's arguments on behalf of the "poor" litigant, which are reflected in many early small claims court proposals,⁴⁴ remain important because they focus on one of the most troublesome issues in the area: whether a system should be designed primarily to protect a "poor" class of prospective claimants or to resolve efficiently a particular type of claim. The problem of defining the term "poor litigant" in a modern context clouds the issue. Arguably, today's lower middle-class citizens are more comparable to the "poor" of the past than are the indigent, who have access to improved legal services in many communities. The wage earner who maintains a moderate standard of living may not be able to afford an attorney for a small claim,⁴⁵ yet he cannot qualify as an indigent in order to receive subsidized legal advice or representation.⁴⁶ While advocates of judicial reform for the indigent are generally concerned with a broad spectrum of alleged inequalities,⁴⁷ the problem of small claims procedure is necessarily more narrow in scope. However, the class of citizens who may be benefited by an efficient and affordable small claims procedure is large. Plaintiffs far above the poverty level can hardly afford to expend more money in the prosecution of a claim than the potential recovery involved. Therefore notwithstand-

constitutional authority to create inferior courts as necessary. *See, e.g.*, TENN. CONST. art. 6, § 1.

43. ORE. CODE ANN. §§ 28-1401 to -1414.

44. *See, e.g.*, Maguire, *Poverty and Civil Litigation*, 36 HARV. L. REV. 361 (1923); Nims, *Poor Man's Court*, 96 FORUM 21 (July 1936).

45. *See Note, The Persecution and Intimidation of the Low-Income Litigant as Performed by the Small Claims Courts in California*, 21 STAN. L. REV. 1657 & n.3 (1969).

46. Smith was very concerned with expanding free legal services for the indigent when such services were not generally available. *See* R.H. SMITH, *supra* note 32, at xv-xvi. Legal aid's improvement over the years also changes the context of the term "poor" litigant. In an interview conducted in preparation for this Project, the President of the Nashville Bar Association expressed the view that in the modern legal context the most disadvantaged citizen is the worker who cannot qualify for free legal aid but also cannot afford present legal rates. Interview with John J. Hollins, President of the Nashville Bar Association, in Nashville, Tennessee, Nov. 21, 1974.

47. Clearly legal problems of the indigent are broader than the small claims procedure issue alone. *See* D. CAPLOVITZ, *THE POOR PAY MORE* (1967).

ing the valid concern expressed by Smith for the legal problems of the poor, concentration on development of small claims courts to dispose efficiently of minor civil actions regardless of the economic stratum of the claimant will best effectuate the primary objective of making the judicial system responsive to the needs of citizens.⁴⁸

B. *The Years of Development—1920 to 1955*

The initial success and praise of early small claims courts led to the enactment of similar legislation in other states, and by 1955, twenty-eight jurisdictions had adopted some type of specialized small claims procedure.⁴⁹ At first, states tended to initiate small claims procedures solely in major cities through the establishment of conciliation branches by rule of court,⁵⁰ but later a trend toward state-wide enactment of small claims procedures emerged.⁵¹ Although these procedures were essentially similar, systems differed from state to state primarily in the areas of jurisdictional limit, method of judge selection, and venue requirements.⁵² A few jurisdictions expressly barred attorneys from small claims courts, but in most states attorneys were neither barred nor required.⁵³

The objectives of the various small claims statutes and rules were articulated differently from state to state. Some appeared simply to follow the procedural details of statutes passed in other jurisdictions without clearly specifying the underlying policies involved.⁵⁴ This statutory ambiguity coupled with basic disagreement on the proper purpose of small claims courts among proponents of judicial reform made it difficult for those working within the new systems to effectuate any particular policy goals. By contrast, other jurisdictions had well-articulated objectives. For example, in the act

48. For a more complete characterization of a model small claims court system see Part One, § IV *infra*.

49. INSTITUTE OF JUDICIAL ADMINISTRATION, *SMALL CLAIMS COURTS IN THE UNITED STATES* 3 (1955) [hereinafter cited as IJA STUDY].

50. Of the earliest small claims court systems, those of Cleveland, Chicago, New York City, and Philadelphia were all created by rule of court. Northrop, *supra* note 41, at 40.

51. Between 1925 and 1935, 8 jurisdictions adopted specialized small claims procedure by statute. *Id.* at 40-41.

52. A comparison of current state small claims courts appears in Forbes, *What the Legal Community Needs to Know about the Small Claims Court*, 6 CREIGHTON L. REV. 317, 336 (1973).

53. California and Nebraska are among jurisdictions that bar attorneys from small claims court, unless the attorney is suing in his own behalf. CAL. CIV. PRO. CODE §117y (West 1954); NEB. REV. STAT. § 24-523(2) (Cum. Supp. 1972). See notes 301-31 *infra* and accompanying text.

54. The Texas statute contains a brief statement of objectives, TEX. REV. CIV. STAT. ANN. art. 2460a, § 7 (1971), while the New Mexico statute contains no such statement. N.M. STAT. ANN. §§ 16-5-1 *et seq.* (1970).

creating a small claims court for the District of Columbia, Congress clearly stated the policies and goals behind the act.⁵⁵ A primary goal was the promotion of public confidence in the American judicial system through initiation of a workable small claims procedure. Since the average citizen would be more likely to have contact with the judicial process in such a forum, Congress believed that a positive contact in a small claims court would increase the litigant's confidence in the administration of justice in general.⁵⁶

Although the movement to create new small claims court systems began to taper off in the early 1950's, empirical studies continued to yield highly favorable reports.⁵⁷ The systems generally handled larger numbers of small claims more quickly than state courts of general jurisdiction, and litigation costs were lower because of reduced filing fees and service of process by registered mail. The studies characterized the systems as an efficient alternative to the processing of small claims by justices of the peace or more formal courts.⁵⁸

C. *Growing Problems within Small Claims Court Systems*

Recent criticism of small claims court procedures has indicated that these systems have frequently failed to meet the growing needs of American society. Since 1950 the rapid increase in the sales of consumer goods has led to a heavy docket of small collection claims and, similarly, claims against sellers and manufacturers for defective products or fraudulent sales practices.⁵⁹ Since small claims courts could bear the brunt of this judicial workload, the failure of small claims systems to provide a forum in which debts may be fairly adjudicated and in which consumers can obtain redress has indicated a need for revision.⁶⁰ Indeed, one of the most frequently

55. 52 Stat. 103, ch. 43 (1938).

56. The unanimous committee stated in its final report:

The purpose of the bill is to improve the administration of justice in small civil cases and make the service of the municipal court more easily available to all of the people whether of large or small means; to simplify practice and procedure in the commencement, handling and trial of such cases; to eliminate delay and reduce costs; to provide for the installment payment of judgments; and generally to promote the confidence of the public in the courts through the provisions of a friendly forum for disputes, small in amount but important to the public.

Hearings on S. 1835 Before the District of Columbia Comm. of the Senate, 75th Cong., 1st Sess. (1937).

57. See the discussion of the data compiled on the Hartford, Connecticut courts in IJA STUDY at 49.

58. INSTITUTE OF JUDICIAL ADMINISTRATION, SMALL CLAIMS COURTS IN THE UNITED STATES 1 (Supp. 1959) [hereinafter cited as IJA SUPPLEMENT].

59. Note, *Consumer Legislation and the Poor*, 76 YALE L.J. 745, 746 (1967).

60. NICJ REPORT, *supra* note 15, at 10.

stated criticisms is that through misuse, disuse, and lack of interest they have become "forgotten" courts.⁶¹ In many jurisdictions few individuals use the court; thus, the systems often cater to one class of litigant, the general creditor, who is represented by a retained collection agency or collections lawyer.⁶² Recent studies of some American small claims courts have shown that the proportion of cases initiated by organizations against individuals is much larger than those brought by individuals against organizations or against other individuals.⁶³ Commentators in California have characterized their small claims courts as servants of institutional plaintiffs: government agencies, corporations, and proprietorships.⁶⁴ Interviews in California indicated that those individuals who did elect to use the small claims court were "almost entirely middle-class and well educated."⁶⁵ Moreover, a national study of the institutional plaintiff situation indicates that in jurisdictions with no statutory curbs on recurring plaintiffs, business claimants tend generally to take over the systems.⁶⁶ The recurrent plaintiff has some advantage simply because his frequent presence in small claims court gives him a familiarity with the stratagems and tactics most successful with the individual judge.⁶⁷ When collections cases dominate the court, individual claimants often appear to be squeezed out, and the court functions primarily as a tool of the business community.⁶⁸ Further, courts in which the individual defendant constantly defaults and the consumer plaintiff seldom brings suit fail to perform adequately their potential consumer-protection role, and if the small claims court is to be the primary vehicle for redress of grievances involving

61. See Murphy, *D. C. Small Claims Courts—The Forgotten Court*, 34 D.C.B.J. 14 (Feb. 1967). The 1972 Florida court reform provides an excellent example of a possible result of this problem. Prior to this general overhaul of the Florida judicial system, small claims in each county were heard by specialized judges who decided only small civil cases. Under the 1972 statute, this system was abolished; the county courts of general jurisdiction, with their attendant formal structure and tradition of representation by attorneys, now have jurisdiction to decide all small civil disputes. See Fla. Stat. Ann. ch. 42 (1962), *repealed*, [1972] Fla. Laws, ch. 72-404, § 30, (effective Jan. 1, 1973).

62. NICJ REPORT, *supra* note 15, at 182; NADER STUDY, *supra* note 29, at 32; Klein, *Buyer vs. Seller in Small Claims Court*, 36 CONSUMER REP. 624 (Oct. 1971).

63. NICJ REPORT, *supra* note 15, at App. A-E.

64. 4 STAN. L. REV. 237, 238 (1952).

65. *Persecution and Intimidation*, *supra* note 45, at 1662.

66. Some jurisdictions have experimented with restrictions on recurring plaintiffs, for example, allowing a named individual or company to sue in the small claims court only a certain number of times per month or year. IJA STUDY, *supra* note 49, at 2, 7 & 10. The Texas statute bars from the small claims courts altogether all collection agencies and organizations that lend money as a secondary business. TEX. REV. CIV. STAT. ANN. art. 2460a, § 2 (1971). See text accompanying notes 296-99 *infra*.

67. See note 285 *infra* and accompanying text.

68. Forbes, *supra* note 52, at 332-33.

small monetary sums, it must be used to process consumer claims.⁶⁹

A related criticism of modern small claims courts is that the ostensible beneficiary of the system, the community, seldom receives adequate information about the procedures for suing or defending suits in these courts.⁷⁰ A small claims court cannot be justified unless it is used, and when individuals lack information about the court, and therefore do not use it, the proper objectives of the system are frustrated. When the courts are inadequately publicized in the community, those well versed in the established procedures for debt collections—business claimants and collection agencies—will naturally tend to predominate.⁷¹

One further criticism of modern small claims procedure in many states is that the costs of suing even in the small claims court have become so high that initiation of an action is often impracticable. In addition to the fee for service of process,⁷² the filing fee and other related costs may discourage the individual who believes he has a valid claim but is not absolutely sure of the substantive law. Especially onerous to the individual claimant is the cost of retaining counsel to prosecute the small claim,⁷³ and in those jurisdictions that allow lawyers in the small claims courts it is often a custom, if not a requirement, that the plaintiff or defendant be represented by an attorney.⁷⁴ Although the small amounts typically in controversy in small claims court would apparently discourage the use of counsel, some businesses may have a sufficient volume of claims to justify the expense. Thus, an individual, who cannot afford an attorney for his small claim, may be placed in the disadvantageous position of either having to face a collection attorney or defaulting. As a result, the number of defaults by individual defendants in small

69. See Note, *Due Process Denied: Consumer Default Judgments in New York City*, 10 COLUM. J.L. & SOC. PROB. 370 (1974).

70. See Appendix B *infra*. For an extended discussion of the need for better small claims court publicity and an example of an attempt to provide information in a book containing general instructions on pro se tactics in small claims courts, see D. MATTHEWS, *SUE THE B*ST*RS, THE VICTIM'S HANDBOOK* (1973).

71. Jones & Boyer, *Improving the Quality of Justice in the Marketplace: The Need for Better Consumer Remedies*, 40 GEO. WASH. L. REV. 357, 360 (1972).

72. While many jurisdictions do presently provide for service by registered mail in small claims court actions, some states continue to require personal service as part of their small claims procedure. *E.g.*, ORE. REV. STAT. § 46.445 (1974).

73. For example, the Nebraska Bar Association in a recent advisory statement on minimum fee schedules suggested that an attorney charge at least \$100 for filing a petition and \$25 to \$35 per hour for services. Forbes, *supra* note 52, at 317. In an interview a Nashville attorney who does some collections work stated that he often simply turned down prospective litigants of small claims because even if the action would end in a favorable judgment, the legal fees and court costs would consume all of the money due under the judgment. Interview with Jude Lenahan, in Nashville, Tennessee, Nov. 11, 1974.

74. See NICJ REPORT, *supra* note 15, at 206.

claims court has been high, and the number of individual plaintiffs has remained low.⁷⁵ While many jurisdictions have done little to remedy the growing problems in small claims courts, in part due to an apparent lack of interest by the organized bar in judicial reform at the lower level,⁷⁶ a few systems have been significantly altered in an effort to revitalize the procedures and utility of these courts.

D. *The Movement to Reform Small Claims Courts*

In an attempt to meet the demand for more effective consumer protection and to eliminate the defects that have turned some small claims courts into collection agencies, a few jurisdictions have revised their small claims procedures. The New York City small claims courts are an excellent example of positive reform that has enabled the consumer with a small claim to obtain relief quickly and with minimal technicality and expense. The city established five small claims districts, which utilize simplified procedures and encourage but do not require litigants to proceed pro se.⁷⁷ Claims of a specialized nature, such as eviction proceedings by landlords, are heard separately; the small claims courts concentrate on small civil disputes between local residents for monetary relief.⁷⁸ The judges are required to take an active role in these trial-hearings, and to question the parties closely to draw out any facts that might otherwise remain undiscovered.⁷⁹ The court clerks aid prospective litigants in writing complaints or answers and assist in filing other necessary forms, thereby reducing the number of defaults. If a defendant does not appear, the judge may nevertheless refuse to enter a default judgment unless the plaintiff establishes a prima facie case.⁸⁰ The New York City scheme seeks to provide true "com-

75. See Klein, *supra* note 60; 52 CALIF. L. REV. 876, 884 (1964) (in Alameda County, California, almost 70% of actions were filed by business or government interests); 4 STAN. L. REV. 237 (1952).

76. Although the criticism is not new, it does appear that much of the interest in reform of small claims procedure evidenced by the organized bar in the early twentieth century has dwindled. Compare 8 J. AM. JUD. SOC'Y 186 (1925) with NADER STUDY, *supra* note 29, at 38.

77. The New York City small claims procedure is outlined in detail in Driscoll, *De Minimis Curat Lex: Small Claims Courts in New York City*, 2 FORDHAM URBAN L.J. 479 (1974).

78. The New York small claims districts give money judgments only, and therefore eviction suits cannot be brought in these courts. This aspect of the courts has been criticized. *Id.* at 490.

79. NICJ REPORT, App. H., *supra* note 15, at 680.

80. It should be noted that when the judge requires the plaintiff to present at least some evidence of a potentially valid claim, even when the defendant does not appear, the small claims courts will not be used to recover claims without preparation of a case or upon illusory charges. See NICJ REPORT, *supra* note 15, at 141; 1 PEPPERDINE L. REV. 71, 79 (1973). See also WISO. STAT. ANN. § 299.22(3) (Supp. 1974).

munity courts" in which the residents will feel comfortable in appearing and confident of fair treatment.⁸¹ The system is well publicized and the reaction of the community has been strong; the courts are heavily used.⁸²

Other jurisdictions also have reacted to current problems in the small claims field. Nebraska has enacted a state-wide reform of its small claims procedure.⁸³ Attorneys are now barred from the Nebraska system unless they appear in their own behalf; publicity about the availability of the small claims courts has increased, and claims are quickly processed.⁸⁴ In addition, the Philadelphia municipal court has expanded the traditional roles of the judge and clerk by providing a forum in which pro se proceedings are possible with aid available from the court's staff.⁸⁵ The Philadelphia system utilizes evening sessions to draw an increased number of individual consumer plaintiffs, who otherwise might have to miss a full day's work on the scheduled court day.⁸⁶ In light of these positive responses to recent shortcomings in small claims procedure, other jurisdictions having less effective small claims courts or no specialized small claims courts at all should be able to improve their judicial administration by utilizing these innovative procedural techniques. In this way, the presently needed reform of small claims procedures may be advantageously accomplished.

IV. CHARACTERIZATION OF A MODEL SMALL CLAIMS COURT SYSTEM

With the increased volume of consumer claims for small amounts and the rise in costs of litigation, efficient small claims courts are needed more urgently today than in 1913.⁸⁷ If the adminis-

81. *De Minimis*, *supra* note 77.

82. New York is one of several jurisdictions that has prepared "how to sue" booklets for distribution to the general public; coupled with media notice, this information should operate to reduce the publicity problem that small claims courts encounter. See Appendix B *infra*; DEPARTMENT OF CONSUMER AFFAIRS, NEW YORK CITY, HOW TO SUE IN SMALL CLAIMS COURT AND HOW TO COLLECT A JUDGMENT (1974).

83. See Forbes, *supra* note 52, at 317-18.

84. *Id.* at 321.

85. For a detailed study of the Philadelphia municipal court's small claims procedure and achievements, see Steaumann & Rosenstein, "Small Claims" Consumer Plaintiffs in the Philadelphia Municipal Court: An Empirical Study, 121 U. PA. L. REV. 1309 (1973).

86. The experience in Philadelphia demonstrates at least some correlation between night sessions and the number of individual consumer defendants and plaintiffs utilizing the small claims procedure. *Id.* at 1321.

87. A British study of American small claims courts has reached a similar conclusion. While criticism was directed generally at the inefficient procedures existing in many states, the report was optimistic in terms of the potential of small claims courts to provide needed access to the judicial system for the small claimant, and to do so with a minimum of expense and delay. CONSUMER COUNCIL, JUSTICE OUT OF REACH: A CASE FOR SMALL CLAIMS COURTS (1970).

tration of justice is truly to provide an opportunity for the redress of all grievances, the prospective litigant with a valid but small claim must have access to an inexpensive alternative to formal court procedures.

*A. Simplified Procedure in an Informal Forum
with a Low Jurisdictional Limit*

In a small claims court formality is not necessary to preserve the solemnity of courtroom proceedings; the value of a small claims court depends on efficient and fair adjudication of the actions that are brought. The nature of the small claim requires a simple procedure for efficiently initiating and conducting the suit before a judge sitting alone. This sort of speedy and informal forum will draw more prospective litigants into court. Additionally, the jurisdictional limit of the court should be low, in order to ensure that the court is a forum for small claims only, and to guard against the procedural formality that accompanies actions for large amounts.

B. Application of Conciliation Principles

Principles of conciliation should be incorporated into the small claims court. The judge should actively inquire into the circumstances of the particular case, drawing out the facts that might otherwise be overlooked. The court should encourage settlements between the parties when a compromise appears possible. Small claims cases generally do not involve important legal points, and the key objective is to provide a forum in which the parties may pursue their case to a fair conclusion. Thus, successful conciliation efforts will result in both parties being satisfied that they have been treated fairly. Cases should be resolved as quickly as possible, and experience has demonstrated that many small civil disputes can be resolved simply by providing an opportunity for the adverse parties to meet and agree on a settlement.

C. Opportunity for Individuals to Appear Pro Se

The staff of the small claims court should stand ready to assist prospective plaintiffs and defendants with their claims and defenses. The parties must not feel that it is necessary to be represented by counsel in order to succeed in the small claims court. Informational manuals that explain the procedures of the court and the steps required in bringing or defending a suit should be available and distributed in the community. These efforts to facilitate a resident's proceeding in his own behalf will help the court become a true "community court" in the mind of the public.

D. Minimization of Expense; Attorneys Banned

If the small claims court is to function properly, it must provide for practical use by individuals with small claims; they must be able to initiate an action and proceed without excessive expense. Legal representation in small claims courts brings about a distinct imbalance: individuals simply cannot afford a lawyer for their small claim, but institutional plaintiffs and defendants can. Therefore, in a small claims court that allows attorneys the parties often start on an unequal footing, and as a consequence individuals may not utilize the court. Thus, attorneys should be barred from small claims courts unless they are representing themselves or testifying as witnesses. This rule eliminates the problem of balancing the relative costs of an attorney against the potential recovery. In any case, other characteristics of the court should render legal counsel unnecessary. Service of process by registered mail must be the primary method utilized in small claims actions; personal service escalates costs and delays docketing. Finally, every effort should be made to keep the filing fee as low as possible, and *in forma pauperis* petitions should be permitted.

E. Adequate Publicity for the Small Claims Court

Once established, the small claims court cannot be justified unless it is used. Therefore adequate publicity beyond the mere availability of information must be directed toward the community. Public service announcements in the media should focus community attention on the system, and prepared information should then be distributed either generally or upon request.

F. Statutory Enactment

Statutory enactment of small claims procedures is the preferred method of creating a small claims court. A direct legislative authorization articulates the policy objectives of the small claims court and lends visible support to the system at the outset, thus giving the small claims court an opportunity to demonstrate its advantages to the community.

A small claims court with these characteristics can become a highly useful and efficient branch of the judicial system. The specific reforms necessary are not difficult to accomplish but require an affirmative effort. The culmination of this project, a model small claims court statute for Tennessee, is a recommended response to the need for specific reforms.

PART TWO

DEVELOPMENT AND FUNCTIONING OF THE TENNESSEE GENERAL SESSIONS COURTS

I. HISTORICAL BACKGROUND

A. *Establishment of the Justice of the Peace System*

Many of the legal institutions of Britain, as well as the common law, have been reproduced faithfully in American jurisdictions since the earliest colonial settlements. Tennessee shares this English judicial heritage, particularly in its local governmental institutions. The early settlers of the Carolina colony, of which Tennessee was an unexplored western appendage, transplanted from England the office of the justice of the peace in an attempt to maintain order in the wilderness.⁸⁸ Adopted in 1776, North Carolina's first constitution provided that each county should have justices of the peace who were recommended by the general assembly and commissioned for life by the governor.⁸⁹ The specific judicial powers of these officers were left to legislative determination. Justices were soon appointed for the Tennessee area, then known as Washington County, North Carolina. The first justices of the peace for Washington County met initially in 1778 and included men like John Sevier and James Robertson, who later played major roles in the state's development.⁹⁰ Because of the isolation of settlements, the justices of the peace in frontier counties had to assume broad governmental powers to keep internal discord at a minimum in those remote communities. Thus, in addition to legislative and military duties, the justices' powers included settling petty controversies, deciding land disputes, providing for widows and orphans, and hearing criminal cases. The justices were leaders in public affairs on the frontier and were able conciliators of local disagreements.⁹¹

When Tennessee was admitted to the Union in 1796, the state's first constitution affirmed the position and authority of the justices of the peace.⁹² Although originally filled by appointment by the

88. The justice of the peace was regarded as an integral part of the English common law system. The legislature of North Carolina expressly provided that the common law remained in full force and effect to the extent possible in the New World. Ch. 31, § 6, [1715] N.C. Acts.

89. N.C. CONST. § 33 (1776).

90. See Ewing, *Justice of the Peace—Bedrock of Democracy*, 21 TENN. L. REV. 484, 493 (1950) (containing an historical account of the development of the justice of the peace system in England, North Carolina, and Tennessee). John Sevier was the first governor of Tennessee, serving 6 terms, and James Robertson is known as the "Father of Middle Tennessee."

91. See *id.* at 494-96.

92. TENN. CONST. arts. 5, § 12 & 6, § 1 (1796).

general assembly, the office was made elective by the constitution of 1834.⁹³ Since the office is prescribed by the constitution, it has not been subject to legislative abolition, although the extent of its powers has been determined by the legislature.⁹⁴

B. Expansion of the Justice of the Peace System

Throughout the nineteenth century, the basic structure of Tennessee local government continued with few modifications, and the justice of the peace remained a central legislative and judicial figure. In their legislative capacity the justices of the peace collectively constituted the "Quarterly County Court" of each Tennessee county.⁹⁵ The quarterly court functioned as the law-making body of the county, with the important duties of appropriating funds for operation of the local government and setting the property tax rate. Though termed a "court" and presided over by the county judge, the quarterly court exercised no judicial power.⁹⁶

In addition to their legislative functions, the justices of the peace individually functioned as local judges and exercised limited original jurisdiction in civil and criminal cases in the counties. Indeed, the judicial role of the justices was perhaps more important than their legislative role in the predominately agricultural society of Tennessee in the 1800's. Representing a district with only a few hundred inhabitants, the justice of the peace was always well-acquainted with the events in his neighborhood. The typical justice would often compromise or settle his neighbors' disputes at the crossroads country store, or on his front porch, or while working in his cotton or tobacco field. The office was regarded as one of great public trust, and the justice frequently would charge neither party with fees. Thus, though the position was not lucrative, the justice was generally a man of respect in the community, often a country

93. TENN. CONST. art. 6, § 15 (1834).

94. The supreme court held in an early case that the jurisdiction of judicial officers, including justices of the peace, falls within the discretion of the legislature. *State v. Turk*, 8 Tenn. 287 (1827). Yet the extent to which the judicial power of the justices of the peace could be withdrawn was not finally settled until 1937. See note 115 *infra* and accompanying text.

95. Each county is divided into as many as 25 civil districts, each of which elects at least 2 justices of the peace. The county seat and incorporated towns are allotted additional justices. TENN. CONST. art. 6, § 15 (1870). Many rural areas traditionally have had fewer than 100 voters per justice. This method of representation has been altered somewhat in recent years by reapportionment along one-man, one-vote lines. The justices may be elected on a partisan or nonpartisan basis, depending upon the tradition in each county.

96. Neither is the principal function of the county judge judicial. He is regarded as the head of county government and acts as its administrative and fiscal officer. County judges do have jurisdiction in probate and juvenile cases unless it has been removed by private act. Some counties have a county chairman instead of a county judge.

merchant or leading farmer, and always readily available to dispense his notions of fairness in local disputes. Although the justice almost never had any formal legal training, he was aware of the community mores and the temperament of his neighbors, and he usually could settle disputes with finality.⁹⁷ By the turn of the century, the legislature had given the justices of the peace jurisdiction over contract and tort cases up to 500 dollars and over cases involving negotiable instruments up to 1,000 dollars. It also provided for justice of the peace jurisdiction in detainer suits and other minor actions.⁹⁸ Hence, the role of the justice was deeply embedded in the fabric of county government in Tennessee.

C. *The Movement for Reform in Tennessee*

Unfortunately, by the early 1900's, the justice of the peace system in Tennessee had developed most of the generally recognized abuses found on a nation-wide scale.⁹⁹ As the state became increasingly urbanized and travel to the county seats became easier in rural areas, many of the justices ceased their home-community function as conciliator among neighbors. A significant number established offices in the larger county seats and in the expanding cities. In the cities some justices of the peace devoted their full time to the office, which became a lucrative one because compensation was based on the fee system. Since a large volume of cases insured substantial fees, some justices subtly solicited business, and the resulting competition for cases was often flagrant. Justices were paid a fee that was charged to the losing party, and each justice knew he would receive no more business from those plaintiffs who did not win in his court.¹⁰⁰ Consequently, defendants were seldom successful in justice of the peace courts. A random survey in 1933 found that 96.8 percent of the cases in Davidson County (Nashville) and 96.7 percent of the cases in eight rural counties of middle Tennessee ended in judgments for the plaintiff. Shelby County (Memphis) set the record, with 99.4 percent of the cases decided for the plaintiff.¹⁰¹ A large volume of cases made the office extremely lucrative; as one observer remarked, "[s]ome of the justices of the peace in Tennes-

97. See Simpson, *Constitutionality of the Fee System of Justices of the Peace*, 14 TENN. L. REV. 565, 566 (1937).

98. Tenn. Code Ann. § 5935 (Shannon 1896).

99. See notes 27-33 *supra* and accompanying text.

100. See Simpson, *supra* note 97, at 567, 570, 572-73.

101. The middle Tennessee counties surveyed were Bedford, Cannon, Coffee, Marshall, Maury, Rutherford, Williamson, and Wilson. The survey examined all civil cases docketed in these counties and the 4 urban counties in January, April, July, and October of 1933. Howard, *The Justice of the Peace System in Tennessee*, 13 TENN. L. REV. 19, 22-25 (1934).

see have been known to earn more than the Chief Justice of our Supreme Court."¹⁰² As a result, the default rate in justice of the peace courts was extremely high—estimated at 75-80 percent of all judgments.¹⁰³ Many defendants, realizing the justices' prejudice for plaintiffs, chose to default and then appear for trial de novo in the circuit court.¹⁰⁴ The collection of judgments also constituted a serious problem. In 1933, the proportion of unsatisfied judgments ranged from 41.6 percent in Davidson County to 63.8 percent in Knox County (Knoxville).¹⁰⁵

Thus, by the late 1930's, the justice of the peace system had departed radically from its original function in Tennessee. It largely had ceased to provide the free and effective hearing before a sympathetic country squire that had once characterized its operation. Instead of serving as arbitrators and peacemakers, many justices became mercenaries who preyed upon the very people for whose benefit their office had been created. At the foundation of the legal system, the courts that were designed to have the most intimate contact with the laborer, the small debtor and the tenant, had been turned against these elements of the population most in need of justice.¹⁰⁶ The function of the justice of the peace was tailored to an earlier era and was basically inadequate under later conditions.

In addition to its obvious abuses, the justice of the peace system was subject to a number of substantive criticisms. Most of the justices lacked knowledge of fundamental legal principles, since very few, if any, had formal legal training. Thus, they lacked the exposure to the law that was increasingly necessary to settle complicated disputes properly.¹⁰⁷ The justices' only real qualifications were political, related to their legislative duties on the county quarterly court.¹⁰⁸ This duality of function gave rise to conflicts of interest when the justices were called upon to levy taxes and appropriate funds for law enforcement activities that were closely related to their judicial duties in minor criminal cases.¹⁰⁹ In addition, the vot-

102. Keebler, *Our Justice of the Peace Courts—A Problem in Justice*, 9 TENN. L. REV. 1, 14 (1930). The average costs in civil cases in the 1933 survey were \$3.55, of which the justices received \$2.02. When considered in light of the large number of civil actions and the fees derived from criminal cases, the justices' compensation could be substantial. The most energetic justice in Davidson County earned \$8,537, quite a tidy sum in the depression year of 1933. Howard, *supra* note 101, at 27, 32-35.

103. Howard, *supra* note 101, at 25.

104. *See id.*; Keebler, *supra* note 102, at 12.

105. Howard, *supra* note 101, at 25-26.

106. *See* Keebler, *supra* note 102, at 4-5.

107. *Id.* at 12-13.

108. *Id.* at 16.

109. *See* Simpson, *supra* note 97, at 568-69.

ers usually elected the justices on the basis of their performance on the county court rather than their qualifications for judicial position. The justices' political nature also explains the great oversupply of these officers. With nearly 3,000 justices in the state,¹¹⁰ many were able virtually to ignore their judicial duties, while those who pursued that role with great vigor were competitors for business. Since the jurisdiction of justices was county-wide, each could seek business far from the district that elected him.

The inefficiency of justices of the peace was a further shortcoming. They were subject to no significant supervision, and their records often were poorly kept and inadequate.¹¹¹ Justices' offices were often dark and dingy cubbyholes, instilling in litigants contempt for the law. Not surprisingly, the public lost confidence and respect for the justice of the peace courts. Although many of the justices were dedicated and conscientious, the growing abuses of the system on a state-wide basis began to draw heavy criticism, which was encouraged by the nation-wide movement at that time for reform of the justice of the peace courts. The need for change was most acute in the urban areas, where fee-grabbing and other abuses were most acute. Reform-minded civic groups became concerned with these deficiencies, and major newspapers and bar associations led the agitation for modification of the system.¹¹²

Although initial attempts in 1935 to reform the justice of the peace system met defeat at the hands of the supreme court and a cautious legislature,¹¹³ the demand for reform continued with in-

110. Over 1,200 civil districts existed in Tennessee during the early 1900's. Howard, *supra* note 101, at 20-21. Since each district elected at least 2 justices of the peace and many elected a larger number, the total number of justices must have approached 3,000. Several rural counties elected more than 50 justices. See note 95 *supra*.

111. Howard, *supra* note 101, at 35-36.

112. See Ewing, *General Sessions Courts*, 16 TENN. L. REV. 979 (1941).

113. The first reform attempt in 1935 resulted in poorly drafted private acts applicable to 3 counties. Ch. 213, § 9, [1935] Tenn. Priv. Acts 493 (restricting powers of justices of the peace in Hamilton County over misdemeanor and criminal cases); ch. 352, § 10 [1935] Tenn. Priv. Acts 786 (creating a court in Washington County to exercise certain powers of justices of the peace); ch. 410, § 8, [1935] Tenn. Priv. Acts 978 (vesting in the county judge of Unicoi County the powers of the justices of the peace, except for jurisdiction over detainer cases). The supreme court declared each of these statutes to be unconstitutional on different technical grounds. *Gouge v. McInturff*, 169 Tenn. 678, 90 S.W.2d 753 (1936) (holding the Unicoi County act invalid because its contents were broader than its title and because it removed the sheriff's office from the classifications of the general salary law); *State ex rel. Ward v. Murrell*, 169 Tenn. 688, 90 S.W.2d 945 (1936) (declaring the Hamilton County act to be unconstitutionally discriminatory since it deprived citizens in one county of jury trials); *Spurgeon v. Worley*, 169 Tenn. 697, 90 S.W.2d 948 (1936) (holding that the Washington County act unconstitutionally permitted the court to determine its own jurisdiction and that it violated the right to a jury trial).

A bill to establish courts to replace justices of the peace on a state-wide basis also met with ignominious defeat in the 1935 session of the general assembly after senate and house

creasing momentum, particularly in the larger cities. The first breakthrough came in 1937 when the general assembly passed an act transferring the judicial powers of the justices of the peace in Davidson County to a newly-created "General Sessions Court."¹¹⁴ An objection to reform based on the constitutional requirement that justices of the peace exist was met in the 1937 Act by retaining justices as legislative members of the county quarterly courts. In declaring the law to be constitutional, the Tennessee Supreme Court recognized the broad power of the legislature to limit the justices' functions.¹¹⁵ Consequently, the Davidson County Act became a model for other private acts creating general sessions courts across the state. The gradual expansion of general sessions courts continued for the succeeding two decades.¹¹⁶

Although a measure of uniformity was present in the various private acts because of their common basis in the Davidson County Act, substantial differences existed in the organization, jurisdiction, and procedure of the several general sessions courts. The variations were most pronounced in the provisions relating to general sessions judges. Many counties required the judge to be a lawyer, while a significant number did not, and the salaries and methods of initial selection of the judges varied significantly.¹¹⁷ Yet in each instance the origins of the new court's functions could be traced to the justices of the peace. The general sessions judges, however, were able to exercise their power in a more responsible fashion. Most of the

amendments exempted 90 of the 95 counties from its operation. S. 661, 69th Gen. Ass. (1935).

114. Ch. 12, [1937] Tenn. Priv. Acts 51.

115. *Hancock v. Davidson County*, 171 Tenn. 420, 104 S.2d 824 (1937). Although the office is given a few powers by the constitution, the court found that the judicial authority of the justices of the peace was purely statutory and could be withdrawn by the legislature at will. The court easily disposed of other constitutional objections to the Act.

116. Although the larger counties more rapidly established general sessions courts, a number of smaller counties followed suit. Each county's legislative delegation determined when to present a private act for its county, strongly influenced, of course, by the officials, lawyers, and voters back home. In 1939 and 1941, the legislature approved general sessions courts for the other urban counties of Knox (Knoxville), Hamilton (Chattanooga), and Shelby (Memphis). By 1947, 10 years after passage of the initial private act, general sessions courts had been established in over one-fourth of the counties. These included most of the larger counties although several smaller ones, like Bledsoe and Trousdale, were among the first to set up general sessions courts. For a concise account of the early development of general sessions courts, see Williams, *General Sessions Courts in Tennessee*, 31 J. AM. JUD. SOC'Y 101 (1947). See also Bryan & Baer, *General Sessions Courts: Origin and Recent Legislation*, 24 TENN. L. REV. 667 (1956) (an article that attempts to trace the development of general sessions and contains a list of counties and private acts that stripped justices of the peace of their judicial powers).

117. See generally Overton, *The Judicial System in Tennessee and Potentialities for Reorganization*, 32 TENN. L. REV. 501, 503-05, 517-19, 525-26 (1965) (including some analysis of the general sessions courts).

judges were attorneys, particularly in larger counties, where greater legal expertise was needed. Nevertheless, general sessions courts were able to retain some of the informality of the justice of the peace courts. The abolition of the fee system removed conflicts of interest and contributed to more honesty and fairness in judgments. In addition, the general sessions judges were more efficient and able to handle the work of many justices of the peace, and record-keeping improved significantly. As a whole, the new courts began to restore public confidence in the merit of the entire judicial system.¹¹⁸

By the late 1950's, general sessions courts had been established by private acts in thirty-nine of the ninety-five counties in Tennessee, including those that contained the great majority of the state's population.¹¹⁹ The superiority of the new courts over the justice of the peace system enabled the 1959 Tennessee Legislature to do what its predecessors of the 1930's had found impossible—pass an act for general sessions courts on a state-wide basis. Consummating the efforts to remedy the abuses of the justices of the peace, the 1959 General Sessions Court Act¹²⁰ provided for a general sessions court in each county, thereby reaching many rural counties for the first time and stripping nearly all of the local justices of the peace of their judicial authority.¹²¹ The 1959 Act did not establish complete uniformity among the general sessions courts, however, since eight counties were exempt from its provisions,¹²² and the private acts continued to apply to the previously established courts.¹²³ Yet the Act did set forth minimum standards for all the general sessions courts in the state. Most significantly, it signaled a change in approach—general sessions court was now a recognized institution of

118. See Ewing, *supra* note 112, at 980-81; Williams, *supra* note 116, at 103-04.

119. See A. CARUTHERS, HISTORY OF A LAWSUIT § 8 nn.29 & 29d (8th ed. S. Gilreath & B. Aderholt 1963).

120. Ch. 109, [1959] Tenn. Pub. Acts 350 (codified at TENN. CODE ANN. §§ 16-1101 to -1124 (Supp. 1974)).

121. The justices of the peace retained their importance as members of the county quarterly courts and their authority to perform marriage ceremonies and administer oaths. Ch. 109, § 2, [1959] Tenn. Pub. Acts 353 (codified at TENN. CODE ANN. § 19-312 (Supp. 1974)).

122. These counties were exempted from the Act by narrowly drawn population categories. See ch. 265, § 1, [1959] Tenn. Pub. Acts 764; ch. 255, § 1, [1959] Tenn. Pub. Acts 746; ch. 109, §§ 1, 22, [1959] Tenn. Pub. Acts 351, 365 (codified, *as amended*, at TENN. CODE ANN. § 16-1101 (Supp. 1974)). The counties originally excluded from the Act were Johnson, Humphreys, Stewart, Hancock, Sevier, Gibson, Perry, and Polk. A. CARTHERS, *supra* note 119, at § 8 n.29b.

123. The 1959 Act was not designed to decrease the powers of any courts previously created by private act. Those courts were to have the powers and jurisdiction granted by the 1959 Act in addition to the powers conferred by the private acts. Ch. 109, § 22, [1959] Tenn. Pub. Acts 365 (codified at TENN. CODE ANN. § 16-1124 (Supp. 1974)).

Tennessee county government. Since 1959, the jurisdictional limit of the general sessions courts has been increased, as have the judges' salaries, and the trend toward uniformity on a state-wide basis has gained legislative support.¹²⁴

II. GENERAL SESSIONS AS A SMALL CLAIMS COURT

The general sessions court is the only Tennessee court that might arguably be said to function as a small claims court. As noted below, the statutory provisions for general sessions bear a certain similarity to those for small claims courts in other parts of the country: the court has limited jurisdiction over civil actions, operates without a jury, and is a relatively informal forum in which the judge may exercise substantial discretion. At this point it is necessary to analyze the general sessions court's structure and operation in order to determine whether it actually functions as an adequate small claims court. The standards applied in evaluating the general sessions court are those developed in the second part of this Special Project—the characterization of a model small claims court. Thus, the evaluation must determine whether general sessions court is: (1) an informal forum with simplified procedures and a low jurisdictional limit; (2) a court whose judge inquires into the circumstances of the case and encourages conciliation; (3) a court in which an individual may sue in his own behalf without difficulty; (4) a court in which the expenses of suit are minimized by low fees for filing and service, and provisions barring representation by attorneys; (5) a court with adequate publicity in the community; (6) a court enacted by statute.

A. *Structure of the Court*

The present structure of general sessions court is founded on

124. General sessions has spread to most of the originally exempt counties, so that today justice of the peace courts function only in Johnson and Stewart counties. Several counties have joined the trend of vesting probate and juvenile jurisdiction in general sessions. *See, e.g.*, ch. 2, [1973] Tenn. Priv. Acts 12 (applicable to Rutherford County). A bill introduced in the 1974 general assembly may be the precursor of major changes in general sessions courts. S. 1886, 88th Gen. Ass. (1974). The proposal was part of a plan to revamp the Tennessee judicial system before the August 1974 judicial elections, but it met the usual fate of judicial reform measures and was not enacted. Nevertheless, much study went into its formulation and the bill does indicate possible future trends. The bill would have divided the state into 65 general sessions court districts, consisting of one or 2 counties in most instances, in order to equalize case loads. Jurisdictional limits would have been increased to \$5,000 in cases at law and equity, and juvenile and probate authority would have been placed in the court. The bill contained a requirement that judges be attorneys, although a "grandfather clause" would have protected incumbent nonlawyers. The bill also would have suspended the operation of private acts, thereby creating a uniform, state-wide general sessions court system.

several chapters of the Tennessee Code Annotated and the county private acts.¹²⁵ In substance, the powers of the court are those formerly exercised by the justices of the peace, with increased jurisdictional monetary limits. The Code grants to general sessions courts jurisdiction over all civil cases involving up to 3,000 dollars and unlimited authority over cases of forcible entry and detainer.¹²⁶ In equity matters, the courts' jurisdiction is limited to 250 dollars, and while the courts may apply the principles of equity, they are limited in the equitable remedies they may impose.¹²⁷ In actions to recover personal property, general sessions courts have jurisdiction up to 7,500 dollars. General sessions judges have power to issue restraining orders and to impose penalties for their violation. The court also exercises concurrent jurisdiction with the circuit and chancery courts "to grant fiats for writs of injunction, attachments and other extraordinary process."¹²⁸ The minor criminal jurisdiction granted general sessions courts falls outside the scope of this study.¹²⁹

The judges of general sessions courts are elected to eight-year terms¹³⁰ and are in most instances attorneys, although they need not be unless a private act so specifies.¹³¹ Only a few larger counties have more than one general sessions judge. The judges' salaries are fixed by statute, generally according to the population of the county in which they serve, although numerous exceptions may be found for specific counties.¹³² The statute further provides that judges in counties having a population of more than 30,000 must devote their full time to the duties of the office, while those in most smaller counties may engage in private law practice.¹³³ The clerk of the circuit court

125. The private acts are now supplementary in nature, often relating to the judges' qualifications and salaries and granting additional jurisdiction over certain matters. The provisions of the often-amended public laws give general sessions courts their primary authority.

126. TENN. CODE ANN. § 19-301 (Supp. 1974). This jurisdiction extends to justices of the peace in the 2 counties in which they are not superseded by general sessions courts.

127. See W. HALL, *THE GENERAL SESSIONS COURT* 16 (1972).

128. TENN. CODE ANN. § 16-1104 (Supp. 1974).

129. See *id.* §§ 16-1104, 40-118.

130. *Id.* § 16-1106.

131. The varied qualifications required of judges often relate to the additional powers exercised by some courts, and some degree of legal training is frequently required. See Overton, *supra* note 117, at 517-19. In smaller counties the judge often is not a lawyer, and in a few counties it might be impractical to impose such a requirement because of the shortage of attorneys. Recently, however, Sumner County (Gallatin and Hendersonville), which has a population of 60,000 and is one of the faster-growing and more progressive counties, voted in a public referendum *not* to require its general sessions judge to be a lawyer. Nashville Tennessean, May 24, 1974, at 21, col. 3.

132. See TENN. CODE ANN. §§ 16-1108 to -1112 (Supp. 1974).

133. See *id.* § 16-1113.

normally serves as clerk of general sessions.¹³⁴

To commence a civil suit in general sessions, the plaintiff must pay fees for filing and service of process that vary by county from twelve to fifteen dollars unless a pauper's oath is filed.¹³⁵ The rules of pleading and practice are the same as those for justice of the peace courts.¹³⁶ The filing of a warrant, which serves as a combined complaint and summons, begins an action;¹³⁷ no answer is required unless the action is a suit on a sworn account.¹³⁸ No generally mandated procedure for the trial of a case in general sessions exists, and these courts are expressly exempt from the operation of the Tennessee Rules of Civil Procedure.¹³⁹ For this reason, procedural rules are improvised for the occasion by judge or counsel, and, in addition, the rules of evidence do not strictly apply. The atmosphere is much less formal than that of the circuit courts, and the judge exercises considerable discretion in the conduct of cases. In these respects, the general sessions courts clearly reflect their justice of the peace origins.¹⁴⁰ Although attorneys are not necessary in general sessions, they appear, at least on behalf of the plaintiff, in the great majority of cases.¹⁴¹

General sessions is a court not of record, and a jury trial cannot be obtained there. Since the Tennessee constitution provides for the right to a jury trial for nonequitable claims above twenty dollars, an appeal for a trial de novo is necessary as a matter of state constitutional law to protect that right.¹⁴² For this reason, the losing party

134. *Id.* § 16-1116. *But see* note 145 *infra*. A few of the private acts contain different provisions. In some counties with separate criminal courts, including Davidson, the criminal court clerk serves as clerk for the criminal division of general sessions, while the circuit court clerk serves the civil division of general sessions.

135. *See* TENN. CODE ANN. § 8-2115 (Supp. 1974). The total of court costs may vary according to the type of case and the county, since some counties impose small additional fees.

136. *Id.* §§ 16-1118, 19-301 to -710 (1955), *as amended*, (Supp. 1974).

137. *Id.* § 19-402 (1955).

138. *See* text accompanying note 258 *infra*.

139. TENN. R. CIV. P. 1.

140. *See* Institute of Judicial Administration, *The Judicial System of Tennessee* 62, 64, Oct. 1971 (study made for the Tennessee Judicial Council); France, *Effective Minor Courts: Key to Court Modernization*, 40 TENN. L. REV. 29, 42-43 (1972). Since general sessions is the successor to the justice of the peace court, basically the same rules of procedure apply. "[T]he Legislature intended to preserve the informalities of the Justice of the Peace Court and the General Sessions Court so that cases may be tried upon their merits without regard to any formality except that which is absolutely essential." *Weaver v. Cromer*, 54 Tenn. App. 510, 513, 392 S.W.2d 835, 836 (1965).

141. *See* notes 161-65 *infra* and accompanying text.

142. TENN. CONST. art. 1, § 6 declares that "the right of trial by jury shall remain inviolate." The courts have interpreted this provision as a guarantee of jury trial in civil cases that would have been tried by jury when the first state constitution was written in 1796. Therefore, the provision protects the right of trial by jury at common law as recognized in

in general sessions court has an unrestricted right to appeal to the circuit court for a new trial.¹⁴³ The ready availability of such an easy appeal route has seriously undermined the finality of general sessions judgments and led in the past to the use of the courts as an inexpensive discovery device.¹⁴⁴

Although the Tennessee Code Annotated provides a broad outline of the structure of the general sessions courts, it is important to recognize that some variations continue to exist among these courts because of numerous private acts applicable to individual counties. For example, though most are not of record, the general sessions court in Roane County (Kingston, Harriman, and Rockwood) is a court of record.¹⁴⁵ The equivalent of general sessions in Anderson County (Oak Ridge) is the "Trial Justice Court," also a court of record.¹⁴⁶ The new Trial Justice Court of Sevier County (Sevierville and Gatlinburg) has much more extensive jurisdiction than most general sessions courts.¹⁴⁷ Although many similar varia-

North Carolina when the Tennessee territory was ceded by North Carolina to the federal government. *Grooms v. State*, 221 Tenn. 243, 426 S.W.2d 176 (1968). The law at that time guaranteed jury trial when more than \$20 was at stake. The supreme court held in *Morford v. Barnes*, 16 Tenn. 444 (1835) that statutes conferring jurisdiction upon justices of the peace to try jury cases of a civil nature involving more than \$20 are constitutional, provided that a jury trial may be had upon appeal. This same rationale was adopted by the United States Supreme Court in *Capital Traction Co. v. Hof*, 174 U.S. 1 (1899) (upholding a statute that permitted justices of the peace in the District of Columbia to try civil cases of moderate amount without a common law jury when the parties could have a jury upon appeal). The seventh amendment to the federal constitution, which guarantees the right to jury trial in civil cases involving more than \$20, is one of the few provisions of the Bill of Rights that has not been held applicable to the states through the fourteenth amendment. *Colgrove v. Battin*, 413 U.S. 149, 169 n.4 (1973) (Marshall, J., dissenting).

143. TENN. CODE ANN. § 16-1118 (Supp. 1974), 19-425 (1955). The appeal must be filed within 10 days after the general sessions judgment is rendered, *id.* § 27-509 (Supp. 1974), and an appeal bond must be posted, *id.* § 27-503 (1955). The circuit court in Tennessee is the court of original, unlimited jurisdiction. Most circuits include several counties and least one term of court is held in each county. Tennessee is one of the few states that have not formally merged their courts of law and equity. Separate chancery courts continue to function in Tennessee, although their jurisdiction largely overlaps that of the circuit courts. From these courts of general jurisdiction appeals may be made to the 9-member Court of Appeals, which sits in regional panels. Criminal appeals from the circuit courts and the separate criminal courts that exist in certain counties are taken to the 7-member Court of Criminal Appeals. The highest court in the state is the Supreme Court, which is composed of 5 justices.

144. Use of general sessions as a discovery vehicle has been alleviated by the adoption of the liberalized pretrial discovery procedures of the Tennessee Rules of Civil Procedure. See TENN. R. CIV. P. 26-37.

145. Ch. 77, § 7, [1959] Tenn. Priv. Acts 268. Another unusual feature of the Roane County Act is that the clerk and master of the local chancery court serves as general sessions court clerk. *Id.* § 19 at 274.

146. Ch. 459, § 6, [1947] Tenn. Priv. Acts 1808. The court in Anderson County has somewhat more extensive powers than most general sessions courts. See *id.* § 3, at 1806.

147. The court exercises jurisdiction up to \$10,000 in civil cases and \$5,000 in equity matters. Ch. 34, § 2, [1973] Tenn. Priv. Acts 138. Sevier County was one of the last holdouts

tions exist, the public acts have insured a substantial degree of uniformity in most courts throughout the state.

B. *The Operational Characteristics of General Sessions*

This Special Project's analysis of the operation of the general sessions courts has focused primarily on two counties, one urban and one rural. Davidson County was selected as the urban county, in part because its general sessions court was used as a model by other counties during the transition from the justice of the peace courts to the present system. In addition, the state capital, Nashville, is located in Davidson County.¹⁴⁸ For these reasons, Davidson County might be expected to have one of the better general sessions courts in the state. Bedford County is the rural county examined in this Special Project.¹⁴⁹ The Bedford County General Sessions Court was created by private act in 1947,¹⁵⁰ but is not significantly different from the great majority of courts established by other private acts or the 1959 state-wide act.¹⁵¹ In addition to analyzing these two courts, the Special Project evaluated data from other general sessions courts across the state that have been the subjects of study by other researchers in the past.¹⁵²

The primary method of gathering data on the operation of the two courts was a statistical analysis of the courts' dockets. This

of the justice of the peace courts and remains exempt from the public act establishing general sessions courts on a statewide basis. TENN. CODE ANN. § 16-1101 (Supp. 1974) (exempting counties having populations between 23,350 and 23,380 in 1950, which includes Sevier with 23,375).

148. Davidson County is situated in the north-central part of Tennessee and has a population approaching one-half million persons, making it the state's second most populous county.

149. Bedford County is located in south-central Tennessee, and has a population of about 25,000, which is typical in size of many rural counties in the state. The Bedford county seat is Shelbyville, with a population of about 12,000. The economy of the area is based on agriculture, particularly the breeding of Tennessee walking horses, and some light industry.

150. Ch. 41, [1947] Tenn. Priv. Acts 115. The Act requires the general sessions judge in Bedford County to be an experienced attorney. *Id.* § 12, at 120.

151. Other similar courts established in the same year include those in neighboring Rutherford County, ch. 384, [1947] Tenn. Priv. Acts 1574, and in east Tennessee's Campbell County, ch. 769, [1947] Tenn. Priv. Acts 3140.

152. The leading study of the operation of general sessions focuses on Knox County (Knoxville) in east Tennessee, which is the state's third largest county. *See generally* H. Plaas, O. Stephens, & J. Glass, *The Function of the Judge in the General Sessions Court of Knox County, Tennessee*, Feb. 1973 (Preliminary Report to the Tennessee State Law Enforcement Planning Agency) [hereinafter cited as *Knox County Report*]. This study was conducted by professors and students under the auspices of the Bureau of Public Administration of the University of Tennessee. The data contained in the study reflect a random sample of 450 civil cases drawn from docket books covering a one year period ending in December 1970, and in addition, a sample of 1,311 observed civil actions docketed from mid-May to mid-June, 1971. *Id.* at 6-7.

analysis was conducted during September 1974, and was supplemented by interviews with judges, clerks, and attorneys who dealt with cases in those courts.¹⁵³ The docket analysis has produced certain operational information about the courts: (a) who utilizes the general sessions courts; (b) what size claims most commonly are brought; (c) whether the parties normally are represented by attorneys; (d) whether one side wins more frequently than the other. While the information obtained from the statistical analysis and interviews necessarily is limited in scope, it does provide a general picture of the general sessions court as an operating entity, and it indicates to some extent how well the court functions as a small claims court.

1. Who Utilizes the General Sessions Courts?

The docket analysis indicates that the general sessions courts studied were heavily used by institutional plaintiffs. In the Davidson County General Sessions Court, a total of 84.3 percent of the surveyed cases were brought by plaintiffs who were not individuals. The most frequent plaintiffs include governmental agencies (19.5 percent), hospitals (8.9 percent), finance companies (8.6 percent), and banks (5.0 percent).¹⁵⁴ In contrast to these figures, the dockets indicate that an overwhelming number of defendants, 95.4 percent in Davidson County, were individuals.¹⁵⁵ Moreover, the institutional plaintiff characteristic does not appear to be a strictly urban phenomenon. The docket analysis conducted in Bedford County indicates that nonindividual litigants utilized the rural and urban courts to

153. The information obtained from the docket and warrants included the names of the parties, the attorneys of record, the basis of the claim, the amount of the claim, disposition of the cases and the amounts of judgments awarded, and the time of filing, trial and execution. The analysis of the court in Bedford County included all 66 civil cases docketed for trial during September 1974. In Davidson County the survey covered the 637 civil cases docketed for the week from September 24 through September 30, 1974. For a detailed summary of the information obtained from the docket survey, see Appendix A *infra*.

In Bedford County, interviews were conducted with the general sessions judge, Marvin Marshall; the clerk, James Atnip; and 4 attorneys, John Bobo, Tyrus Cobb, Rondal Wilson, and Charles Kurtz, all on October 31, 1974. In Davidson County, 8 general sessions judges were interviewed: A. A. Birch, John Boone, Leslie Mondelli, Robert Murphy, Gale Robinson, Dennis Summers, Donald Washburn, and Randall Wyatt. The ninth judge, Hamilton Gayden, was recently appointed by Governor Dunn to fill the vacancy created by the death of Judge Andrew Doyle and was not in office during the period of the survey. Interviews in Davidson County were also conducted with George Rooker, the clerk; Justice William Harhison of the Tennessee Supreme Court; John J. Hollins, President of the Nashville Bar Association; and attorney Jude Lenahan. The Nashville interviews were conducted from October 1974 through February 1975.

154. See Appendix A, Table 1 *infra*.

155. See Appendix A, Table 2 *infra*.

almost the same extent. During the surveyed period, 84.8 percent of all suits in Bedford County General Sessions Court were brought by institutions. This similarity in types of plaintiffs is further reflected by the fact that finance companies, banks, and governmental agencies accounted for fifty percent of all suits filed in Bedford County.¹⁵⁶ In addition, every defendant in the Bedford County court was an individual.¹⁵⁷ Thus, the dockets indicate that the general sessions courts examined are used primarily by the institutional plaintiff to recover against the individual defendant.

2. What Size Claims Are Most Common?

Although the amounts claimed varied greatly in the courts studied, some general impressions may be gathered from the docket analysis.¹⁵⁸ First, a substantial portion of suits were for amounts of 250 dollars or less. 54.2 percent of the Davidson County suits and 45.4 percent of Bedford County suits were within the 250 dollar range.¹⁵⁹ Secondly, a significant number of suits were filed for much larger amounts. The proportion of suits for amounts in excess of 500 dollars was 19.5 percent in Davidson County and 33.3 percent in Bedford County.¹⁶⁰ Thus, the docket analysis indicates that although a large percentage of claims filed could be characterized as small claims, the general sessions court is also heavily utilized for suits involving much larger amounts.

3. Are the Parties Normally Represented by Attorneys?

The docket analysis indicates that a large proportion of plaintiffs are represented by attorneys in general sessions. In Davidson County, 96.4 percent of the examined warrants listed an attorney of record.¹⁶¹ The docket analysis did not indicate whether or not defendants were represented, because of the failure of litigants and court personnel to fill in that information on the warrant.¹⁶² A recent study of the Knox County General Sessions Court compiled statis-

156. See Appendix A, Table 1 *infra*.

157. See Appendix A, Table 2 *infra*.

158. A preliminary problem in analyzing the types of claims brought in the general sessions courts is the high jurisdictional limit of \$3,000 in civil cases, in addition to the courts' unlimited jurisdiction in detainer (eviction) actions. See note 126 *supra*.

159. See Appendix A, Table 3 *infra*.

160. *Id.*

161. See Appendix A, Table 6 *infra*. A reliable figure was not available for Bedford County.

162. See *id.* The low figure indicated is certainly unreliable. Very few attorneys for defendants were listed at the designated place on the warrants. When the warrant is filed the plaintiff or his attorney does not know whether the defendant will secure counsel, and court personnel seldom complete this item of information at a later stage of the case.

tics through courtroom observation that tend to show that defendants frequently are not represented.¹⁶³ The Knox County study found that in seventy-three percent of the cases observed the plaintiff was represented by an attorney, while the defendant was represented in only nine percent of the cases.¹⁶⁴ Furthermore, the study found that in almost all cases in which the defendant had retained an attorney, the plaintiff also was represented.¹⁶⁵

4. Does One Side Win More Frequently than the Other?

The docket analysis tends to show a very high rate of success for plaintiffs in the two courts. In the Davidson County court, judgment was rendered for the plaintiff in 72.5 percent of the cases, while the defendant obtained a judgment or dismissal in only 1.9 percent of the trials. The remaining 22.9 percent of cases surveyed were continued, nonsuited, or settled. The Bedford County statistics show an even greater percentage of judgments for plaintiffs, 98.5 percent of the cases surveyed, while defendants won in only 1.5 percent.¹⁶⁶ The Knox County study indicated a somewhat lower success rate for plaintiffs, sixty-three percent; twelve percent of the suits were decided in the defendant's favor.¹⁶⁷

The rate of default judgments is another characteristic of the courts related to the disposition of cases. While exact information on the default rate is difficult to obtain because of clerical procedures in the courts,¹⁶⁸ the data available from the Davidson County docket indicates that the default rate is very high. The proportion of defendants defaulting varied daily during the survey period from 49.1 percent to 80.8 percent of all cases. The total defaults noted on the warrants was 68.8 percent.¹⁶⁹ Default figures were unavailable from the Bedford County records, but the general sessions judge estimated the default rate at fifty to sixty percent.¹⁷⁰

Although these statistics show considerable variance among the courts' dispositions of cases, it is clearly evident that the success

163. Knox County Report, *supra* note 152, at 41.

164. *Id.* It is interesting to note, however, that some of the attorneys never appeared in court. Compare *id.* at 42 with *id.* at 41.

165. *Id.* at 41.

166. See Appendix A, Table 4 *infra*.

167. Knox County Report, *supra* note 152, at 30, 33.

168. No place is provided on the warrant to designate a default judgment. This is usually indicated, however, by a notation made on the corner of the warrant. While the consistency of this practice in Davidson County makes these statistics quite reliable, the number cannot be reckoned with absolute certainty.

169. See Appendix A, Table 5 *infra*.

170. Interview with the Honorable Marvin Marshall, Bedford County General Sessions Judge, in Shelbyville, Tennessee, Jan. 7, 1975.

rate for plaintiffs in these general sessions courts has been very high. In addition, a significant default rate was indicated.

C. *Evaluation of General Sessions as a Small Claims Court*

In order to determine whether the general sessions court is an effective forum for small claimants, it is necessary to evaluate the structural and operational aspects of the court in light of the characterization of the model small claims court developed above. Although general sessions possesses some of the major structural indicia of traditional small claims courts, it is more revealing to gauge the court in terms of its actual operation.

The first elements that characterize the model small claims court are informality, procedural simplicity, and a low jurisdictional limit. Clearly, general sessions has retained to some extent the informal atmosphere and simplified procedures of the justice of the peace courts. These features, however, are not mandated by statute and may be present to a greater or lesser degree depending on the general sessions judge. The judge may in his discretion apply more rigid courtroom rules, thereby removing the informality which is necessary in a small claims court. In addition, the customary presence of attorneys in general sessions court naturally leads to more formalized proceedings. Moreover, the 3,000 dollar jurisdictional limit of general sessions is substantially higher than that of most small claims courts. Because of the wide variety of types of cases and amounts sued for, the general sessions judges have never had the opportunity to develop specialized techniques for dealing with small claims. As a result of the presence of attorneys, the high jurisdictional amount, and the nature of the proceedings, general sessions has become an instrumentality of institutional plaintiffs rather than a forum for individuals with small claims. The court simply has not been oriented toward serving the individual.

The second element of the model small claims court is the activist judge, who assures that the facts of the case are fully developed and encourages conciliation. The extent to which the general sessions judge actually fulfills this role appears to vary substantially among individual judges. General sessions judges who were interviewed disagreed as to the degree to which they should intervene in trials; several judges questioned the propriety of excessive intervention.¹⁷¹ The crucial consideration is that judges are under no statu-

171. Interviews with A.A. Birch, John Boone, Leslie Mondelli, Donald Washburn, Davidson County General Sessions Judges, in Nashville, Tennessee, Jan. 1975. The Knox County study found that although the judge was frequently involved in interrogation of parties, in only 4% of the observed cases did he leave his formal judicial role by giving legal or personal counsel. Knox County Report, *supra* note 152, at 43, 45.

tory duty to assume an activist role in general sessions courts. Unrepresented individual litigants who have no knowledge of the law may fail to present relevant facts that the judge of the model court would routinely extract.

The third characteristic of a small claims court is that an individual may sue there in his own behalf without difficulty. General sessions falls substantially short of the model court in this respect. Attorneys now represent the vast majority of plaintiffs in general sessions suits, which strongly indicates that plaintiffs feel unable to adequately present their claims in their own behalf. The virtual necessity of attorneys greatly increases the expense and inconvenience of justice and renders claims for small amounts uneconomical. Rather than utilizing the court as plaintiffs, individuals seldom have contact with general sessions unless they are forced into court as defendants by institutions which are represented by counsel. The high rate of defaults certainly indicates in some measure the feeling of individuals that it is useless to come into court without legal assistance, particularly when one must confront a skilled lawyer.¹⁷²

The fourth criterion of the small claims court is minimal expense in bringing suit. This is achieved by low fees for filing and service and elimination of attorneys' fees. These features do not characterize the general sessions court, with its relatively high filing fees and the practical necessity of legal counsel in contested matters. The expense of general sessions clearly would deter most plaintiffs from pressing small but valid claims, and high attorneys' fees reduce the value of any recovery. Although general sessions is less costly than courts of record, it does not approach the ideal of inexpensive justice.

The fifth characteristic of a model small claims court is its extensive publicity in the community. In contrast, no concerted effort has been made to familiarize Tennesseans with the function of general sessions courts. Additionally, the paucity of individual claimants in general sessions strongly indicates that the public is largely ignorant of the role of the court.¹⁷³ While the extent of public

172. The litigants who responded to the questionnaires were most vocal on this point. Several complained that a person cannot receive an adequate hearing unless he has counsel to speak for him. One said, "If you don't have money these days you can't get anything done." Another remarked that the judge insisted that he consult an attorney and refused to answer adequately his questions. Without realizing the probative worth of their comments, these citizens were expressing the need that the model small claims court fulfills.

173. Many of those connected with the court feel it lacks public notoriety, especially among the mass of the people. In Nashville, Judges Robinson and Wyatt felt the level of public awareness was sufficient, but Judges Boone, Mondelli, and Summers and attorneys Hollins and Lenahan mentioned lack of publicity as a problem of the court. In Shelbyville,

awareness of general sessions has not been empirically determined, the absence of any official attempt, through the media or pamphlets, to educate the public as to the availability and procedure of this forum is a significant weakness of the general sessions courts.

The final characteristic of the model small claims court is that it is enacted by statute with the articulated purpose of serving the needs of the individual litigant. While Tennessee has moved toward more uniformity in the general sessions courts, a rational structure and expressed purpose for the system are yet lacking. Many of the features of general sessions which are essential in a small claims court are subject to the broad discretionary powers of the judge in the conduct of proceedings. On a state-wide basis, the court has a jerry-built structure resulting from uncoordinated efforts to remedy abuses of the justice of the peace courts, without a reasoned philosophy of what purpose the courts should serve.

In summary, the structural and operational characteristics of the general sessions court reveal that general sessions is not functioning as an adequate small claims court. The similarities of general sessions to the model small claims court have occurred almost by accident, because of the historical antecedents of general sessions. While general sessions is far superior to the abused justice of the peace system, it has largely lost those virtues which perpetuated the justice of the peace courts over the years. The notion that there should be an inexpensive forum for the rectification of small claims by a judge acting as a conciliator or arbitrator was historically effectuated in rural Tennessee by the justice of the peace, but this continuing need has been neglected by the present judicial system. Clearly, general sessions does not adequately serve the interests of individual litigants with claims which, though relatively small, are of major importance in the administration of justice. Tennessee needs a more effective small claims court. In order to obtain this end, a model small claims court statute for Tennessee will be proposed. At this point it is necessary to consider the provisions of the model statute.

PART THREE

ANALYSIS OF POLICY CONSIDERATIONS FOR A MODEL SMALL CLAIMS COURT

I. STATE-WIDE APPLICABILITY OF THE STATUTE

A preliminary question of great import is whether the small

Judge Marshall and attorneys Bobo and Cobb felt that the public is not familiar with the functions of the general sessions court. Interviews, *supra* note 153.

claims court statute should have state-wide applicability or be limited to the state's larger cities. As noted above, changes in the Tennessee judicial structure traditionally have been made in piecemeal fashion by private acts.¹⁷⁴ Although this approach runs counter to the recent legislative policy of increasing uniformity among the general sessions courts,¹⁷⁵ it is necessary to determine whether the benefits to be derived from separate small claims courts in rural areas justify implementing small claims procedures on a state-wide basis. The smaller volume of cases in rural counties that might be characterized as "small claims" arguably does not warrant the creation of a specialized small claims procedure.¹⁷⁶

A further problem arises by virtue of the fact that in many rural Tennessee counties one judge is responsible for the entire general sessions docket. If, as proposed below, the small claims court is created within the general sessions court structure,¹⁷⁷ staffed by present judges, the rural judge would be required to decide cases under the normal general sessions procedures and also sit as a small claims judge, without confusing what ideally should be two very different roles.¹⁷⁸ This raises the danger of a small claims judge utilizing the more formal procedures of the general sessions court that may intimidate a pro se litigant.¹⁷⁹

The vast majority of other jurisdictions enacting small claims court statutes have done so on a state-wide basis,¹⁸⁰ and there are significant arguments in favor of this position. The need for uni-

174. See notes 114-23 *supra* and accompanying text.

175. See note 124 *supra* and accompanying text.

176. Survey of the General Sessions Court of Bedford County, Tennessee, September 1974. See Appendix A, Table 1 *infra*.

177. See notes 181-91 *infra* and accompanying text.

178. The small claims judge should assume an active role as inquisitor-conciliator, charged with the duty of utilizing informal procedures, interrogating witnesses, marshalling evidence, and seeing that substantial justice is done. See notes 332-34 *infra* and accompanying text.

179. The further danger exists that when the small claims court judge is also a judge of the ordinary civil court, he may not only experience a confusion of roles but also feel a disdain for the role of small claims judge, resulting in a determination "to get the [small claims] case over as quickly as possible." NADER STUDY, *supra* note 29, at 117.

180. See, e.g., CAL. CIV. PRO. CODE § 117 (West 1954); NEB. REV. STAT. § 24-521 (Cum. Supp. 1972); R.I. GEN. LAWS ANN. §§ 10-16-1, -16 (1969); TEX. REV. CIV. STAT. ANN. art. 2460a, § 1 (1971). For examples of states with state-wide statutes that also have separate small claims procedures for particular cities, see MASS. ANN. LAWS ch. 218, § 21 *et seq.* (1974) (Boston municipal court); N.Y.C. CIVIL CT. ACT. § 1801 *et seq.* (1963) (N.Y.C. small claims courts).

It was suggested by a Shelbyville, Tennessee attorney that while a uniform statute was generally desirable, its applicability should be limited to counties with a population in excess of a given number. Interview with Ron Wilson, in Shelbyville, Tennessee, Oct. 31, 1974. For an example of a state that has adopted this approach, see N.M. STAT. ANN. § 16-5-1 (1970) (small claims courts created in every county having a population of 100,000 or more).

formity in the Tennessee judicial system is of considerable importance, but a more important consideration is that of fundamental fairness. If the existing system is deficient in providing a suitable forum for small claims, reform measures should ensure that citizens will not be barred from using the new small claims procedures merely because of their place of residence within the state. That there are presently fewer small claims in rural areas should not be viewed as sufficient justification for denying rural residents access to one portion of the state's court system. This is particularly true since a significantly larger number of small claims may be brought in an improved forum in rural areas. A uniform statute, applicable to all of Tennessee, is therefore recommended.

II. BASIC STRUCTURE OF THE SMALL CLAIMS COURTS

A second important question to consider in creating a small claims court system is whether a separate court system should be established, or whether a small claims division within the present general sessions court structure is preferable. The majority of American jurisdictions that have enacted small claims statutes have created special small claims divisions within existing civil courts.¹⁸¹ Other jurisdictions have created separate small claims courts,¹⁸² and still others have attempted to simplify procedures in trials involving amounts under a specified jurisdictional limit in the existing courts.¹⁸³

An important argument against the majority approach is that when the small claims court is a division of the regular civil court, staffed by the same judges and utilizing the same facilities, the judge tends to run both courts in much the same manner.¹⁸⁴ More-

181. See, e.g., IDAHO CODE § 1-2301 (Supp. 1974) (small claims department of magistrate's division); MICH. STAT. ANN. § 27A.8401 (Supp. 1974) (small claims division of each district court).

182. See, e.g., N.D. STAT. ANN. § 27-08.1-01 (1974) (separate court but staffed by judges and justices of the county courts); TEX. REV. CIV. STAT. ANN. art. 2460a, § 1 (1971) (separate court but staffed by justices of the peace).

183. ALASKA STAT. § 22.15.040 (1971) (district judge or magistrate hears claims under \$1,000 as small claims unless important or unusual points of law are involved; state supreme court directed to prescribe rules "to assure simplicity and the expeditious handling of small claims"); MASS. ANN. LAWS ch. 218, §§ 21-22 (1974) (alternative procedure to be established, by rule of court, for trial of small claims in district courts and in Boston municipal court).

184. The common pleas courts in Michigan have been empowered to establish a conciliation division "for the purpose of adjusting, *in an informal manner*, controversies . . . involving \$300 or less." MICH. STAT. ANN. § 27.3668 (Supp. 1974) (emphasis added). Nevertheless, a judge in the common pleas court of Detroit stated that judges usually are not aware of whether a case is a small claim or regular case, even though different procedures should be used in the trial of small claims cases. NICJ REPORT, *supra* note 15, at 285 n.125.

over, if the judge fails to assume an active inquisitorial role, the unrepresented litigant must bear the entire burden of producing evidence, interrogating witnesses, and arguing legal questions that he may not fully understand.

In spite of the inherent problems involved, several policies favor the creation of a small claims division within the existing general sessions court. First, since a small claims division could utilize the facilities, judges, and clerical personnel of the general sessions court, adopting the divisional structure would involve less expense than creating and operating a separate court system.¹⁸⁵ Furthermore, by utilizing present personnel, the small claims division would have the benefit of experienced judges and clerks from the beginning of its operation. Divisional organization would also be a politically feasible alternative, because it would not engender radical changes in the state's judicial system.¹⁸⁶ In addition, general sessions judges should be more receptive to a small claims division, since no judgeships would be created or abolished.¹⁸⁷ Finally, adequate supervision and control of the small claims court, which are necessary to insure the fair dispensing of justice, could be accomplished within the existing court system.¹⁸⁸

185. The financing of the new court is an important practical problem, especially in light of the low fee structure proposed; this question was one of the first ones raised by a Nashville general sessions judge. Interview with the Honorable Gale Robinson, Presiding Judge of the General Sessions Court of Davidson County, in Nashville, Tennessee, Nov. 21, 1974. The fact that the proposed fee structure may be less than what is actually necessary to pay for the court makes utilization of existing facilities even more desirable, if not imperative. See discussion of filing fees, text accompanying notes 265-70 *infra*.

Though utilization of existing facilities is desirable from an economic standpoint, a decentralized small claims court, located at convenient locations throughout the community would have major beneficial effects, including physical convenience for litigants and greater access from a psychological point of view as well, on the theory that a community court would seem less distant and alien. Eovaldi & Gestrin, *Justice for Consumers: the Mechanisms of Redress*, 66 Nw. U.L. REV. 281, 318 (1971).

186. The fate of a reform bill proposed in 1974 is an example of the Tennessee legislature's opposition to major judicial change. See note 124 *supra*. One of the sponsors of that bill suggested that legislators who might have voted for change were influenced by home-town judges who, for one reason or another, were reluctant to depart from the present system. Interview with Daniel Oehmig, Chairman of the Tennessee Senate Judiciary Committee, in Nashville, Tennessee, Nov. 21, 1974. While Senator Oehmig was of the opinion that the present general sessions system was in great need of reform, he did not favor establishment of a small claims court in Tennessee.

187. The small claims division could be staffed by designated small claims judges or by all of the general sessions judges on a rotating basis.

188. See Note, *Small Claims in Indiana*, 3 IND. LEGAL F. 517, 522 (1970). It also has been suggested that the prestige and legitimacy of the small claims court may be enhanced by making the court part of the preexisting civil court. NICJ REPORT, *supra* note 15, at 25. Although this argument may seem to be of questionable validity in Tennessee, where the operation of the general sessions courts is open to criticism, the danger that a litigant would

It therefore is recommended that the model small claims court for Tennessee be created as a division of general sessions court. Although the simplified small claims procedures proposed for the model court render unlikely the confusion of the judges' two roles,¹⁸⁹ the functions should be made as distinct as possible. Therefore, it is recommended that particular judges be exclusively designated small claims judges in counties having more than one general sessions judge.¹⁹⁰ Since one judge would be responsible for the small claims and general sessions dockets in smaller counties, the statute should require that the small claims judge assume an active inquisitorial role to insure the achievement of substantial justice.¹⁹¹

III. JURISDICTION

A. *Concurrent versus Exclusive Jurisdiction*

The major question concerning the new court's jurisdiction is whether the small claims division should be the sole forum for small claims, or whether the plaintiff should have the option of suing in general sessions court.¹⁹² The majority of jurisdictions grant small claims courts concurrent jurisdiction with the regular civil court.¹⁹³ Nevertheless, several significant arguments have been advanced in favor of granting exclusive jurisdiction to the small claims court in those cases within its purview. The most persuasive argument is that exclusive jurisdiction prevents forum shopping by forcing all small claims to be litigated under the same informal procedures.¹⁹⁴

feel he was getting "second-hand justice" from a newly established court with no connection to the present court system cannot be ignored.

189. See text accompanying notes 343-49 *infra*.

190. The designation would be by rule of court and the number of small claims judges would vary from county to county.

191. See text accompanying notes 332-34, and Part Four, § 14(a) *infra*.

192. General sessions courts have concurrent jurisdiction with the circuit courts for claims within the general sessions jurisdiction. Thus, concurrent jurisdiction might include not only a choice between the small claims courts and general sessions court but also the option of filing suit in circuit court. See TENN. CODE ANN. § 16-1104 (Supp. 1974).

193. See, e.g., N.Y. UNIFORM DIST. CT. ACT § 1802 (McKinney 1963); OHIO REV. CODE ANN. § 1925.02 (Page Supp. 1973); TEX. REV. CIV. STAT. ANN. art. 2460a, § 2 (1971); cf. LA. CONST. art. 7, § 91 (New Orleans city court given exclusive jurisdiction if amount in dispute not over \$100, but concurrent jurisdiction if amount in dispute up to \$1,000); ORE. REV. STAT. § 46.405 (1974) (small claims court given exclusive jurisdiction in cases up to \$20, concurrent in cases to \$500). *Contra*, D.C. CODE ANN. § 11-1321 (1973) (small claims court given exclusive jurisdiction in cases for the recovery of money to \$750).

194. Forum shopping has been mentioned as another problem arising from concurrent jurisdiction. Ison, *Small Claims*, 35 MOD. L. REV. 18, 32 (1972). It also has been argued that exclusive jurisdiction should help clear the dockets of the other civil courts. NICJ REPORT, *supra* note 15, at 43. An equally large number of litigants, however, may choose to take advantage of the lower costs and more informal procedures where the small claims court's jurisdiction is concurrent.

Otherwise, as one writer has noted, when jurisdiction is concurrent, some businessmen will "always bring their small claims in the higher courts precisely because it makes it more difficult for customers to defend."¹⁹⁵

An inherent problem in granting exclusive jurisdiction to the small claims court is that litigants would be deprived of an alternative forum in the regular civil court. As a practical matter, it is unlikely that a truly innovative small claims statute would be politically feasible if the court were to be the sole forum for small claims. For example, a primary characteristic of the model small claims court is that representation by an attorney is not permitted.¹⁹⁶ Yet if attorneys are to be barred from Tennessee's small claims court, granting the court exclusive jurisdiction would deprive the parties in a small claims suit of the opportunity to be represented in court.

Additionally, conferring exclusive jurisdiction on the small claims court would, for constitutional reasons, prevent the legislature from placing controls or limitations on the use of the court. If, for example, corporate plaintiffs began using the court as a device to harass debtors,¹⁹⁷ the legislature would be powerless to limit the number of suits that could be brought by corporate plaintiffs in small claims court¹⁹⁸ since those plaintiffs would have no alternative forum.

For these reasons,¹⁹⁹ it is recommended that the proposed Tennessee small claims court have concurrent jurisdiction with the general sessions court.

195. Ison, *supra* note 194, at 32.

196. For a thorough discussion of the preclusion of attorneys from the small claims court, see text accompanying notes 300-31 *infra*.

197. The overuse of the small claims courts for debt collection is a frequently voiced criticism. See, e.g., 47 TEX. L. REV. 448, 452 (1969).

198. Cf. notes 296-99 *infra* and accompanying text.

199. In addition to those reasons mentioned in text, 2 other arguments have been advanced in favor of concurrent jurisdiction. First, if a particular small claims court is corrupt or of low quality, exclusive jurisdiction will relegate the litigant to the undesirable forum. Secondly, legitimate reasons exist for trying a case in the regular civil court. A particular case may raise an important point of law, which the parties prefer to have resolved through the traditional trial and appellate process, complete with attorneys and a record of the proceedings. See NICJ REPORT, *supra* note 15, at 44. Under the system proposed for Tennessee by this Special Project, however, in those counties where the general sessions judge will be the small claims judge as well, concurrent jurisdiction will have no effect. On other hand, in those counties with more than one general sessions judge, concurrent jurisdiction will give litigants some measure of relief from corrupt judges by allowing the litigants to bring suit either in general sessions or in small claims court. Concurrent jurisdiction also gives the plaintiff the option of having his case tried in circuit court. See note 192 *supra*.

B. Causes of Action

Broad relief should be available in the model small claims court and for this reason it is important to place few limitations on the causes of action for which the court may grant relief.²⁰⁰ In the majority of American jurisdictions, small claims courts have jurisdiction over most civil actions,²⁰¹ although suits for libel and slander frequently are excluded.²⁰²

The exclusion of libel and slander is based on the theory that the judgment of the community is needed to determine the extent to which a man's reputation has been wrongfully damaged,²⁰³ thus requiring trial by jury. Since jury trials should not be available in the small claims court,²⁰⁴ suits for defamation must be excluded from the court's jurisdiction. It has been argued further that defamation suits entail a complexity of proof for which small claims procedures are inadequate.²⁰⁵ Additionally, without representation by attorneys,²⁰⁶ litigants would be unable to master the substantive and evidentiary requirements of a defamation case. It therefore is recommended that the Tennessee small claims court have jurisdiction over all civil actions with the exception of libel and slander.

C. Relief Available

Most jurisdictions with small claims courts allow the court to award money damages only,²⁰⁷ although in at least two states, courts

200. Cf. Part One, § IV *supra*.

201. See, e.g., ILL. ANN. STAT. ch. 110A, § 281 (Smith-Hurd Supp. 1974) (actions in "tort or contract for money"); N.J. STAT. ANN. § 2A:6-43 (Supp. 1974-75) ("actions in contract and actions for property damages resulting from negligence in a motor vehicle accident" and landlord-tenant security deposit cases); N.Y. UNIFORM DIST. CT. ACT § 1801 (McKinney 1963) ("any cause of action for money only"); UTAH CODE ANN. § 78-6-1 (Supp. 1973) ("cases for the recovery of money only"); WASH. REV. CODE § 12.40.010 (Supp. 1974) ("cases for the recovery of money only").

202. See, e.g., CONN. GEN. STAT. ANN. § 51-15 (Supp. 1975); MASS. ANN. LAWS ch. 218, § 21 (1974); VT. STAT. ANN. tit. 12, § 5531 (Supp. 1974). Some jurisdictions exclude certain specialized causes of action in addition to libel and slander. See MICH. STAT. ANN. § 27A.8424 (Supp. 1974) (fraud excluded); OHIO REV. CODE ANN. § 1925.02 (Page Supp. 1973) (suits for alienation of affections, malicious prosecution and abuse of process).

203. Note, *Small Claims Court: Reform Revisited*, 5 COLUM. J.L. & SOC. PROB. 47, 62 (Aug. 1969).

204. See text accompanying notes 367-68 *infra*.

205. *Reform Revisited*, *supra* note 203 at 62. Some jurisdictions permit removal to the regular civil court on the ground of complexity. See, e.g., MASS. ANN. LAWS ch. 218, § 24 (1974); N.Y.C. CIVIL CT. ACT § 1805 (McKinney 1963).

206. See text accompanying notes 314-16, 327-31 *infra*.

207. See, e.g., CONN. GEN. STAT. ANN. § 51-15 (Supp. 1975); N.Y. UNIFORM DIST. CT. ACT § 1801 (McKinney 1963); UTAH CODE ANN. § 78-6-1 (Supp. 1973); WASH. REV. CODE ANN. § 12.40.010 (Supp. 1974).

may grant certain equitable relief as well.²⁰⁸ The argument has been made that equitable relief is too difficult for the small claims court to fashion. This assertion may reflect the belief that the small claims judge is unqualified to fashion equitable relief.²⁰⁹

It should be noted that the Tennessee general sessions courts have jurisdiction in equity cases in which the subject matter does not exceed 250 dollars,²¹⁰ which is the suggested jurisdictional limit of the proposed small claims division.²¹¹ Therefore, granting the small claims judge the same equity jurisdiction would not be a departure from the present system. The argument that the small claims judge may be unqualified to fashion equitable relief loses its force in light of the structure of the proposed system, in which the general sessions judges will staff the small claims courts.²¹²

Additional arguments compel conferring of equity jurisdiction on the small claims court. If the small claims division is to be a forum where substantial justice will be done,²¹³ the small claims judge must be able to fashion broad remedies. For example, the availability of equitable relief provides a consumer threatened with suit on a contract of sale with a remedy such rescission or reformation of the contract.²¹⁴ Perhaps more important, if equitable relief were not allowed, small equitable claims might never be brought because of the high cost of litigating the claim.²¹⁵ It therefore is recommended that equity jurisdiction be conferred on the small

208. See NEB. REV. STAT. § 24-522 (Cum. Supp. 1972) ("all civil actions of any type" a special provision confers jurisdiction when "plaintiff seeks to disaffirm, avoid or rescind a contract or agreement for the purchase of goods or services"); N.D. CENT. CODE § 27-08.1-01 (1974) (allows cases for "the cancellation of any agreement involving fraud, deception, misrepresentation, or false promise"). Under the Massachusetts small claims procedure, the court has jurisdiction over all contract and tort actions, with no apparent limitation to monetary relief. MASS. ANN. LAWS ch. 218, § 21 (1974). In addition, the Boston municipal court is given jurisdiction over actions of replevin. MASS. ANN. LAWS ch. 218, § 54 (1974).

209. This notion may harken back to the justice of the peace system in which justices had broad jurisdiction but lacked legal training. See Note, *supra* note 188, at 521.

210. TENN. CODE ANN. § 19-301 (Supp. 1974). It should be noted, however, that limitations have been placed on the exercise of general sessions equity jurisdiction by Tennessee case law. It has been held that the justice of the peace, who exercises jurisdiction identical to that of general sessions court, is not clothed with the extraordinary equity jurisdiction of the chancellor. For example, he cannot enforce a lien on land for unpaid taxes or subject an equitable estate to satisfaction of a debt. *Flanagan v. Oliver Finnie Grocery Co.*, 98 Tenn. 599, 40 S.W. 1079 (1897); *Putnam v. Bentley*, 67 Tenn. 84 (1874). The scope of the justice's, and therefore general sessions', equity jurisdiction is "in a case where equitable principles are involved, to determine it upon equitable principles." 98 Tenn. at 603, 40 S.W. at 1080.

211. See discussion of monetary limit, text accompanying notes 225-36 *infra*.

212. As already noted, it is recommended that the same judges staff both courts.

213. See characterization of the small claims court at Part One, § IV *supra*.

214. See Forbes, *supra* note 52, at 319.

215. See *De Minimis*, *supra* note 77, at 490.

claims division.²¹⁶

The question of whether injunctions and temporary restraining orders should issue from the small claims division poses a special problem. Tennessee Code Annotated, section 19-301 empowers the general sessions court to issue restraining orders.²¹⁷ Thus, if the jurisdiction of the small claims division is to be truly concurrent with that of general sessions, so that a plaintiff may choose either forum, it could be argued that the small claims division must have jurisdiction to issue restraining orders. Yet small claims courts in most jurisdictions have no power to issue injunctions and temporary restraining orders,²¹⁸ based on the rationale that these extraordinary forms of relief should issue only after a more formal procedure.²¹⁹ Furthermore, the idea of a "small claim" and the requirement of "irreparable harm" for issuance of a restraining order seem contradictory.²²⁰ For these reasons it is recommended that the proposed small claims division not be empowered to issue injunctions or temporary restraining orders.

The award of court costs in an action is one final form of relief that merits discussion.²²¹ Under the small claims court systems of most jurisdictions,²²² as well as in the Tennessee general sessions courts,²²³ costs generally are awarded to the winning party. Although the potential assessment of costs might discourage a litigant with a valid claim from bringing suit, the relatively low filing fees in the small claims division should not operate as a deterrent.²²⁴ Indeed, the award of costs to the winning party obviously lessens the burden on the litigant with a valid claim, thereby encouraging meritorious suits. It is therefore recommended that the small claims judge be

216. The court's equity powers will stem both from the grant of equity jurisdiction and from the statutory mandate that the judge apply equitable principles and do substantial justice. See text accompanying notes 332-34, 350-54 *infra*.

217. TENN. CODE ANN. § 19-301 (Supp. 1974).

218. NICJ REPORT, *supra* note 15 at 36.

219. *Id.*

220. Although it might be argued that plaintiff could be threatened with irreparable harm in the amount of \$250, the loss of a possession of such limited value should not result in irreparable harm to the plaintiff.

221. A discussion of the related question of whether the small claims court should be allowed to award attorneys' fees has been omitted, since attorneys are to be barred under the proposed statute. See discussion of attorneys, text accompanying notes 300-31 *infra*.

222. See, e.g., ME. REV. STAT. ANN. tit. 14 § 7455 (Supp. 1974); N.J. STAT. ANN. § 2A:18-69 (1952); UTAH CODE ANN. § 78-6-15 (1953). Some jurisdictions leave the awarding of costs within the judge's discretion. See, e.g., D.C. CODE ANN. § 16-3909 (1973); VT. STAT. ANN. tit. 12, § 5533 (1973).

223. The Tennessee provisions for award of costs are discretionary, not mandatory, and may be apportioned between the litigants at the judge's discretion. TENN. CODE ANN. §§ 20-1601, -1621 (1956).

224. See discussion of filing fees, text accompanying notes 265-70 *infra*.

allowed to award costs to the winning party. In keeping with present Tennessee procedure, it is recommended that this award be discretionary.

D. Monetary Limit

The primary question in regard to the proper jurisdictional amount for a small claims court is whether to opt for a high figure in order to encompass the maximum number of consumer claims or whether to choose a smaller figure for the sake of consistency with the small claims ideals of simplicity and informality.²²⁵ Other jurisdictions have differed greatly with respect to jurisdictional monetary limits. The amounts vary from as low as 200 dollars²²⁶ to as high as 2,000 dollars²²⁷ with the average limit in courts surveyed being 489 dollars and the median 400 dollars.

If the small claims court is viewed as a forum for consumer protection,²²⁸ the jurisdictional limit should be relatively high in order to encompass major consumer items such as televisions, refrigerators, and automobiles.²²⁹ Furthermore, a high jurisdictional limit makes less likely the diminution of the effective jurisdiction of the small claims courts by rising prices during an inflationary period.²³⁰

The more persuasive arguments, however, urge the adoption of a fairly low jurisdictional limit. One of the principal virtues of a small claims court is that because of its informal procedures, a litigant may sue in his own behalf and thereby forego the expense of an attorney. This benefit may be lost by setting a high monetary limit since suits involving larger sums will be important enough to litigants to justify the trouble and expense of hiring an attorney.²³¹

225. See characterization of the small claims court at Part One, § IV *supra*.

226. See, e.g., ME. REV. STAT. ANN. tit. 14, § 7451 (Supp. 1974); N.J. STAT. ANN. § 2A:6-43 (Supp. 1974) (limit increased to \$500 if rent security deposit involved); N.D. CENT. CODE § 27-08.1-01 (1974). Although Kansas purports to create a small debtors court with a jurisdictional limit of only \$20, the court is defunct. KAN. STAT. ANN. § 20-1304 (1974). One reason given for the demise of that court is that the monetary limit was "highly obsolescent," simply too small for the court to be effective. Oglesby and Carr, *supra* note 41 at 238. The New Orleans city courts have exclusive jurisdiction over cases not exceeding \$100, but these courts have considerably higher concurrent jurisdiction. LA. CONST. art. 7, § 91.

227. See N.M. STAT. ANN. § 16-5-1 (1970). It should be mentioned that a very small minority of states place no monetary limit on certain types of cases. See, e.g., HAWAII REV. LAWS § 633-27 (Supp. 1974) (unlimited jurisdiction allowed in landlord-tenant cases where the suit is for recovery of a security deposit); cf. TEX. REV. CIV. STAT. ANN. art. 2460a, §1 (1971) (jurisdictional limit raised from \$150 to \$200 if suit is for recovery of wages).

228. See text accompanying notes 67-69 *supra*.

229. Cf. *De Minimis*, *supra* note 76, at 489, criticizing the \$500 limit in New York as excluding a large number of cases.

230. Note, *supra* note 188, at 529.

231. See NADER STUDY, *supra* note 29, at 36. A logical extension of this argument is that

Furthermore, it has been observed that higher monetary limits generally lead to more formal court procedures.²³² Thus, the informality essential to an effective small claims court may be hampered or lost if substantial sums are involved. It also has been suggested that higher claims will increase the likelihood of appeal, thereby protracting the litigation and bringing into question the finality of small claims decisions.²³³

This study recommends that the small claims division for Tennessee have a jurisdictional limit of 250 dollars. Important practical reasons, in addition to the policy reasons noted above, justify this relatively low limit. One of the primary purposes of a small claims court is to provide a forum where individuals may bring claims that are too small to be economically tried with attorneys. With the 35-50 dollar per hour fee range charged by most Tennessee attorneys, claims under 250 dollars normally cannot be tried economically with an attorney.²³⁴ In addition, a statute excluding attorneys from small claims court would be more politically feasible with a 250-dollar jurisdictional limit since a suit for less than this amount presumably will be unattractive to most attorneys.²³⁵ Although the 250-dollar limit would exclude suits involving automobiles and major appliances from the court's jurisdiction, it will encompass most medium-priced consumer goods, and those actions excluded may always be brought in general sessions or circuit court.²³⁶

in jurisdictions where attorneys are barred from the small claims court, the litigant is likely to choose the regular civil court as the forum for his larger case in order to be afforded the opportunity of counsel and the traditional trial procedure.

232. Fowks, *Small Claims Courts: Simplified Pleadings and Procedures*, 37 J. KAN. B. Ass'n 167, 169 (1968).

233. NICJ REPORT, *supra* note 15, at 41.

234. Interview with J. Hollings, President of the Nashville Bar Association, in Nashville, Tennessee, Nov. 21, 1974.

235. The majority of attorneys and judges questioned by the members of this Special Project stated that because of the reason stated in text, there should be little bar association opposition to a small claims court statute with a jurisdictional limit of \$250.

Even if attorneys were not barred from the court outright, use of counsel is obviously discouraged by a jurisdictional limit unappealing to lawyers. The small claims court does, however, put the attorney in the favorable position of being able to advise the client of the court's existence and provide a short pretrial conference for a minimal fee; whereas, if the court did not exist, the attorney is often put in the uncomfortable position of having to tell a good client that a justifiable cause or claim is not worth litigating. Forbes, *supra* note 52, at 328-29.

236. See discussion of the proposed concurrent jurisdiction of the small claims division, text accompanying notes 192-99 *supra*.

IV. PRETRIAL PROCEDURES

A. *Service of Process*

In an effective small claims court, service of process must be rapid, effective, and inexpensive. The primary question regarding service of process is whether the model small claims statute for Tennessee should utilize service by registered mail or personal service. In most other jurisdictions, service by mail is an alternative but not an exclusive method of service in small claims courts.²³⁷ This method has met with repeated success.²³⁸ Personal service, however, has traditionally been utilized in Tennessee courts.²³⁹

The strongest argument in favor of retaining personal service is the traditional belief that the defendant is more likely to appear if he is personally served.²⁴⁰ Service of process by registered mail, however, is both cheaper and quicker than personal service by a sheriff,²⁴¹ and the returned receipt insures that defendant actually received the summons. Moreover, in large urban areas problems have been encountered with personal service because of corrupt process servers who often never attempt actual service but instead falsify the return, a practice known as "sewer service."²⁴² The server's oath apparently has proved an ineffective deterrent to this practice. Finally, constitutional due process requirements must be considered in insuring effective service.²⁴³ It is therefore recommended that the initial method of service be by registered mail; in the event of non-

237. See, e.g., CAL. CIV. PRO. CODE § 117c (West Supp. 1975) (personal service also allowed); N.H. REV. STAT. ANN. § 503:6 (1968) (if service cannot be effected by registered mail, the court may direct that service be made "as in all other actions at law"); UTAH CODE ANN. § 78-6-3 (1953) (personal service also allowed); WASH. REV. CODE ANN. § 12.40.040 (Supp. 1974) (service by registered mail an alternative method of service; traditional methods also allowed).

238. *Reform Revisited*, supra note 203, at 52.

239. See TENN. R. CIV. P. 4.03, 4.04.

240. NICJ REPORT, supra note 15, at 70. *But cf.* D. CAPLOVITZ, CONSUMERS IN TROUBLE 199-201 (1974), for a discussion of problems encountered with personal service in Chicago, Detroit, and New York City.

241. Delivery by registered mail costs only a little over \$1, whereas service by the sheriff costs approximately \$5. See 47 TEX. L. REV. 448, 453-54 (1969), criticizing personal service as one of the ineffective provisions of the Texas small claims court statute.

242. *Reform Revisited*, supra note 204, at 53. The claim made is that the process server will "throw the summons into the sewer," then swear that the summons has been served. For a complete discussion of this problem, see *Abuse of Process: Sewer Service*, 3 COLUM. J.L. & SOC. PROB. 17 (1967). The only evidence uncovered by this Special Project that this problem exists in Tennessee were statements by some general sessions judges that there may be occasions when the summons never reaches the defendant but that the problem is not chronic. *E.g.*, Interview with the Honorable Donald Washburn, Davidson County General Sessions Court Judge, in Nashville, Tennessee, Jan. 17, 1975.

243. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

delivery, personal service will be required, but with no additional charge to the small claims litigant.

B. Venue

The primary objective in drafting a small claims court venue provision is to designate a forum that is convenient for both litigants, thereby minimizing expense and delay. In the majority of jurisdictions, venue in small claims court cases is in the county where the defendant resides or does business.²⁴⁴ This could create a hardship for the plaintiff, who may be forced to travel many miles to the defendant's county.²⁴⁵ Several small claims statutes provide that venue also may be where the claim arose or where the contract was to be performed.²⁴⁶ This type of provision may work a hardship on the defendant, however. For example, companies that employ salesmen who sell goods throughout the state may utilize contracts providing for performance at the company's corporate headquarters. Although the buyer might be able to bring an action for breach of warranty in his own county if the goods prove shoddy, if he stops payment the company can maintain an action in the county of its corporate headquarters, which may be many miles from the buyer's place of residence.²⁴⁷ The poor or uneducated consumer who is unwilling or unable to travel many miles to defend, even though he has a valid defense, is likely to default in this situation.²⁴⁸

At present, the Tennessee venue statute provides for trial of civil actions "in the county where the cause of action arose or in the county where the defendant resides or is found."²⁴⁹ It is recommended that the model small claims court statute for Tennessee follow the general Tennessee venue provisions. It is recommended further that the statute provide for change of venue at the judge's discretion to prevent undue hardship to the parties.²⁵⁰ Additionally,

244. See, e.g., MASS. ANN. LAWS ch. 218, § 21 (1974) (statute has provision allowing defendant to waive improper venue); 14 ME. REV. STAT. ANN. tit. 14, § 7453 (Supp. 1975) (only where defendant resides); N.Y. UNIFORM DIST. CT. ACT § 1801 (McKinney 1963); UTAH CODE ANN. § 78-6-1 (Supp. 1973) (only where defendant resides).

245. Note, *The California Small Claims Court*, 52 CALIF. L. REV. 876, 889 (1964).

246. See, e.g., MICH. STAT. ANN. § 27A.8415 (Supp. 1974); TEX. REV. CIV. STAT. ANN. art. 2460a, § 3 (1971).

247. Note, *supra* note 245, at 889; 42 S. CAL. L. REV. 493, 499 (1969). If reduced costs and delays are to be a virtue of the small claims court, requiring the defendant to travel to a distant judicial district is "absurd." *Id.*

248. 42 S. CAL. L. REV. 493, 499 (1969).

249. TENN. CODE ANN. § 20-401 (Supp. 1974).

250. Such a provision has been widely recommended for small claims courts. See, e.g., Note, *supra* note 245, at 889; *Reform Revisited*, *supra* note 203, at 54; cf. 42 S. CAL. L. REV. 493, 500 (1969), discussing the similar doctrine of *forum non conveniens*.

the defendant should be allowed to move for a change of venue by mail.²⁵¹

C. Pleadings

Most commentators agree that the small claims complaint should be as simple as possible, containing a concise statement of the plaintiff's claim and informing the defendant where he should go to defend and what will happen if he fails to appear.²⁵² If the small claims procedure is to be simple and informal, and if attorneys are barred from the courts,²⁵³ complicated pleading must be avoided to ensure that the proceedings are comprehensible to the average small claims litigant.

It is recommended that the Tennessee small claims division use a combination summons-complaint, similar to the warrant now used in general sessions court.²⁵⁴ The warrant should be simplified, however, to require only the name of the court, the names and addresses of the plaintiff and defendant, the name of the county in which the action was commenced, and a statement of the claim in concise form, including pertinent dates. As noted above, the defendant should be informed of the place of trial and what will happen if he fails to appear.

The question of whether an answer should be required in small claims court is more difficult. Requiring an answer should arguably minimize delays due to surprise, avoid unnecessary appearances by plaintiffs when the defendant defaults, and clarify issues for the court.²⁵⁵

It is doubtful, however, that an answer actually minimizes delay overall since in most cases an oral answer at the hearing is simpler, quicker and eliminates paper work by litigants and court personnel. Furthermore, it has been suggested that the requirement of an answer increases defaults since the defendant automatically loses if he fails to answer within the prescribed time.²⁵⁶ The majority of American jurisdictions with small claims courts do not require an answer,²⁵⁷ and it is recommended that Tennessee not require a writ-

251. See Note, *supra* note 245, at 889.

252. See, e.g., Note, *The Nature and Operation of the New York Small Claims Courts*, 38 ALBANY L. REV. 196, 200 (1974); *Reform Revisited*, *supra* note 203, at 50-51, noting that oversimplification may conceivably work an injustice if the defendant is given insufficient information to formulate his defense.

253. See discussion of attorneys, text accompanying notes 300-31 *infra*.

254. See TENN. CODE ANN. § 1135 (Supp. 1974) (commencement of actions in general-sessions court).

255. Albany Note, *supra* note 252, at 200.

256. NICJ REPORT, *supra* note 15, at 91.

257. See, e.g., CAL. CIV. PRO. CODE § 117h (West Supp. 1974) (defendant may file a

ten answer but allow defendant to file an answer if he wishes.

A special problem is presented by Tennessee Code Annotated section 24-509, which provides that a sworn account is deemed conclusive proof of the existence of a debt unless a denial under oath is filed by the defendant. Although this provision facilitates the collection of debts in cases when the defendant has no real defense,²⁵⁸ the individual litigant who does not understand this technical requirement may be deprived of an adequate hearing. It is therefore recommended that section 24-509 be made inapplicable to cases brought in the small claims division.

Provisions dealing with counterclaims involve two conflicting policies. On the one hand, the policy favoring a quick and thorough dispensation of justice calls for the resolution of all the issues of a case in a single hearing. On the other hand, the policy favoring widespread use of small claims courts by individual litigants militates against the allowance of unlimited counterclaims by more powerful defendants since potential claimants may refrain from using the court out of fear of a large counterclaim. Furthermore, in states where a counterclaim in excess of the small claims court's jurisdictional limit results in automatic removal of the case to the civil court of record,²⁵⁹ the defendant can escape the jurisdiction of the small claims court simply by filing a colorable counterclaim in excess of the monetary limit.²⁶⁰

Although most other jurisdictions allow counterclaims in small claims courts,²⁶¹ some statutes require that the counterclaim arise out of the same transaction or occurrence as plaintiff's claim.²⁶² The time waste resulting from multiple litigation arising from the same occurrence provides a strong argument against the complete disallowance of counterclaims in small claims court. In view of these considerations it is recommended that counterclaims be allowed in

verified answer stating any new matter which shall constitute a counterclaim); IDAHO CODE § 1-2309 (Supp. 1974) (no pleading necessary other than claim and notice); ILL. ANN. STAT. ch. 110A § 286 (Smith-Hurd 1968) (defendant need not file an answer unless ordered to do so by the court). *Contra*, R.I. GEN. LAWS ANN. § 10-16-9 (Supp. 1974) ("Upon the hearing, the defendant shall in writing file in court his answer or defense to the plaintiff's claim").

258. See TENN. CODE ANN. § 24-509, comment 1 (1956, Supp. 1974).

259. See, e.g., N.Y. UNIFORM DIST. CT. ACT § 1805 (McKinney 1963); PHIL. SUP. CT. R. 110(h) (1974); cf. R.I. GEN. LAWS ANN. § 10-16-9 (Supp. 1974) (if defendant counterclaims in excess of the jurisdictional limit and wins, plaintiff takes a nonsuit; defendant is awarded costs only in small claims court but may pursue his counterclaim elsewhere). *But see* HAWAII REV. STAT. § 633-30 (Supp. 1974) (action stays in small claims court so long as the counterclaim does not exceed the jurisdictional limit of the district court).

260. *De Minimis*, *supra* note 77, at 496.

261. See, e.g., CAL. CIV. PRO. CODE § 117h (West Supp. 1974); N.J. STAT. ANN. § 2A:6-43 (Supp. 1974); R.I. GEN. LAWS ANN. § 10-16-9 (Supp. 1974).

262. See, e.g., WIS. STAT. ANN. § 299.02 (Supp. 1974).

the model small claims court. Counterclaims should be restricted, however, to those within the jurisdiction of the court that arise from the transaction or occurrence complained of. If the counterclaim exceeds the court's jurisdictional limit, the case should be automatically removed to the general sessions court. Furthermore, all counterclaims should be deemed permissive rather than mandatory.

Although it may be argued that the recommended provision allows the defendant to escape the jurisdiction of the court by counterclaiming over 250 dollars, the counterclaim must be valid before the case can be removed.²⁶³ The requirement that the counterclaim arise out of the same transaction or occurrence as the plaintiff's claim reduces the likelihood of a valid counterclaim in excess of the jurisdictional limit. Of course, excessive counterclaims without basis can be dismissed by the court. Moreover, as a practical matter, this type of provision has not been greatly abused; for example, during a one-year period in New York City fewer than one percent of the cases filed in small claims court were removed to the regular civil court.²⁶⁴

D. Filing Fees

A low fee structure is important to the effective functioning of a small claims court, because it encourages middle and lower income litigants to utilize the court.²⁶⁵ There are valid reasons, however, for retention of at least a minimal filing fee. First, these fees should help to discourage frivolous suits. Secondly, a filing fee should deter collection agencies, finance companies, and other corporate plaintiffs from using the small claims court to threaten debtors.²⁶⁶ Admittedly, one of the chief uses of the court will remain debt collection, but at least this function will not be subsidized by the state.

In other jurisdictions, a fee of one dollar to \$3.50 usually covers filing and service of process.²⁶⁷ A slightly higher fee of five dollars is

263. *De Minimis*, *supra* note 77, at 496.

264. *Id.* It should be noted that in the situation where the consumer, for example, pays \$200 on a \$900 sales contract, stops payment, then sues for return of his money, the defendant can counterclaim for \$700 and thereby remove to the regular court. *Id.*

265. See characterization of the small claims court at Part One, § IV *supra*.

266. One theory is to set the fee at a level which slightly exceeds the usual cost to a corporation of sending a typical series of letters notifying customers of delinquent accounts. *Reform Revisited*, *supra* note 203, at 51-52.

267. See, e.g., CAL. CIV. PRO. CODE § 117p (West Supp. 1974) (\$2 plus \$1.50 for each copy of an affidavit sent to a defendant); MASS. ANN. LAWS ch. 218, § 22 (1974)(\$3); N.J. STAT. ANN. § 2A:18-65 (1952) (\$2.10 plus 40¢ for each additional defendant); WASH. REV. CODE ANN. § 12.40.030 (Supp. 1974) (\$1). Some small claims courts provide for higher filing fees for frequent users of the court. See note 295 *infra* and accompanying text.

recommended for the Tennessee statute,²⁶⁸ however, in order to partially finance the operation of the court. Although this fee will not totally defer the expenses of the small claims division, this amount strikes a balance between the legitimate fiscal needs of the state and the policy of encouraging broad use of the court.²⁶⁹ It also is recommended that the model statute provide for a waiver of the filing fee if the claimant takes a pauper's oath.²⁷⁰

E. Scheduling of Trials

Tennessee Code Annotated section 20-1207 and Rule 40 of the Tennessee Rules of Civil Procedure outline the present system for scheduling cases in Tennessee trial courts. These are essentially mechanical rules and serve adequately. It therefore is recommended that no special provision be made for the initial scheduling of trials in the small claims division.

An acute problem, however, has been created by the frequent use of continuances in general sessions courts. This Project's analysis of the Davidson County general sessions court docket revealed that a significant number of cases are continued, causing considerable delay in the trial of all general sessions cases.²⁷¹ The possibility of abuse of the continuance procedure is great since continuances are often granted for little or no reason, merely out of professional courtesy, in small claims courts in other jurisdictions. In addition, defendants may exploit continuances to defeat bona fide claims by delaying trial until the plaintiff drops his case.²⁷²

Since the unlimited use of continuances could defeat the small claims court goal of a speedy trial, it is recommended that a party's first request for a continuance be granted whenever the judge determines that such request is warranted and in the interest of justice,

268. It is recommended that this fee cover filing and service of process.

269. The model statute should also be more politically feasible if the filing fee provides at least some measure of economic support for the court.

270. Cf. TENN. CODE ANN. § 20-1629 (Supp. 1974) (pauper's oath may be given in lieu of cost bond).

271. The Knox County General Sessions Court Study revealed that 35% of the cases heard during the observation period were continued at least once, while 18% of the cases continued were continued 2 or more times. The study also took a random sample of cases, of which 21% were continued at least once. Of this 21%, 49% were continued more than once. Knox County Report *supra* note 152, at 35-37. The writers of the report were of the opinion that, because the first trial date was chosen by the plaintiff's attorney, the court could not be criticized for granting continuances and thereby contributing to delay. The report did not deny, however, that continuances contributed to delay and seemed to imply that it was usually the defendant who took advantage of the procedure.

272. NADER STUDY, *supra* note 29, at 79-80. See also NICJ REPORT, *supra* note 15, at 145-47.

but that a more rigid standard²⁷³ be applied to subsequent requests, unless the parties and the judge agree to the continuance.

F. *Evening and Saturday Sessions*

One reason cited for the high default rate in the Tennessee general sessions court is that many defendants do not feel their case merits missing a day's work.²⁷⁴ It is even more likely that a plaintiff will forego bringing suit on a small claim merely because of the inconvenience of the hours of the court. Though this is a problem that should be dealt with by rule of court rather than by statute, it is highly recommended that evening and Saturday small claims court sessions be established for the convenience of the average citizen.²⁷⁵

V. PUBLICITY AND "HOW TO SUE" MANUALS

Small claims courts in several jurisdictions have been underutilized by average citizens but overly utilized by business plaintiffs.²⁷⁶ Business concerns are often far more familiar with the legal process than the individual.²⁷⁷ It therefore is essential to the success of the Tennessee small claims division that the public be thoroughly informed of the existence and operation of the court both by means of publicity and through instruction manuals for individual litigants. A model instruction manual is set out in Appendix B.

VI. CLAIMANTS, COUNSEL AND COURT PERSONNEL

A. *Parties Plaintiff*

One of the salient characteristics of the Tennessee general sessions courts and of courts of limited jurisdiction in other states has been the dominance of business interests over consumer interests.²⁷⁸ This predominant position of business will not cease automatically, however, with the establishment of a small claims court.²⁷⁹ In fact,

273. *E.g.*, "dire circumstances" or "only upon agreement of the other party." See NICJ REPORT, *supra* note 15, at 146.

274. Interview with the Honorable Gale Robinson, Presiding Judge of the General Sessions Court of Davidson County, in Nashville, Tennessee, Nov. 21, 1974.

275. NADER STUDY, *supra* note 29, at 80.

276. Haemmel, *The North Carolina Small Claims Court—An Empirical Study*, 9 WAKE FOREST L. REV. 503 (1973).

277. Eovaldi & Gestrin, *supra* note 185, at 297.

278. See text accompanying notes 154-57. A survey of British courts in 1968 found that 90% of the summons were issued on behalf of corporations or utilities. The surveyors added that a good portion of the suits filed by individuals were probably brought for small businesses in the proprietors' names. CONSUMER COUNCIL, *supra* note 87, at 13.

279. In the small claims branch of the municipal court of Chicago, 80% of the cases

the low court costs and summary nature of the proceedings have encouraged businesses to use small claims courts where they exist to collect delinquent accounts.²⁸⁰ In some small claims courts the use of this efficient collection process by businessmen and finance companies so pervades the court that legal writers have referred to them as "super collection agencies."²⁸¹ In proposing restrictions on the use of small claims courts as devices for collection of debts by merchants and lenders, several writers have argued that small claims courts are run frequently at a loss to the taxpayer, and that allowing unlimited use by businesses amounts to subsidizing their collection process.²⁸² On the other hand, restricting these companies' use of the small claims mechanism will not deprive them of an adequate judicial remedy since the regular civil courts, such as general sessions, are still available to them.²⁸³ In addition, allowing merchants to rely on a streamlined small claims process to collect overdue accounts may encourage some sellers to extend credit to high-risk customers with the expectation of quick and easy collection in small claims court after default.²⁸⁴

The repeated use of the small claims court by business plaintiffs creates problems apart from the risk of abuse by unscrupulous businessmen. An agent of a business using the courts frequently becomes familiar with the format and simplified procedures of the small claims court as well as the relevant substantive law governing

represent commercial collections or assigned claims. Robinson, *A Small Claims Division for Chicago's New Circuit Court*, 44 CHI. B. RECORD 421, 422 (1963). In a study of the small claims courts in Oakland-Piedmont-Emeryville, California, 60% of all actions were initiated by businesses and government agencies, while over 80% of all suits were defended by individuals. 52 CALIF. L. REV. 876, 884 (1964). An additional indicator of business domination was revealed in a study of the Pomona, California small claims division. When a private party was a defendant, and a business or government agency was plaintiff, the plaintiff had a favorable judgment in 93% of the cases. When the roles were reversed, an individual plaintiff won in only 65.5% of cases. 1 PEPPERDINE L. REV. 71, 75(1973). See Appendix A, Tables 1 & 2 *infra*.

280. 14 U.C.L.A. INTRA. L. REV. 879, 885 (1967). For an article encouraging doctors to employ small claims facilities as a collection device, see Perrin, *Small Claims Courts Can Help Collect Your Fees*, 32 MEDICAL ECONOMICS 119 (Feb. 1955).

281. Forbes, *supra* note 52, at 333. For a discussion of abuses by collection agencies in the California small claims court system, see Brooks v. Small Claims Court, 8 Cal. 3d 661, 668-69, 504 P.2d 1249, 1254-55, 105 Cal. Rptr. 785, 790-91 (1973); 4 STAN. L. REV. 237, 237-40 (1952).

282. 4 STAN. L. REV. 237, 241 (1952).

283. 34 COLUM. L. REV. 932, 941-42 n.74 (1934). See Adolph M. Schwartz, Inc. v. Burnett Pharmacy, 112 Cal. App. 781, 785, 295 P. 508, 509 (App. Dep't, Super. Ct. of L.A. County 1931). As was noted *supra* notes 154-57 and accompanying text, businesses in Tennessee presently use the general sessions courts to collect delinquent accounts. Though general sessions is not as inexpensive or as informal for the layman as a small claims court, the court does provide an efficient forum for debt collection. See generally Knox County Report, *supra* note 152, at 23-52.

284. See D. CAPLOVITZ, *supra* note 47, at 21-25.

a specific type of case. In a court where defendants are rarely represented by counsel these "professional plaintiffs" have significant advantages over individual defendants.²⁸⁵ More significantly, the use of small claims courts as a debt collection device is directly contrary to the function of the model small claims court as a forum for consumer relief.²⁸⁶

Numerous solutions to the problem of the potential dominance by business interests in small claims courts have been suggested and enacted.²⁸⁷ The primary method used by states to prevent business domination of small claims courts has been to deny access to the courts to certain types of plaintiffs.²⁸⁸ The most frequent restriction has been the prohibition of suits brought by assignees,²⁸⁹ thus pre-

285. *Persecution and Intimidation*, *supra* note 45, at 1662. This participation by professional plaintiffs results in a form of limited legal education. One writer has suggested that not only should lawyers be barred from the small claims courts, but also the "semi-professionals." 1 PEPERDINE L. REV. 71, 81 (1973). *Cf.* *State ex rel. Long v. McLeod*, 6 Wash. App. 848, 496 P.2d 540 (1972).

286. *See* Part One, § IV *supra*. *See generally* CONSUMER COUNCIL, *supra* note 87; Eovaldi & Gestrin, *supra* note 185; Steadman & Rosenstein, "Small Claims" Consumer Plaintiffs in the Philadelphia Municipal Court: An Empirical Study, 121 U. PA. L. REV. 1309 (1973).

287. One proposal that no states have adopted is to create separate sections of the small claims court, one for business plaintiffs and another for individual plaintiffs. Hearings would be conducted on separate days or in different court rooms. Robinson, *supra* note 279, at 421-26. This proposal attempts to remedy the problem of clerks and judges giving less attention to individual litigants than to business litigants who frequently use the small claims court and are known to them. Segregating the cases could result in an atmosphere where court personnel are more responsive to the problems of the pro se litigant. Another variation of the segregated-plaintiff approach would have counsel provided at no cost to all indigent defendants in the business section of the small claims court, though this would be unnecessary in the individual plaintiff section. *Reform Revisited*, *supra* note 203, at 66-67. This is a partial solution, however, because it does not discourage overreaching by unscrupulous businessmen. Although appointing counsel for indigents may help counter the expertise of professional plaintiffs, adding professionals to the small claims process merely results in added delay and procedural technicality. *See text* accompany notes 314-15 *infra*. The business plaintiff section, in fact, would probably be indistinguishable from courts similar to the present Tennessee general sessions courts. In addition, the cost of having two divisions of a small claims court other than in large urban counties may be prohibitive.

288. American courts have generally argued that these plaintiffs (primarily assignees and corporations, *see* notes 289 and 291 *infra*) are not denied due process or equal protection since the classification seems reasonable, and these plaintiffs have an alternative remedy such as initiating a suit in general sessions or circuit courts. *Cf.* *People ex rel. Brixton Operating Corp. v. La Fetra*, 194 App. Div. 523, 186 N.Y.S. 58 (1st Dept. 1920), *aff'd sub nom.* *People ex rel. Durham Realty Corp. v. La Fetra*, 230 N.Y. 429, 130 N.E. 601 (1921). In *La Fetra* the New York Legislature enacted a statute denying landlords access to lower courts for the purpose of instituting summary proceedings for the removal of tenants. The supreme court relied on *Fourth Nat'l Bank v. Francklyn*, 120 U.S. 747 (1887), and stated that the legislature could withdraw or modify any remedy at will, provided it left another adequate remedy available to this class of plaintiffs. Since the landlords had available an action for ejectment, the statute was not unconstitutional. *Cf.* *Oshkosh Waterworks Co. v. Oshkosh*, 187 U.S. 437, 439 (1903).

289. CAL. CIV. PRO. CODE § 117f (West Supp. 1975) (no assignee may file or prosecute a

venting the use of the courts by collection agencies.²⁹⁰ A few states have gone farther in restricting categories of plaintiffs,²⁹¹ and one proposal to create small claims courts in Great Britain suggested a total ban on the use of the small claims process by assignees, corporations, partnerships and associations.²⁹²

The total exclusion of commercial plaintiffs may not be the best solution to the problems enumerated above, however. It would be fundamentally unfair to exclude an entire class of plaintiffs from a useful adjudicative process because of the abuses of a few. Furthermore, consumer defendants receive substantial benefits from defending a suit in a small claims court, such as reduced court costs and counsel fees, night sessions, and relaxed procedural rules.²⁹³ Finally, a small claims court act that grants some access to business plaintiffs would be more acceptable to the Tennessee business community, and would have a better chance of passage by the legislature.²⁹⁴

The imposition of restrictions on the use of small claims procedure is less drastic than an absolute prohibition, and is perhaps the

claim with the exception of a trustee in bankruptcy and a holder of a conditional sales contract who has purchased the contract for investment and not collection purposes); NEB. REV. STAT. § 24-523(1), (4) & (5) (Cum. Supp. 1972) (no assigned claims may be filed, and only a party to the transaction with the defendant for which the claim is brought may file and prosecute a claim); UTAH CODE ANN. § 78-6-6 (1953) (no assignee may file or prosecute a claim).

290. Oglesby & Carr, *supra* note 41, at 242. A prohibition against assignees alone, however, is not sufficient to keep financial institutions out of the small claims courts. *Hearings Before Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency*, 90th Cong., 2d Sess. 65 n.1 (1968). Some courts distinguish between assignees and third-party beneficiaries. Accordingly, a finance or factoring company can bring suit in a small claims court to collect on a delinquent account if the company is named as a third-party beneficiary in the initial agreement signed by the consumer-defendant. See *Merchants Serv. Co. v. Small Claims Court*, 94 Adv. Cal. App. 2d 154, 210 P.2d 543 (1949), *rev'd on other grounds*, 35 Cal. 2d 109, 216 P.2d 846 (1950).

291. MICH. STAT. ANN. § 27A.8407 (Supp. 1974) (no claim may be filed or prosecuted by an assignee, or by a third-party beneficiary); N.Y. UNIFORM DIST. CT. ACT § 1809 (McKinney Supp. 1974) (no assignee, or corporation, may institute a claim, except for a municipal or public benefit corporation, or for a school district; nor may an insurer bring an action, either in its own name or that of its insured). An amendment in 1964 deleted the exclusion of partnerships and associations from use of the New York small claims court. TEX. REV. CIV. STAT. ANN. art. 2460a, § 2 (1971) (no assignee or collection agent may bring an action; nor may any person, firm, partnership, association, or corporation engaged primarily or secondarily in the business of lending money at interest). Senator Pearson introduced a bill in 1971 that would provide financial assistance to encourage states to establish "consumer claims courts." The states would be eligible for assistance, though, only if they excluded collection agencies, assignees and persons engaged in the business of lending money at interest. S. 1602, 92d Cong., 1st Sess. § 3(b)(2)(A) (1971).

292. CONSUMER COUNCIL, *supra* note 87, at 30.

293. *Reform Revisited*, *supra* note 203, at 65; 4 STAN. L. REV. 237, 241 (1952).

294. See Note, *supra* note 188, at 535.

best solution to the business dominance problem. The statute could require that court costs be increased by a specified amount each time a plaintiff files an additional claim.²⁹⁵ After the first suit these costs would be levied on the plaintiff who would bear the costs of repeated use of the court. Another alternative, which has been adopted by Nebraska and Ohio, is the best means of accommodating the conflicting policies of free access to the small claims court and prevention of its misuse.²⁹⁶ This method limits the number of times any one plaintiff may bring a suit in small claims court within a specified period of time.²⁹⁷ In this way, the dominance of business plaintiffs may be avoided without depriving merchants and individual defendant-debtors of some access to the small claims procedure. Weekly and yearly limitations give flexibility to a plaintiff with a few claims while simultaneously prohibiting mass filings.²⁹⁸ It is recommended that the model statute for Tennessee allow any person, association, or business to bring suit in the small claims court, but that each plaintiff be limited to no more than two claims per week and twenty-five claims per year.²⁹⁹ In order to make the provi-

295. NADER STUDY, *supra* note 29, at 211. The Nader Study suggests that the model small claims court increase by not more than 20 cents the filing fees for the second and subsequent claims filed by a plaintiff in any one year. The NICJ Report recommended limiting access to court to 3 cases per 30-day period. NICJ REPORT, *supra* note 15, at 101-02.

296. NEB. REV. STAT. § 24-523(6) (Cum. Supp. 1972) (no party shall file more than 2 claims within a calendar week, nor more than 10 claims within any calendar year). OHIO REV. CODE ANN. § 1925.08 (Page Supp. 1973) (no party shall file more than 6 claims within any 30-day period). The New Hampshire and Maine small claims statutes originally limited claimants to 5 claims in any one week, and 20 claims in any one month. Me. Rev. Stat. ch. 109, § 5 (1954) (repealed 1957); N.H. Rev. Laws ch. 378, § 5 (1942) (repealed 1955). See Klein, *Buyer vs. Seller in Small Claims Court*, 36 CONSUMER REP. 628 (Oct. 1971).

297. One proposal, instead of limiting the number of cases that could be filed, would impose a good-faith credit requirement in all businesses suing on debts, thereby limiting use of the court to companies with "clean hands." 4 STAN. L. REV. 237, 242-43 (1952). This suggestion is based on Congressman Celler's proposed bill H.R. 33, 82d Cong., 1st Sess. (1951). Though unscrupulous businessmen who engage in overextension of credit, sales of shoddy merchandise, overpricing, and misrepresentation may not win on the merits, there is nothing in this solution to stop them from initiating a claim in the small claims court. It certainly does not decrease the number of cases brought by collection agencies who do not engage in these sharp business tactics. Furthermore, the "clean hands" standard is vague and difficult to prove in a forum with summary process and no counsel.

298. Mass filings characterize the civil dockets of courts of general sessions of both Davidson and Bedford counties. In Davidson County the Metro Development and Housing Agency filed 171 warrants on September 13, 1974, of which 119 came to trial on September 26, 1974. Even more indicative of the dominance that can be caused by sheer numbers is the use of the Bedford County General Sessions Court by the Shelbyville and Bedford County Ambulance Authority. On August 19, 1974, the Ambulance Authority filed 83 warrants; this figure should be compared with the total number of cases, 66, brought before the court in the entire month of September 1974. See Appendix A, Table 1 *infra*.

299. The proposed model statute requires that the plaintiff sign an affidavit to the effect that he has not exceeded his filing limit. This provision ensures that the plaintiff has knowledge of the limitation. See Part Four, § 11(b) *infra*.

sion self-enforcing and to penalize any abuse of the small claims procedure, all claims filed in excess of the number allowed should be decided summarily in favor of the defendant at the discretion of the judge.

B. Attorneys

The role of the attorney in the small claims court has been the most controversial policy issue involved in the creation of small claims courts. Even though the use of attorneys in small claims courts has been prohibited altogether in some states, a few states actively encourage their presence.³⁰⁰ Representation by attorneys is passively encouraged in still other states by omitting any reference to attorneys in the small claims court statute,³⁰¹ by setting very high jurisdictional limits,³⁰² or by allowing jury trials in small claims courts, which requires evidentiary rules and formal procedure.³⁰³

Those legal scholars who favor allowing representation by attorneys have argued forcefully that in some cases the attorney acts as an essential spokesman for an individual litigant incapable of presenting his case pro se.³⁰⁴ The "disadvantaged" litigant may be ignorant of essential facts or defenses in his case, or frightened, inarticulate, or illiterate.³⁰⁵ It is further argued that the presence of attorneys

300. CONN. GEN. STAT. ANN. § 51-15 (Supp. 1975) (attorneys specifically allowed); IND. ANN. STAT. § 4-5804b (Burns Supp. 1974) (all nonnatural litigants must be represented by legal counsel); OHIO REV. CODE ANN. § 1925.17 (Page Supp. 1973) (corporation may be represented by attorney or bona fide officer or employee; but if by the latter, then the corporation may not engage in cross-examination, argument, or other acts of advocacy).

301. N.J. STAT. ANN. §§ 2A:6-41 *et seq.* and 2A:18-65 *et seq.* (1952).

302. *E.g.*, ALASKA STAT. § 22.15.040 (1971) (jurisdictional limit is \$1000); ILL. ANN. STAT. ch. 110A, § 281 (Smith-Hurd Supp. 1974) (\$1000); IOWA CODE ANN. § 631.1 (Supp. 1974) (\$1000); N.M. STAT. ANN. § 16-5-1 (1970) (\$2000).

303. ILL. ANN. STAT. ch. 110A, § 285 (Smith-Hurd 1968) (plaintiff may demand a jury trial at the time the action is commenced, and defendant may demand a jury by the date he is required to appear); N.D. CENT. CODE § 27-08.1-03 (1974) (either party may demand a jury trial before the commencement of the trial); OKLA. STAT. ANN. tit. 12, § 1761 (Supp. 1974) (either party may demand a jury if a demand is made 48 hours prior to time of defendant's appearance, accompanied by a deposit of \$25); TEX. REV. CIV. STAT. ANN. art. 2460a, § 11 (1971) (each party has a right to demand a jury); VT. STAT. ANN. tit. 12, § 5535 (1973) (defendant may request a jury prior to date of his appearance if he files an affidavit that there are questions of fact in the cause requiring trial, with specifications thereof, that such jury request is intended in good faith, and deposits a jury fee of \$4).

304. This elitist approach is exemplified in the following quotation: "Coupled with this conclusion [that poor litigants will appear frequently as defendants in suits brought by collection agencies] is the fact that the economically disadvantaged may be unfit both psychologically and intellectually to legally defend themselves . . ." Note, *supra* note 188, at 535-36. See text accompanying notes 328-29 *infra*.

305. *E.g.*, Committee on Small Claims and Conciliation Procedure, *Report*, 10 A.B.A.J. 828, 830 (1924); 34 COLUM. L. REV. 932, 938 (1934); *Persecution and Intimidation*, *supra* note 45, at 1661.

in small claims courts will discourage businessmen from taking advantage of consumer defendants by equalizing the bargaining position of both sides.³⁰⁶ The lawyer can investigate facts, interrogate witnesses, argue questions of law and protect the rights of his client—functions better performed by an attorney than by the judge.³⁰⁷ Finally, it has been argued that there is a need for counsel to take an active role in small claims litigation to be able to recommend legislation and to select certain cases for appeal in order to develop a body of law that assists the poor.³⁰⁸

The basic fallacies underlying the arguments in favor of allowing attorneys in small claims court are readily apparent, however. While most legal scholars favoring the use of attorneys recognize that these courts often become havens for skillful collection agency lawyers rather than for neighborhood litigants suing over small loans, property damage, and consumer complaints,³⁰⁹ these scholars fail to see that this phenomenon is not so much related to the absence of lawyers as to the unlimited presence of business interests. The suggestion that this problem may be remedied by the availability of additional lawyers is unpersuasive. Moreover, the availability and quality of free legal services must be questioned at the outset.³¹⁰ The model small claims court is not designed primarily for "small claimants," poor litigants who are eligible for free legal assistance.

306. Murphy, *supra* note 61, at 18.

307. *Id.* at 16.

308. *Id.*

309. Even Judge Tim Murphy of the District of Columbia court of general sessions, who has been most vocal in support of attorneys practicing in small claims courts, has criticized the present D.C. small claims branch which allows representation by counsel. *Id.* at 15. Yet he not only continues to favor presence of attorneys of large credit stores, but would increase the number of lawyers by requiring the Junior Bar and the Neighborhood Legal Services Project each to assign a lawyer to attend small claims court and accept assigned cases. *Id.* at 18-19. Another author, while criticizing the presence of lawyers and "professional plaintiffs," suggests that the court counter this by providing "legal technicians" to represent litigants without counsel, or to appoint a "friend of the defendant." *Persecution and Intimidation*, *supra* note 45, at 1675-84. Another similar suggestion is for "institutionalized counselling and advocacy." The author would form plaintiff and defendant divisions where litigants could go for counselling prior to the hearing. At the hearing each party could be represented by an officer from the plaintiff or defendant divisions or by himself. These divisions would be staffed by law school graduates, paralegal assistants, and law students. Adams, *The Small Claims Court and the Adversary Process. More Problems of Function and Form*, 51 CANADIAN B. REV. 583, 612-16 (1973).

310. A study by sociologist David Caplovitz indicates that the working class takes its problems to professionals far less frequently than other social strata. This is not based either on economics, since free legal services frequently are available, or on ignorance of their existence, since 36% of the persons in the study knew of some source of help. *See also* E. KOOS, *THE FAMILY AND THE LAW* (1952); E. KOOS, *THE HEALTH OF REGIONVILLE* (1954). Furthermore, it is unlikely that attorneys will have a significant impact on changing the financial habits of the poor. *See generally* D. CAPLOVITZ, *supra* note 47, at 32-48.

To the contrary, the court is created for "small claims" regardless of the economic stratum of the claimant. Litigants of the middle income level, who are not entitled to free legal services, would be relegated to the same alternatives that presently are available in general sessions court. They may either retain an attorney, making the litigation too costly, or go into court with the distinct disadvantage of facing an attorney representing the opponent.

In aid of litigants who are ignorant of essential legal principles, the judge, in his role as inquisitor, will be able to seek out facts and possible defenses or claims.³¹¹ Furthermore, cases brought by litigants who are so totally frightened or inarticulate as to be unable to bring their case pro se will be too infrequent to justify the added expense, delay, and technicality that would result from allowing them to be represented by lawyers. An additional safeguard against the possibility of substantial injury caused by the lack of legal advice may be obtained by providing for a trial with attorneys on de novo appeal.³¹²

The argument that the presence of attorneys in small claims court will discourage overreaching by business plaintiffs is unrealistic. In Tennessee general sessions courts the defendant rarely is represented by counsel; ordinarily, the only attorneys present represent the business plaintiffs. The suggestion that attorneys must be present to develop case law to protect the poor is more philosophical than actual. Very few cases have been decided in the past half-century dealing with small claims court procedure, and most of the cases brought were initiated by financial institutions.³¹³

In addition to the criticisms of the proponents' arguments above, several reasons may be offered to explain why attorneys should not be allowed. In particular, small claims courts that allow attorneys increasingly develop more formalized procedures.³¹⁴ A Bri-

311. *Reform Revisited*, supra note 203, at 57-58.

312. Vance, *A Proposed Court of Conciliation*, 1 MINN. L. REV. 107, 115 (1917). See text accompanying notes 386-95 *infra*.

313. See, e.g., *Merchants Serv. Co. v. Small Claims Court*, 94 Adv. Cal. App. 2d 154, 210 P.2d 543 (1949), *rev'd on other grounds*, 35 Cal. 2d 109, 216 P.2d 846 (1950). For a criticism of public interest lawyers developing legislation and case law see Cahn & Cahn, *Power To the People or the Profession?—The Public Interest in Public Interest Law*, 79 YALE L.J. 1005, 1040 (1970).

314. An observer of the New York City small claims court noted that cases in which lawyers were involved proceeded at a much slower pace than those cases without lawyers. *De Minimis*, supra note 77, at 492. One legal writer analyzing the small claims branch of Chicago's municipal court noted that whereas the court was once characterized by a simple procedure, over the 47 years of its existence the presence of attorneys had complicated the procedure until it became one fitted to the needs of the lawyers instead of the litigants. *Robinson*, supra note 279, at 425. See Currie, *Small Claims Courts*, 9 U. FLA. L. REV. 33, 33 (1956).

tish study of American small claims courts concluded that the presence of attorneys made it difficult for the judge to conduct the case informally and quickly while asking most of the questions himself. The study found that since the attorneys were accustomed to procedural technicalities and often objected to the introduction of evidence—even in jurisdictions where evidentiary rules were theoretically abolished—the trials tended to proceed by the traditional method of examination and cross-examination.³¹⁵ Additionally, the cost of legal services is great, and it makes no economic sense to pay attorneys' fees approximately equal to the amount of the claim. A small claims court will not be used if litigants must incur substantial expense to bring suit. Moreover, cases that take longer to try and that are procedurally more complex and expensive defeat the fundamental characterization of a model small claims court as an informal, speedy, and inexpensive forum. For these reasons, many legal writers and lawmakers have suggested that counsel be discouraged, restricted or barred from small claims court in order to achieve this model forum.³¹⁶

Several major statutory mechanisms for discouraging the use of attorneys have been proposed, including the imposition of a very low mandatory fee schedule,³¹⁷ or the denial of recovery of attorney's fees.³¹⁸ Statutory provisions that would restrict the use of attorneys include allowing counsel solely at the defendant's option.³¹⁹ Another proposal is to provide one side with free counsel whenever the other side is represented.³²⁰ Federal Trade Commissioner Jones suggests that attorneys be allowed only when both sides have counsel; if only one side is represented then no attorneys should be allowed.³²¹ Some statutes do not allow attorneys to appear on behalf of a litigant without the prior consent of the small claims court judge.³²² Hawaii

315. CONSUMER COUNCIL, *supra* note 87, at 25-26. The London Consumer Council also was of the opinion that hearings with lawyers took longer to try than those without lawyers. They noted that objections to the admissibility of certain evidence was made despite the statutory suspension of evidentiary rules. *Id. Accord*, NICJ REPORT, *supra* note 15, at 215.

316. The Chicago Bar Association by resolutions in 1915 and 1916, discouraged the appearance of attorneys in the small claims branch of the municipal court of Chicago; however, this policy has not been followed in later years. R. H. SMITH, *supra* note 32, at 52.

317. *E.g.*, WIS. STAT. ANN. § 299.25(10)(a) (Supp. 1974) (on a judgment for \$50 or less, there are no attorneys' fees; on a judgment for more than \$50, and less than \$100, there is a \$5 attorneys' fee; on a judgment between \$100 and \$200, the fee is \$10; and for a judgment between \$200 and \$500, the fee is \$25). *See* 34 GEO. L.J. 352, 367 (1946).

318. *E.g.*, NEV. REV. STAT. § 73.040 (1973).

319. *Persecution and Intimidation*, *supra* note 45, at 1680.

320. Murphy, *supra* note 61, at 19.

321. Address by FTC Commissioner Mary Gardiner Jones before the Center for Consumer Affairs, University of Wisconsin at Milwaukee, August 27, 1970, at 27.

322. ORE. REV. STAT. § 46.415(4) (1974); WASH. REV. CODE ANN. § 12.40.080 (1962).

prohibits the use of attorneys in disputes over a security deposit between a landlord and a tenant.³²³ Finally, some jurisdictions allow an attorney to appear in small claims court for the limited purpose of moving for removal to the regular civil court.³²⁴ The majority of small claims court statutes that place some limitation on counsel, however, bar them entirely.³²⁵ This total restriction has been held not violative of due process, provided that the litigant may exercise the right to be represented by counsel at some stage of the proceedings, for example, in a de novo trial on appeal.³²⁶

Barring attorneys from the model small claims court will have several beneficial results in addition to decreased expenses and formality. This type of provision will eliminate substantially the unequal bargaining power that exists when the consumer or debtor faces the merchant, who is ordinarily represented by counsel, in the

323. HAWAII REV. STAT. § 633-28(b) (Supp. 1974).

324. *E.g.*, MINN. STAT. ANN. § 419.02 (1971). For a discussion of some requirements to being granted a removal see the proposed rules in *Robinson*, *supra* note 279, at 432.

325. CAL. CIV. PRO. CODE § 117g (West 1954); IDAHO CODE § 1-2308 (Supp. 1974); MICH. STAT. ANN. § 27A.8408 (Supp. 1974); NEB. REV. STAT. § 24-523(2) (Cum. Supp. 1972). Kansas does not allow attorneys in the small debtors court; however, this court is not really a small claims court. The jurisdictional limit is \$20; and before he can entertain a suit in court, the plaintiff must prove that he does not have the financial means to employ a lawyer and proceed in the regular court. KAN. STAT. ANN. §§ 20-1304, -1305, -1310, -1311 (1974). The Pearson bill would provide financial assistance to states barring attorneys from consumer claims courts. S. 1602, 92d Cong., 1st Sess. § 3(b)(2)(A)(iii). *See* note 291 *supra*. Fowks in his Recommended Small Claims Court Act favors barring attorneys. Fowks, *supra* note 232, at 223. Similarly, the London Consumer Council recommends barring lawyers from small claims courts. CONSUMER COUNCIL, *supra* note 87, at 31.

326. The Supreme Court recognized that there is a fundamental right to the aid of counsel, and that a denial of that right is a deprivation of due process. *Powell v. Alabama*, 287 U.S. 45, 68-71 (1932). The sixth amendment right to be provided counsel by the state, however, has not been extended to civil cases. *McGaughy v. Gardner*, 296 F. Supp. 33, 36 (E.D. La. 1967); *cf.* Note, *The Right to Counsel in Civil Litigation*, 66 COLUM. L. REV. 1322 (1966) (discusses the need to extend the indigent's right to be provided counsel to civil cases, provided there is a screening process to weed out frivolous claims, and this right is originally limited to "special circumstances"). While the Supreme Court has never decided a case involving a court of limited jurisdiction barring attorneys but allowing them on a trial de novo to a court of general jurisdiction, three state appellate courts have decided such an issue. The leading case is *Prudential Ins. Co. of America v. Small Claims Court*, 76 Cal. App. 2d 379, 173 P.2d 38 (1946). The California court started with the proposition that the right to a hearing in both criminal and civil cases includes the right to appear by counsel. Any arbitrary denial of this right is unconstitutional since it acts as a deprivation of due process. The court continued, however, by stating that the legislature could deny this right at one stage in the proceeding provided that the right to appear by counsel is guaranteed in a real sense somewhere along the proceeding. Accordingly, the California small claims court statute was not unconstitutional despite its denial of representation by counsel since this right could be exercised at the appeal to the superior court in a trial de novo. This is true even though the plaintiff is deemed to have waived any right to appeal by electing to commence the action in the small claims court. *Accord*, *Foster v. Walus*, 81 Idaho 452, 347 P.2d 120 (1959); *Flour City Fuel & Transfer Co. v. Young*, 150 Minn. 452, 185 N.W. 934 (1921).

courts.³²⁷ Moreover, providing a forum in which citizens may sue in their own behalf creates the opportunity for the general public to have affirmative contact with the judicial system that can result in a feeling of political efficacy for the winning litigant³²⁸ and confidence in the small claims courts as effective and fair forums. Since the average citizen is likely to come in contact with the judicial system only at its lowest level, a small claims court that engenders confidence will increase the legitimacy of the entire judicial system in the public mind.³²⁹

The prohibition of an attorney's presence is an effective means of ensuring that the model small claims court will be an inexpensive, speedy, informal, and understandable forum for the litigation of small claims.³³⁰ Moreover, it is unlikely that most attorneys in Tennessee would strongly oppose such a proposal if the jurisdictional limit of the court is low.³³¹ Accordingly, it is recommended that no attorneys be allowed in the model small claims court, except those appearing in their own behalf or as witnesses, and that all partnerships, associations, and corporations be represented by a bona fide partner, official or employee who is not a lawyer.

C. Court Personnel

In order to create a court that functions well when the litigants are nonprofessionals, it is necessary to have competent court personnel who will help each litigant present his claim or defense. Since the roles of the clerk and judge in the small claims court will be different from their traditional roles in the circuit and general sessions courts, these differences should be specified in the statute.

The judge plays a pivotal role in the small claims court, and must have great discretion in formulating a remedy that is substantively fair, although summary in nature.³³² The judge must uncover the facts, interrogate witnesses and litigants, and assure that potential claims and defenses are asserted. For this reason the judge must

327. One author feels that the reason default judgments and settlements abound in small claims courts is because plaintiff's counsel convinces the pro se defendant of the futility of his defense before trial. *Reform Revisited*, *supra* note 203, at 65.

328. See NICJ REPORT, *supra* note 15, at 218.

329. See generally Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049, 1055 (1970).

330. For an exhaustive list of 16 reasons for barring attorneys from small claims courts see NICJ REPORT, *supra* note 15, at 206-18.

331. Interview with John J. Hollins, President of the Nashville Bar Association, in Nashville, Tennessee, Nov. 19, 1974; interview with the Honorable Marvin Marshall, Judge of Bedford County General Sessions Court, in Shelbyville, Tennessee, Oct. 31, 1974.

332. Note, *supra* note 188, at 533.

assume an inquisitorial role beyond that of the judge in the traditional adversary system.³³³ The judge must be both the devil's advocate and counsel for the litigants. He further must function as a conciliator who can resolve disputes and fashion remedies appropriate to each situation. Frequently litigants only need a neutral place to discuss misunderstandings and arrive at informal solutions. To this end the judge should provide space in the court where litigants may meet, and he should encourage this form of settlement whenever possible.³³⁴

It is apparent that the success of the small claims court will depend to a large measure on the competence of the judges and their willingness to participate actively in the small claims proceedings. In order to ensure this success, some commentators have proposed that the judge always be an attorney.³³⁵ This requirement becomes particularly relevant in courts where representation by counsel is forbidden, raising the possibility that no attorneys would be involved in the entire small claims adjudicative process. It should be noted that a majority of the states have an attorney-judge requirement, either as a constitutional provision,³³⁶ or by statute.³³⁷ Nevertheless, judges with great experience frequently may be excellent

333. CAL. CIV. PRO. CODE § 117g (West 1954); TEX. REV. CIV. STAT. ANN. art. 2460a, § 9 (1971). See Eovaldi & Gestrin, *supra* note 185, at 321.

334. A discussion of the extrajudicial alternative of arbitration of small claims is beyond the scope of this project. For an analysis and evaluation of small claims arbitration, and the Pennsylvania compulsory arbitration system, see the following articles: NICJ REPORT, *supra* note 15, at 112-19, 226-33; INSTITUTE OF JUDICIAL ADMINISTRATION, COMPULSORY ARBITRATION AND COURT CONGESTION—THE PENNSYLVANIA COMPULSORY ARBITRATION STATUTE (1956); Eovaldi & Gestrin, *supra* note 185, at 306-19; Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846 (1961); Mentschikoff, *The Significance of Arbitration—A Preliminary Inquiry*, 17 LAW & CONTEMP. PROB. 698 (1952); Rosenburg & Schubert, *Trial by Lawyer: Compulsory Arbitration of Small Claims in Pennsylvania*, 74 HARV. L. REV. 448 (1961); Comment, *Compulsory Arbitration in Pennsylvania—Its Scope, Effect, Application, and Limitations in Montgomery and Delaware Counties—A Survey and Analysis*, 2 VILL. L. REV. 529 (1957).

335. *E.g.*, Silverstein, *Small Claims Courts Versus Justices of the Peace*, 58 W. VA. L. REV. 241, 257-58 (1956).

336. The constitutions of 26 states require that the general trial court judges be lawyers. LEGISLATIVE DRAFTING RESEARCH FUND OF COLUMBIA UNIVERSITY, INDEX DIGEST OF STATE CONSTITUTIONS 231 (2d ed. 1959, 4th Cum. Supp. 1971). Another 5 state constitutions impose a requirement that the trial judge be "learned in the law," which some courts have interpreted as requiring attorney-judges. *Id.* at 232; *see, e.g.*, *In re Daly*, 294 Minn. 351, 200 N.W.2d 913, *cert. denied*, 409 U.S. 1041 (1972); *Jamieson v. Wiggin*, 12 S.D. 16, 80 N.W. 137 (1899).

337. This has been held as constitutional in *LaFever v. Ware*, 211 Tenn. 393, 365 S.W.2d 44 (1963). Recently, the California Supreme Court has determined that it is a violation of due process for a person to be tried for a misdemeanor crime by a judge who was not an attorney. In upholding the right to an attorney judge, the court did not rely on any express state constitutional or statutory provision. *Gordon v. Justice Court*, 12 Cal. 3d 323, 525 P.2d 72, 115 Cal. Rptr. 632 (1974). *Contra*, *Ditty v. Hampton*, 490 S.W.2d 772 (Ky.), *appeal dismissed*, 414 U.S. 885 (1973). *See* 28 VAND. L. REV. 421 (1975).

conciliators, despite their lack of formal legal training.

In states that currently do not require trial judges to be attorneys, like Tennessee in the general sessions courts, the legislatures may be unwilling to create this requirement for small claims courts. Since it has been recommended that the model small claims court for Tennessee be a division of the general sessions court, which generally does not require attorney judges, they cannot be required in small claims court.³³⁸ Accordingly, while it is recommended that small claims judges be attorneys, the political realities in Tennessee militate against a mandatory provision in the model statute. It is recommended, however, that the model act for Tennessee clearly delineate the inquisitorial-conciliatory role of the small claims judge.

Since counsel will not be available to draft a complaint, it is important that the clerk be permitted to perform this service. In addition, the clerk should be able to file claims, effect service by registered mail, distribute booklets explaining small claims court procedure (a copy of the booklet should be given to the plaintiff upon filing the claim and mailed to the defendant along with service of process), and answer any questions that the litigants may have about small claims court procedure. Although some jurisdictions deny this service to corporations, partnerships, and associations,³³⁹ there is no need to limit access to the clerk's services if businesses are neither represented by counsel nor using the court repeatedly. The plaintiff should be permitted to state his claim orally to the clerk who should write a concise statement of the claim on the warrant.³⁴⁰ In order to protect the clerk from charges of practicing law without a license in filling out the warrant and in answering questions about small claims procedure, it is important to specifically delegate these powers to the clerk by the statute.³⁴¹

338. The Tennessee Legislature had the opportunity of passing a provision requiring all judges to be attorneys in a bill, which would have reformed the entire general sessions system in Tennessee, sponsored by Senator Daniel W. Oehmig, Chairman of the Senate Judiciary Committee S. 1886, § 9, 88th Gen. Ass. (1973). The Oehmig bill never got out of committee. See note 124 *supra*.

339. *E.g.*, D.C. CODE ANN. § 16-3902(a) (1973) (D.C. allows representation by counsel, though).

340. Many states require that the plaintiff execute an affidavit or verify the statement prepared by the clerk. *E.g.*, N.D. CENT. CODE § 27-08.1-02 (1974) (executes and files affidavit); OKLA. STAT. ANN. tit. 12, § 1754 (Supp. 1974) (sworn affidavit); WASH. REV. CODE ANN. § 12.40.070 (1962) (verified claim).

341. The problem of practicing without a license is present in another area. Several legal scholars have suggested that paraprofessionals such as third-year law students, community advocates and legal technicians be allowed to assist litigants in the court. See, *e.g.*, *De Minimis*, *supra* note 77, at 493. Such a suggestion is beyond the purview of the model small

Additional duties have been granted the small claims clerk in other jurisdictions. In New York and Rhode Island, if the clerk believes that the plaintiff is using the court for purposes of oppression or harassment—for example, filing claims that have previously been decided against him—then the clerk, in his discretion, may notify the plaintiff to appear before the small claims court judge. If the judge finds that the claimant acted out of motives of oppression or harassment, he may deny the claimant further use of the small claims court mechanism.³⁴²

It is recommended that the Tennessee model small claims act contain provisions specifically granting the clerk the responsibility of filling out and filing the claim and answering any questions that the litigants might have. Furthermore, the clerk should have the discretionary power to compel the plaintiff to appear before the small claims judge if it appears to the clerk that the plaintiff may be harassing the defendant.

VII. TRIAL PROCEDURE

A. *Trial Procedure, Rules of Evidence and Substantive Law*

The trial procedure must be sufficiently simple to enable litigants to proceed in their own behalf. This may be accomplished by either simplifying existing rules of procedure or abolishing them. The states that have attempted to simplify procedural requirements for small claims brought in general trial courts have been criticized severely because the technicalities inherent in the “simplified” procedural requirements are substantial enough to require retention of counsel.³⁴³ Thus, in order to ensure that the model small claims court remains an informal forum, it is essential that procedural

claims court since the philosophy behind the court is to create a mechanism for self-redress of small claims without resort to lawyers or paraprofessionals.

342. N.Y. UNIFORM DIST. CT. ACT § 1810 (McKinney 1963); R.I. GEN. LAWS ANN. § 10-16-8 (Supp. 1974).

343. KAN. STAT. ANN. § 61-1601 to -2713 (Supp. 1974); WIS. STAT. ANN. § 299.04 (Supp. 1974); Fowks, *supra* note 232, at 168. The County Court Practice Book for British county courts states prosaically that the courts “are adapted to the needs of the great masses of the population by the maximum of . . . *simplicity of procedure* suitors being able in fact to obtain relief and to defend themselves without legal assistance.” The London Consumer Council added that in practice this statement translates into “legal representation is always desirable if obtainable.” CONSUMER COUNCIL, *supra* note 87, at 19. In Tennessee’s general sessions courts, numerous judges indicate that they frequently tell unrepresented litigants to get counsel. Interview with the Honorable John T. Boone, Jr., Judge of the Davidson County General Sessions Court, in Nashville, Tennessee, Jan. 28, 1975; interview with the Honorable Robert Murphy, Judge of the Davidson County General Sessions Court, in Nashville, Tennessee, Jan. 17, 1975.

rules are not merely simplified but are abolished entirely.³⁴⁴ By abolishing all technical rules of procedure and barring the presence of attorneys, the small claims court may utilize simple procedures that litigants will be able to comprehend. This, in turn, encourages citizens to participate in the judicial system and increases their confidence in the system. For this reason it is recommended that the model small claims court act abrogate all rules of practice, pleading and procedure for that court.³⁴⁵

Similar considerations of informality and speedy adjudication are involved in the question of whether to dispense with the rules of evidence along with other procedural and practice rules. At least one state has retained evidentiary rules in the small claims court,³⁴⁶ while another state has done away completely with the rules of evidence.³⁴⁷ The majority, and more sensible, rule³⁴⁸ is to dispense with the technical rules of evidence except as they relate to privileged communications.³⁴⁹ Tennessee's general sessions courts do not adhere strictly to the rules of evidence, and accordingly, it would

344. *E.g.*, D.C. CODE ANN. § 16-3906(b) (1973); MICH. STAT. ANN. § 27A.8411 (Supp. 1974); N.Y. UNIFORM DIST. CT. ACT § 1804 (McKinney Supp. 1974); *see Note, supra* note 188, at 533.

345. Some courts allow depositions to be used in small claims courts. R.I. GEN. LAWS ANN. § 10-16-10 (1969) (depositions may be used at the hearing provided they have been taken according to law). In the New York small claims courts discovery is unavailable except upon order of the court on showing of proper circumstances. N.Y. UNIFORM DIST. CT. ACT § 1804 (McKinney Supp. 1974). In Oklahoma no depositions, interrogatories or other discovery devices are allowed except as an aid in execution. OKLA. STAT. ANN. tit. 12, § 1760 (Supp. 1974). Allowing discovery is time-consuming, and injects another procedural technicality into the system.

346. N.C. GEN. STAT. § 7A-222 (1969) (attorneys are allowed in small claims court, however).

347. N.H. REV. STAT. ANN. § 503:7 (1968).

348. *See* 1 WIGMORE, EVIDENCE § 4d, at 106 (3d ed. 1940):

In small causes generally . . . it would be a defiance of common sense and a nullification of the main purpose, to enforce the jury-trial rules of Evidence; for the parties are expected to appear personally without professional counsel, and they cannot be expected to observe rules which they do not know.

349. *E.g.*, HAWAII REV. STAT. § 633-32 (Supp. 1974); MICH. STAT. ANN. § 27A.8411 (Supp. 1974). The New York statute exempts personal transactions or communications with decedents and lunatics, as well as privileged communications. N.Y. UNIFORM DIST. CT. ACT § 1804 (McKinney Supp. 1974). There has been no discussion concerning the need to differentiate between privileged communications and other rules of evidence. Other rules of evidence are rules of exclusion, while the former are barriers to introduction. The sanctity of privileged communications results from centuries of habit, religion, and strong public policy considerations designed to protect an individual's right to privacy. A claim for up to \$250 does not outweigh the equitable considerations for continuing their existence. On the other hand, since there is no jury to protect from prejudice there is no reason to require evidentiary rules designed around the jury system. The judge should be allowed to weigh all facts in coming to his decision; this high degree of informality should enable the judge to get quickly to what he considers to be the basic issues of the case.

pose no major change to eliminate the use of these rules in a small claims division. It is recommended that the small claims court act for Tennessee follow the majority position and abolish the rules of evidence except as they relate to privileged communications.

Most jurisdictions require that the small claims court judge dispense justice according to the rules of substantive law.³⁵⁰ Strict adherence to substantive law is practically impossible, however, given the informality of the trial and the absence of briefs and lawyers to develop precise legal issues.³⁵¹ Nevertheless, it is unclear how much discretion small claims court judges can exercise in departing from substantive law. Many states use the language of the New York statute requiring that a judge do *substantial justice* according to the rules of substantive law.³⁵² The New York courts interpreting this language have not allowed major departures from substantive law.³⁵³ "Substantial justice" grants the judge considerable discretion in fashioning a remedy while still remaining within the broad perimeters of substantive law;³⁵⁴ *de novo* appeal provides a safeguard against abuses of this discretion. It is recommended that the wording of the New York statute be adopted in Tennessee.

B. Jury Trial

The right to a trial by jury is guaranteed by the seventh amendment to the federal constitution and by the constitutions of the fifty states.³⁵⁵ The Supreme Court discussed the right of trial by jury in civil cases in *Capital Traction Co. v. Hof*.³⁵⁶ In that case the Court

350. *E.g.*, MASS. ANN. LAWS ch. 218, § 21 (1974); VT. STAT. ANN. tit. 12, § 5531 (1973). *But see* UTAH CODE ANN. § 78-6-8 (Supp. 1973); WYO. STAT. ANN. § 1-567 (1957).

351. NICJ REPORT, *supra* note 15, at 127.

352. N.Y. UNIFORM DIST. CT. ACT § 1804 (McKinney Supp. 1974). *See e.g.*, D.C. CODE ANN. § 16-3906(b) (1973); HAWAII REV. STAT. § 633-32 (Supp. 1974).

353. *Bierman v. Consolidated Edison Co.*, 66 Misc. 2d 237, 320 N.Y.S. 2d 331 (App. Term 1970), *modifying* *Bierman v. City of N.Y.*, 60 Misc. 2d 497, 302 N.Y.S.2d 696 (N.Y.C. Small Claims Ct. 1969). The case was brought in small claims court by an elderly homeowner against the city and a utility company for damages caused by a water main break. The plaintiff failed to sustain her burden of proving negligence; the judge, however, relying on a cost-spreading, injury-prevention, and fairness approach, applied a rule of strict liability rather than a rule of fault. The appellate court in a *per curiam* decision stated that stability and certainty of law required adherence to substantive law. The court reversed the small claims court as to the defendant utility company. It affirmed, nevertheless, the decision against the defendant municipality on the grounds that proof of a burst water main permitted an inference that damage was caused by the city's negligence or *res ipsa loquitur*. The ultimate result was that substantial justice was done in *Bierman*, but only upon the traditional fault basis.

354. Siegel, *Practice Commentary on § 1804*, N.Y.C. CIVIL CT. ACT. at 90 (McKinney Supp. 1974).

355. U.S. CONST. amend. VII; *see* INDEX DIGEST, *supra* note 336, at 578-79.

356. 174 U.S. 1 (1899). The Court relied on *Emerick v. Harris*, 1 Binn. 416 (Pa. 1808).

noted that the right to a jury trial may be limited, by express state or federal constitutional provision, to causes involving less than a certain dollar amount³⁵⁷ or to cases in which the right to a jury did not exist at common law at the time the Constitution was enacted.³⁵⁸ The Court upheld the constitutionality of the denial of a jury trial in a lower court when a jury trial at the appellate level was available. The Court noted that the Constitution guarantees the *right* to a jury trial, not the jury trial itself. As long as the statute in question provides for the exercise of that right at some future time, the seventh amendment is not violated.³⁵⁹ Similarly, the Tennessee Supreme Court has held that a statute denying the right to a jury trial does not violate the Tennessee constitution provided that this right may be exercised on appeal.³⁶⁰

Although the small claims statutes of a few states allow jury trials,³⁶¹ the majority do not. In several states, the plaintiff is deemed to have waived a jury trial by resorting to the small claims procedure.³⁶² The opportunity to exercise the right to a trial by jury is preserved in other states by allowing removal to the regular civil trial court³⁶³ or appeal de novo to a court in which a jury trial may be had.³⁶⁴ Removals or appeals taken for purposes of delay are dis-

357. *E.g.*, U.S. CONST. amend. VII (\$20); ALAS. CONST. art. 1, § 16 (\$250); N.H. CONST. art. 1, § 20 (\$500); *see* INDEX DIGEST, *supra* note 336, at 578.

358. The Supreme Court discussed the constitutional history behind the seventh amendment right to jury, including British antecedents to Magna Carta in 1215. *See* 34 COLUM. L. REV. 932, 939 n.58 (1934).

359. 174 U.S. at 23. The Ohio Supreme Court had come to the same conclusion several years earlier. The Ohio court upheld the right of the legislature to impose any conditions upon the right to appeal to a court where trial by jury might be had. This was true even though the Ohio constitution at that time stated that "the right of trial by jury shall be inviolate." *Reckner v. Warner*, 22 Ohio St. 275, 278 (1872); OHIO CONST. art. 1, § 5 (1851). *See* *Flour City Fuel & Transfer Co. v. Young*, 150 Minn. 452, 457, 185 N.W. 934, 936 (1921) (right to trial may be denied in Minneapolis conciliation and small debtors' court provided the party is offered a jury trial on appeal).

360. *Morford v. Barnes*, 16 Tenn. 444 (1835) (justice of peace courts), *followed in* *Pryor v. Hays*, 17 Tenn. 416 (1836); *cf.* *State v. Sexton*, 121 Tenn. 35 (1908) (legislature may inflict punishment for small offenses without a jury so that the proceedings might be summary, speedy and efficient). *See* note 142, *supra*.

361. ILL. ANN. STAT. ch. 110A, § 285 (Smith-Hurd 1968) (either party may file a demand for a jury); N.D. CENT. CODE § 27-08.1-03 (1974) (either party may demand a jury trial); OKLA. STAT. ANN. tit. 12, § 1761 (Supp. 1974) (either party may have a jury trial if demand is made 48 hours before the time of defendant's appearance, and a deposit of \$25 is made); VT. STAT. ANN. tit. 12, § 5535 (1973) (defendant may request a trial by jury after filing an affidavit that there are questions of fact in the cause requiring trial together with a \$4 jury fee).

362. *E.g.*, IDAHO CODE § 1-2315 (Supp. 1974); VT. STAT. ANN. tit. 12, § 5535 (1973). *But see, e.g.*, MINN. STAT. ANN. § 491.06 (1971).

363. *E.g.*, D.C. CODE ANN. § 16-3905 (1973); NEB. REV. STAT. § 24-525 (Cum. Supp. 1972); N.M. STAT. ANN. § 16-5-13 (1970).

364. *E.g.*, IDAHO CODE §§ 1-2311, -2315 (Supp. 1974); UTAH CODE ANN. § 78-6-10 (1953).

couraged in several states by requiring the appellant to post a bond as security for the payment of the judgment and costs,³⁶⁵ or to pay jury fees in advance.³⁶⁶

If a jury were allowed in the model small claims court it would become necessary to apply rules of evidence and procedural safeguards, thereby making attorneys a necessity. This would frustrate the goal of providing for a swift disposition of the case without the expense of attorneys. Of the methods discussed for protecting the exercise of the jury right, the appeal de novo is preferable in Tennessee. The removal method is not consistent with the policy of minimizing removals from small claims court to the circuit court, and that method is subject to abuse by defendants who could defeat the plaintiff's opportunity to use the small claims procedure by demanding a jury trial.³⁶⁷ In addition, the appeal de novo is presently utilized in Tennessee as a means of ensuring that parties in general sessions court, which operates without juries, eventually have access to a jury in the circuit courts.³⁶⁸ It is recommended, therefore, that the model statute creating a small claims court follow the present general sessions procedure by not providing for a jury trial at the small claims level.

C. Removal and Transfer³⁶⁹

Two primary reasons for allowing removal from the small claims court to the regular civil court have been suggested. First, as noted above, some jurisdictions protect the right to a jury trial by providing for a removal option.³⁷⁰ Secondly, allowing removal withdraws complicated cases involving intricate questions of law from the summary procedure of the small claims court. A provision for removal, however, is subject to abuse. It may be used by the defendant when the plaintiff's claim is too small to be economically tried in the more expensive civil court, and it may be used as a device for delay. Removal also is unnecessary in the model small claims court for Tennessee.³⁷¹ In the model act the jury right is protected

365. *E.g.*, MASS. ANN. LAWS ch. 218, § 23 (1974).

366. *E.g.*, ILL. ANN. STAT. ch. 110A, § 285 (Smith-Hurd 1968); N.Y. UNIFORM DIST. CT. ACT § 1806 (McKinney 1963); WIS. STAT. ANN. § 299.21(3) (Supp. 1974).

367. *See text* accompanying notes 370-71 *infra*.

368. TENN. CODE ANN. § 27-509 (Supp. 1974).

369. For the purpose of clarity, the term "removal" shall be used to refer only to a removal from small claims court to the regular civil docket. "Transfer" shall be used to indicate a transfer to the small claims court.

370. This is especially true when the statute does not provide for an appeal. *See* MICH. STAT. ANN. § 27A.8408 & .8412 (Supp. 1974); S.D. COMPILED LAWS ANN. § 15-39-16 & -17 (1967).

371. In those jurisdictions where removal is necessary to protect the jury right, removal

by providing for a trial de novo with a jury on appeal to the circuit court. In addition, it is unnecessary to provide for removal of complicated cases because a low jurisdictional limit will ensure that the bulk of cases in small claims court will not be of a complex nature. Moreover, those claims within the jurisdictional limit that do involve complicated legal and factual issues would be costly to litigate with counsel representing both sides; if an inexpensive and informal forum is not provided for these claims, they frequently will not be brought at all. Therefore, it is recommended that the model small claims court for Tennessee not provide for removal to either general sessions or circuit court.

The question of whether transfers should be allowed from the normal civil court into small claims court involves the strong policy in favor of extending the availability of small claims procedure to as many litigants as possible. A number of jurisdictions have utilized various methods of allowing or encouraging transfers into the small claims court. In the District of Columbia, the judge of the superior court may transfer a case to the small claims and conciliation branch with the consent of all parties, for the limited purpose of obtaining a partial stipulation of facts, or for the broader purpose of conciliation.³⁷² The Minnesota small claims statute, which bars attorneys, allows transfers from the district court to the conciliation division of the municipal court of Minneapolis with no provision for attorney representation after transfer.³⁷³ It is recommended that the model small claims court statute for Tennessee provide for transfer to the small claims court from general sessions court or circuit court at the option of the defendant, provided the case is one that could have been brought originally in the small claims court. Neither party should be allowed representation by counsel in the small claims court. Since the plaintiff will have no control over the transfer, the case should not be counted against the plaintiff's total for

may be limited to a case when one of the litigants or the court specifically moves for it. *See, e.g.*, MICH. STAT. ANN. § 27A.8408 (Supp. 1974) (removal right may be exercised on motion of either defendant or plaintiff); OHIO REV. CODE ANN. § 1925.10 (Page 1968) (motion of either defendant or the court); OKLA. STAT. ANN. tit. 12, § 1757 (Supp. 1974) (motion of defendant); S.D. COMPILED LAWS ANN. § 15-39-24 (1967) (on motion of the court only; the judge may impose terms upon the removal. The defendant would be foreclosed from a trial by jury if he fails to request removal). *E.g.*, OHIO REV. CODE ANN. § 1925.10 (Page 1968). The plaintiff would be deemed to have waived any right to a jury by choosing the small claims forum. *E.g.*, N.Y. UNIFORM DIST. CT. ACT § 1802 (McKinney 1963).

372. D.C. CODE ANN. § 11-1323(a) (1973).

373. MINN. STAT. ANN. § 484.015 (1971). Washington state allows a transfer on motion of the defendant. The ban on attorneys, by comparison, does not apply to such transfers and plaintiff may be represented by counsel if he was so represented at the time the action was commenced. WASH. REV. CODE ANN. § 12.40.025 (Supp. 1973).

purposes of the maximum limitation on the number of suits that may be brought in small claims court.³⁷⁴

VIII. POST TRIAL PROCEDURE

A. Defaults and Executions

One of the major problems in many small claims courts is the overwhelming percentage of default judgments rendered.³⁷⁵ This high number of defaults is attributable in part to the ease with which a default judgment may be obtained and to the defendants' ignorance of the effect of failing to appear in court.³⁷⁶ Several small claims court statutes permit the courts to award default judgments without requiring the plaintiff to produce even a minimal amount of proof of his claim.³⁷⁷ Other states, however, have attempted to limit recovery of default judgments. New York requires a mini-hearing to determine the validity of plaintiff's claim before a default judgment is rendered.³⁷⁸ In the District of Columbia the plaintiff is entitled to a default judgment only if he has a claim for a liquidated amount; if the amount of the claim is unliquidated, the plaintiff must present proof of his claim.³⁷⁹ Provisions allowing the recovery of default judgments without establishing a valid claim facilitate debt-collection, but since one of the primary purposes of the model small claims court is to create a forum in which both creditor and debtor receive equal treatment and a fair hearing, a minimal showing of a legitimate claim should be required. This requirement would have the benefit of preventing groundless suits or claims for excessive amounts.³⁸⁰ It is recommended, therefore, that the small claims statute for Tennessee require that prior to granting a default

374. The proposal of the London Consumer Council favors allowing transfers but prohibiting remands. CONSUMER COUNCIL, *supra* note 87, at 30.

375. The number of defaults in Davidson County General Sessions Court varied from 49.1% to 80.8% of the cases docketed for the week studied. The average number of default judgments for that week was 68.8%. See Appendix A, Table 5 *infra*.

376. CONSUMERS IN TROUBLE, *supra* note 240, at 201-25. Caplovitz noted that the incidence of defaults due to the inability to understand the summons was high in New York where the summons is couched in a great deal of legal verbiage. *Id.* at 207.

377. *E.g.*, IOWA CODE ANN. § 631.10 (Supp. 1974); ME. REV. STAT. ANN. tit. 14, § 7455 (Supp. 1974).

378. NICJ REPORT, *supra* note 15, at 140-41.

379. D.C. CODE ANN. § 16-3902(f) (1973). In the Tennessee general sessions courts a sworn denial must be made in suits on account. Failure to do so results in a default judgment. TENN. CODE ANN. §§ 20-924, 24-506 (1955).

380. The FTC has recommended that a court-appointed referee conduct a neighborhood negotiation as a compulsory prelude to receiving a default judgment. *Hearing Before Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency*, 90th Cong., 2d Sess. 42 (1968).

judgment the judge conduct a mini-hearing to determine whether the plaintiff has a valid claim and whether the amount claimed is justified.³⁸¹

In addition to protecting defaulters from groundless suits, the model statute should be designed to prevent defaults from occurring. One method of decreasing the incidence of defaults is to state clearly on the complaint (or warrant), and in the distributed booklet explaining the small claims court procedure,³⁸² that the effect of failing to appear in court may be a default judgment. The results of a default judgment also should be explained. It further should be made clear that special relief may be granted. For example, if defendant acknowledges liability to plaintiff, but cannot pay according to the terms of the original contract, the small claims court judge has the statutory power to set up an installment basis of payment.³⁸³ Finally, the complaint should explain that a different time for trial may be scheduled if the assigned date is inconvenient for the defendant. By providing a forum in which the defendant can proceed in his own behalf and has an equal opportunity to be heard, the model small claims court statute will reduce the fear of a court appearance and reduce the motive to default.

Provisions for the execution of judgments add complexity to the small claims procedure and may cause hardship to low-income debtors.³⁸⁴ Nevertheless, a small claims judgment that cannot be collected is a Pyrrhic victory and may result in disuse of and lack of confidence in the small claims courts. For this reason, it is recommended that the established general sessions procedures for execution³⁸⁵ be utilized by the small claims courts to enforce their judgments.

B. Appeals

Although a majority of jurisdictions provide for appeal from

381. This mini-trial should include questioning whether the plaintiff attempted to contact the defendant to settle the claim before entering the court. *See* 42 S. CAL. L. REV. 493, 503 (1969).

382. *See* Appendix B *infra*.

383. The judges in general sessions court presently have this power. TENN. CODE ANN. § 26-503 (1955). *See* W. HALL, *supra* note 127, § 141.

384. *See generally* IDAHO CODE § 1-2313 (Supp. 1974) (if no appeal has been filed the small claims judge may certify the judgment by entering the transcript in the judgment docket and execution may issue thereafter); MINN. STAT. ANN. § 491.04 (Supp. 1974) (no execution shall issue from the conciliation courts); NEV. REV. STAT. § 73.020 (1973) (no attachment or garnishment shall issue from small claims court but execution may issue after judgment); UTAH CODE ANN. § 78-6-8 (Supp. 1973) (attachment, garnishment and execution may issue after the judgment in manner prescribed by law).

385. TENN. CODE ANN. tit. 26 (1955).

small claims courts and trial de novo in a court of record,³⁸⁶ the right to an appeal has not been held essential to due process.³⁸⁷ Indeed, several states have made the judgments of their small claims courts final,³⁸⁸ thereby eliminating additional expense and delay in the adjudicatory process. Several states have denied an appeal right to the plaintiff on the ground that by choosing the small claims forum, the plaintiff waives this right;³⁸⁹ other jurisdictions discourage appeals by requiring that the appellant post a bond as security for the payment of the judgment and costs.³⁹⁰

386. *E.g.*, CAL. CIV. PRO. CODE § 117j (West Supp. 1974) (defendant may request appeal de novo); N.C. GEN. STAT. § 7A-228 (1969) (either party may request appeal de novo); *cf.* MINN. STAT. ANN. §§ 491.03(3), 491.06(1) (1971) (conciliation courts). A few states allow appeals solely on questions of law. N.H. REV. STAT. ANN. § 503:9 (1968); N.M. STAT. ANN. § 16-5-12 (1970). New York provides for an appeal on the sole ground that substantial justice has not been done between the parties according to substantive law. N.Y. UNIFORM DIST. CT. ACT § 1807 (McKinney 1963).

387. *Ohio ex rel. Bryant v. Akron Metropolitan Park Dist.*, 281 U.S. 74 (1930) (legislature is free to limit appeals to state supreme court in accordance with state policy); *Reetz v. Michigan*, 188 U.S. 505 (1903) (no provision in federal constitution forbidding state from granting to a tribunal, whether a court or a board of registration, the final determination of a legal question); *Real Estate Comm'n v. McLeinore*, 202 Tenn. 540, 306 S.W.2d 683 (1957) (citing and following *Reetz v. Michigan*); *cf.* *Skaff v. Small Claims Court*, 68 Cal. 2d 76, 435 P.2d 825, 65 Cal. Rptr. 65 (1968) (a party possesses no right to appeal except as provided by statute).

388. MICH. STAT. ANN. § 27A.8413 (Supp. 1974) (all judgments shall be conclusive upon the plaintiff and the defendant); ORE. REV. STAT. § 46.485(4) (1974) (judgment is conclusive upon the parties); *cf.* TEX. REV. CIV. STAT. ANN. art. 2460a, § 12 (1971) (appeal allowed to county court only if amount in controversy is in excess of \$20; judgment of county court is final); WASH. REV. CODE ANN. § 12.40.120 (Supp. 1974) (no appeal allowed if claim was less than \$100; nor permitted to party who requested the exercise of small claims jurisdiction).

389. The constitutionality of this provision was upheld against an attack on equal protection grounds. The court found that the legislature was warranted in determining that there was a natural, intrinsic and constitutional difference between a plaintiff who came into small claims court voluntarily and a defendant who was forced in by the strong arm of the law, so as to justify the classification. *Superior Wheeler Cake Corp. v. Superior Court*, 203 Cal. 1384, 264 P. 488 (1928).

390. MASS. ANN. LAWS ch. 218, § 23 (1974) (\$5 entry fee plus bond in amount of judgment in small claims division of district court); MINN. STAT. ANN. § 491.06 (1971) (bond to cover judgment and costs in conciliation court); N.M. STAT. ANN. § 16-5-12 (1970) (bond to cover all costs of appeal). The constitutionality of requiring appellate bonds, though struck down by 2 state courts, has been upheld by the Supreme Court. *Capital Traction Co. v. Hof*, 174 U.S. 1, 23 (1899). *But see Brooks v. Small Claims Court*, 8 Cal. 3d 661, 504 P.2d 1249, 105 Cal. Rptr. 785 (1973); *Flour City Fuel & Transfer Co. v. Young*, 150 Minn. 452, 458, 185 N.W. 934, 936-37 (1921). The California Supreme Court struck down in *Brooks* a provision of the California small claims statute requiring an undertaking in connection with an appeal from a small claims court judgment. CAL. CIV. PRO. CODE § 117i (West 1954). The court said that this undertaking was a deprivation of property prior to a due process hearing with right to counsel, and relied on *Fuentes v. Shevin*, 407 U.S. 67 (1972), *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969), and *Randone v. Appellate Dep't*, 5 Cal. 3d 356, 488 P.2d 13, 96 Cal. Rptr. 709 (1971). First of all, the court's reliance on, and extension of, these cases is questioned since *Mitchell v. W.T. Grant Co.*, 94 S. Ct. 1895 (1974), which restricts unfettered application of the *Fuentes* doctrine. More importantly, these precedents deal with due pro-

It is necessary, however, that the model small claims statute for Tennessee provide for an appeal by either party to a trial de novo in circuit court³⁹¹ in order to protect the right to a jury trial guaranteed by the Tennessee constitution. It is recommended that the appeal be required to be filed within ten days of judgment pursuant to section 27-509 of the Tennessee Code Annotated relating to appeals from general sessions court to circuit court.³⁹² As a condition to appealing, the appellant should be required to post a bond pursuant to sections 27-313 to -316 of the Tennessee Code Annotated.³⁹³ The judgment of the small claims court should become final unless an appeal is timely made.

C. *Res Judicata*

Inasmuch as small claims courts are forums where justice is

cess requirements of prejudgment executions and garnishments. In the small claims court context there is no prehearing taking. Quite to the contrary, there is a full hearing on the merits before a judge. One of the distinguishing factors present in *Mitchell*, and absent in *Fuentes*, was that in the former case the writ of sequestration was issued by a judge after a mini-hearing and not by a clerk as in the latter case. 94 S. Ct. at 1899. See also *North Ga. Finishing, Inc. v. Di-Chem, Inc.*, 95 S. Ct. 719 (1975). The California court also based its decision on "compelling policy reasons." 8 Cal. 3d at 668, 504 P.2d at 1254, 105 Cal. Rptr. at 790. Realizing that the California small claims courts had become nothing more than judicial collection agencies, the court attempted to remedy this problem, and thus return to the original characterization of small claims courts, in the only manner it thought it could without legislating: encouraging appeals. In fact, the court has been very successful in accomplishing this end as the number of small claims appeals has doubled, and even tripled in some superior courts, since the *Brooks* decision. *Burley v. Stein*, 40 Cal. App. 3d 752, 756 n.4, 115 Cal. Rptr. 279, 281 n.4 (1974). Commentators on *Brooks* have suggested that the court was not so interested in due process requirements as in the abuse of the California small claims courts. *California Supreme Court*, 62 CALIF. L. REV. 408, 423 (1974); 1 PEPPERDINE L. REV. 71 (1973). The court, however, did not fully consider the consequences of its decision. First, by encouraging appeals, the court effectively has annulled one characteristic of the small claims courts: speedy and final adjudication of small claims in a summary manner. Secondly, this liberalized appeals policy helps business defendants more than indigent, consumer defendants by encouraging defendants to default and then appeal for a de novo trial in an appellate court which has technical rules of procedure and where attorneys are allowed. This, alone, frequently will force a plaintiff with a small claim to drop his cause for economic reasons. And now, a defendant who defaulted may appeal even if he has not attempted to vacate his default judgment. *Burley v. Stein*, 40 Cal. App. 3d 752, 115 Cal. Rptr. 279 (1974). The practical effect is that the consumer plaintiff is denied use of the small claims procedure. Appeals bonds are necessary to discourage appeals from small claims courts, both to decrease docket congestion in the circuit courts, and to protect the litigants' right to a simple and final adjudication of small disputes within the summary procedure. If California wishes to remedy the abuse in its small claims courts, it must do so by attacking the source of that abuse. By limiting the number of claims that any one plaintiff may bring, as has been recommended in the model small claims act for Tennessee, one succeeds in ending possible abuse, while at the same time strengthening the characterization of the small claims system.

391. See text accompanying notes 370-71 *supra*.

392. TENN. CODE ANN. § 27-509 (Supp. 1974).

393. TENN. CODE ANN. § 27-313 to -316 (1955).

dispensed primarily on the basis of common sense and notions of fairness, it is unreasonable to assume that each legal or factual issue will receive the same thorough attention as when attorneys are present and rules of pleading and procedure are employed.³⁹⁴ Accordingly, it is recommended that any judgment of a small claims court be *res judicata* only as to the amount involved in the particular action. The doctrine of collateral estoppel would be inapplicable to a small claims court adjudication of any fact or issue. This policy has been adopted by New York,³⁹⁵ and California,³⁹⁶ and results in finality of the present litigation, without affecting future litigation involving separate or related causes of action.

PART FOUR

A MODEL SMALL CLAIMS COURT STATUTE FOR TENNESSEE

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE
STATE OF TENNESSEE:

Section 1. Short title.

This act shall be known and may be cited as the Small Claims Court Act of 1975.

Section 2. Declaration of purpose.

The purpose of this act is to improve the administration of justice in small noncriminal cases, and make the judicial system more available to and comprehensible by the public; to simplify practice and procedure in the commencement, handling, and trial of such cases in order that plaintiffs may bring actions in their own behalf, and defendants may participate actively in the proceedings rather than default; to provide an efficient and inexpensive forum with the objective of dispensing justice in a speedy manner; and generally to

394. See *Leuschen v. Small Claims Court*, 191 Cal. 133, 137, 215 P. 391, 393 (1923).

395. N.Y. UNIFORM DIST. CT. ACT § 1808 (McKinney 1963). See 34 COLUM. L. REV. 932, 942 (1934).

396. *Sanderson v. Neimann*, 17 Cal. 2d 563, 110 P.2d 1025 (1941). The California small claims court statute is silent as to the effect of a small claims judgment on other litigation arising out of the same or similar causes of action. The supreme court, after analyzing the characterization of the small claims court and noting the absence of lawyers and jury trial rules of evidence, decided that the determinations of negligence, contributory negligence and last clear chance made by a small claims court in a case brought by a husband for damage to his car and for medical expenses for his wife sustained in an automobile accident with defendant, were not determinative or binding upon a subsequent case filed by the wife in the superior court for damages for personal injuries.

promote the confidence of the public in the overall judicial system by providing a forum for small claims.

Section 3. Definitions.

As used in this act, unless the context otherwise requires:

- (a) "Clerk of the Small Claims Division" includes the clerk and the deputy clerks of the General Sessions Courts;
- (b) "General Sessions Courts" includes General Sessions Courts, Justice of the Peace Courts and Trial Justice Courts;
- (c) "Nonnatural parties" means any party who is not an individual;
- (d) "Parties" in the Small Claims Division means individuals, partnerships, corporations, associations, governmental subdivisions, or any other kind of organization or entity;
- (e) "Where the cause of action arose" means the county in which the transaction or occurrence that is the basis of the action in the Small Claims Division took place;
- (f) "Where the defendant is found" includes counties where the defendant operates a place of business or dispatches sales representatives for the purpose of selling a product or service;
- (g) "Where the defendant resides" means the county wherein the defendant has his principal place of residence or, in the case of a corporate defendant, the county of the corporation's headquarters.

Section 4. Small Claims Divisions created.

- (a) Small Claims Divisions of the General Sessions Courts shall be established in each county of the State of Tennessee.
- (b) The judges and clerks of the General Sessions Courts shall serve as the judges and clerks of the Small Claims Divisions.

Section 5. Jurisdiction.

- (a) The Small Claims Division shall be a court not of record and shall have jurisdiction, concurrent with that of the General Sessions Courts, in all noncriminal actions, other than actions for libel and slander, where the amount in controversy does not exceed two hundred fifty dollars (\$250), exclusive of interest and costs.
- (b) The Small Claims Division shall have authority to grant any appropriate relief, including money damages and equitable relief;

except that injunctions and restraining orders shall not issue from the Small Claims Division.

Section 6. Commencement of action; form of complaint; venue; change of venue; service of process.

(a) The plaintiff shall commence an action in the Small Claims Division by filing with the clerk of the General Sessions Court a combination summons-complaint, hereinafter called the "warrant," which shall include the name of the court, the names and addresses of the plaintiff(s) and defendant(s), the name of the county in which the action is commenced, and a statement of the claim in concise form, without technicality, including pertinent dates. In addition, the warrant shall include a clear statement that if the defendant fails to appear, he may be ordered to pay the amount claimed by the plaintiff, that the judge may schedule a different time for trial if the assigned date is inconvenient, and that the defendant may obtain assistance from the clerk of the General Sessions Court.

(b) The plaintiff may bring his action in the county where the cause of action arose or in the county where the defendant resides or is found.

(c) A Small Claims Division judge may grant a motion for change of venue in order to prevent hardship to the parties. The motion for change of venue may be made orally, or by mailing a short statement to the judge of the Small Claims Division before whom the case is to be heard, setting out the reasons for the desired change.

(d) The defendant shall be notified of the claim and his right to appear by being served with the warrant. The mode of service shall be by registered mail with return receipt requested; should the receipt not be returned, the defendant shall be personally served with process.

(e) The plaintiff shall sign an affidavit stating that he made a bona fide effort to contact the defendant and settle the claim with the defendant before filing suit in the Small Claims Division.

Section 7. No answer required; suit on sworn account raises no presumption in Small Claims Division.

(a) A written answer shall not be required of the defendant in an action in the Small Claims Division; the defendant may, however, file a written answer if he so wishes.

(b) Tennessee Code Annotated section 24-509 shall be inapplicable to actions commenced in the Small Claims Division.

Section 8. Counterclaims.

The defendant may plead as a counterclaim any claim that at the time of serving the warrant the defendant may have against the plaintiff, if the counterclaim is within the jurisdiction of the Small Claims Division, and if the counterclaim arises out of the same transaction or occurrence that is the subject matter of the plaintiff's claim, and if the counterclaim does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction. Removal of actions in which the defendant's counterclaim exceeds the jurisdiction of the Small Claims Division shall be required pursuant to section 16(a) of this act.

Section 9. Fees.

(a) The plaintiff, upon filing a claim, shall pay a fee of five dollars (\$5.00); no other fee shall be required of the plaintiff, so long as the action remains in the Small Claims Division.

(b) The filing fee shall not be required of a plaintiff who signs an affidavit that he is financially unable to pay the fee.

Section 10. Scheduling of trials; continuances.

(a) The procedures for the initial scheduling of trials shall be those presently utilized by the General Sessions Courts.

(b) A party's first request for a continuance may be granted whenever the judge determines that such request is warranted and in the interest of justice. A party's second request for a continuance, and all requests thereafter, may be granted only upon a showing of extraordinary circumstances justifying the continuance, unless all the parties and the judge agree thereto.

Section 11. Limitations on number of claims that may be brought; requirement of an affidavit; consequences of exceeding limitations.

(a) No party shall file in the Small Claims Division of the General Sessions Court in any county more than two (2) claims in any one calendar week, or more than twenty-five (25) claims in any one calendar year.

(b) Any party who files a claim in the Small Claims Division shall

sign an affidavit with the clerk at the time of filing the warrant stating that he has not brought more than the maximum number of claims allowed under section 11(a) of this act.

(c) If any party files a claim in excess of the maximum number of claims allowed then this claim shall be adjudicated summarily in favor of the defendant at the discretion of the judge.

Section 12. Trial procedure; substantive law; rules of evidence; depositions.

(a) The Small Claims Division shall conduct hearings upon small claims in such manner as to do substantial justice between the parties according to the rules of substantive law, and shall not be bound by the statutory provisions or rules governing practice, procedure, pleading or evidence, except statutory provisions relating to privileged communications.

(b) No depositions shall be taken and no interrogatories or other discovery proceedings shall be used under the small claims procedure.

Section 13. Attorneys barred.

(a) No attorney at law, except on his own behalf or as a witness, shall take any part in the filing, prosecution or defense of litigation in the Small Claims Division.

(b) An individual shall represent himself in the Small Claims Division. A nonnatural party shall be represented by any authorized, bona fide officer, partner, salaried employee or member, who is not an attorney at law.

Section 14. Judge's role; judgment; stay; installment payments; enforcement.

(a) The role of the judge is to be an active inquisitor and conciliator. He shall have the duty to conduct an informal hearing, and develop all of the facts in the particular case. The judge may take testimony, raise defenses or claims of which the parties may be unaware, disregard rules of pleading and evidence, summon any party to appear as a witness in the suit upon his own motion, and do other acts which in his discretion appear necessary to effect a correct judgment and speedy disposition of the case. As conciliator, he shall attempt to conciliate disputes and encourage fair settlements among the parties. These powers are in addition to any pow-

ers given to judges of the General Sessions Courts that are not inconsistent with the sections of this act.

(b) When judgment is to be rendered in an action pursuant to this act, and the party against whom it is to be entered requests an inquiry, or on the judge's own motion, the judge shall inquire fully into the party's financial status and may stay execution and order partial payments in such amounts, over such periods, and upon such terms, which may include payment to the clerk of the court, as seem just under the circumstances. Upon a showing by a preponderance of the evidence that the party has failed to meet an installment payment without just excuse, the stay of execution shall be vacated. When a stay of execution has not been ordered or when a stay of execution has been vacated as provided in this subsection, the party in whose favor the judgment has been entered may avail himself of all remedies available in the General Sessions Court for the enforcement of the judgment; except that no execution shall issue upon any judgment in the Small Claims Division until the time for appeals has expired.

Section 15. Clerk's role; use of the court for oppression or harassment.

(a) The clerk of the Small Claims Division, at the request of any party, shall prepare the warrant and other papers required to be filed in an action in the Small Claims Division. The clerk shall send notice to defendant by registered mail, return receipt requested. In addition, the clerk is authorized to cooperate fully with the parties, which includes answering any questions that the parties may have concerning the small claims procedure.

(b) If the clerk finds by a preponderance of the evidence that the procedure provided by this act is sought to be utilized by a party for purposes of oppression or harassment, as when the party has previously resorted to such procedure on the same claim and has been unsuccessful after a hearing thereon, the clerk shall notify the party to make application to the Small Claims Division judge for leave to prosecute the claim under this section. The judge upon such application shall inquire into the circumstances and, if he shall find that the claim is sought to be brought for purposes of oppression or harassment, the judge may make an order denying the party any further use of the procedure in the Small Claims Division provided in this act.

Section 16. Removal and Transfer.

(a) No party shall move for the removal of a case originally filed in the Small Claims Division to the General Sessions or Circuit Courts, except as provided in section 16(b) of this act for counterclaims in excess of the jurisdictional limit of the Small Claims Division.

(b) A case shall be removed from the Small Claims Division to the General Sessions Court whenever the defendant's counterclaim exceeds the jurisdiction of the Small Claims Division, as stated in section 5 of this act.

(c) A case originally filed in the regular civil docket of the General Sessions or Circuit Courts shall be transferred to the Small Claims Division on motion of the defendant if the claim is within the jurisdictional limit of and otherwise could have been brought originally in the Small Claims Division. Neither party shall be allowed representation by an attorney at law. No case transferred to the Small Claims Division shall be counted in the maximum number of cases that the plaintiff may bring under section 11(a) of this act.

Section 17. Defaults.

In order for a plaintiff to be entitled to a default judgment he shall put forth sufficient evidence of his claim against the defendant in order to make a prima facie showing that he is entitled to a judgment. The plaintiff shall put forth additional evidence, if needed, to prove the amount owed plaintiff.

Section 18. Costs.

The prevailing party in any action in the Small Claims Division may be awarded the costs of the action.

Section 19. Jury.

Trial of a small claims action shall be without a jury.

Section 20. Appeal to Circuit Court; appeals bond.

(a) Any party aggrieved by the judgment of the Small Claims Division may appeal within ten (10) days of judgment to the Circuit Court for a trial de novo. The manner of appeal shall be the one established in Tennessee Code Annotated section 27-509 for appeals from General Sessions Courts.

(b) The appellant shall file an affidavit with the clerk of the Circuit Court that the appeal is made in good faith and not for the purpose of delay. Appellant must also file an appeal bond pursuant to Tennessee Code Annotated section 27-503.

(c) On appeal to the Circuit Court either party may request a jury trial and be represented by counsel. Failure to demand a jury on appeal is a waiver of the right to a jury trial.

Section 21. Res judicata.

(a) If a motion for appeal is not filed within ten (10) days, then the judgment of the Small Claims Division shall be final.

(b) A judgment obtained under this act may be pleaded as *res judicata* only as to the amount involved in the particular action and shall not otherwise be deemed an adjudication of any fact at issue or found therein in any other action or court.

Section 22. Applicability of other laws and rules of court.

All provisions of law relating to the General Sessions Courts and the rules of the courts apply to the Small Claims Division of the court as far as they may be applicable, and are not in conflict with this act. In case of conflict, the provisions of this act control.

Section 23. Severability clause.

The provisions of this act are hereby declared to be severable. If any of its sections, provisions, clauses or parts, or the application thereof to any person or circumstance be held unconstitutional or void, then the remainder of this act shall continue in full force and effect, it being the legislative intent now hereby declared, that this act would have been adopted even if such unconstitutional or void matter had not been included therein.

Section 24. Construction.

This act, being necessary for the welfare of the state and its inhabitants, shall be liberally construed so as to effectuate its purposes as set forth in section 2.

Paul C. Deemer III, *Special Projects Editor*

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APPENDIX A

GENERAL SESSIONS COURT DOCKET SURVEY,
BEDFORD AND DAVIDSON COUNTIES³⁹⁷

TABLE 1

Type of Plaintiff

Type	Bedford County		Davidson County	
	No. of Suits	%	No. of Suits	%
Individuals	10	15.2	100	15.7
Finance Companies	20	30.3	55	8.6
Banks	3	4.5	32	5.0
Government Agencies	10	15.2	124	19.5
Hospitals	9	13.6	57	9.0
Other Businesses	14	21.2	259	40.7
Total	66	100.0	637	100.0

TABLE 2

Type of Defendant

Type	Bedford County		Davidson County	
	No. of Suits	%	No. of Suits	%
Individuals	66	100.0	608	95.4
Businesses	0	0.0	29	4.6
Total	66	100.0	637	100.0

397. In Bedford County, the survey includes all cases that were set for trial during the month of September 1974, totalling 66 suits. In Davidson County, the survey includes all cases set for trial from Tuesday, September 24, 1974, through Monday, September 30, 1974, for a total of 637 suits. The survey covers only civil cases and does not include the criminal cases brought in general sessions.

TABLE 3
Amount of Claim

Amount	Bedford County		Davidson County	
	No. of Suits	%	No. of Suits	%
\$100 or less	23	34.8	136	21.4
\$100-\$250	7	10.6	209	32.8
\$250-\$500	12	18.2	90	14.1
Over \$500	22	33.3	124	19.5
Indeterminable ³⁹⁸	2	3.0	78	12.2

TABLE 4
Disposition of Cases

Disposition	Bedford County		Davidson County	
	No. of Cases	%	No. of Cases	%
Judgment for Plaintiff	65	98.5	462	72.5
Judgment for Defendant	1	1.5	12	1.9
Agreed Judgment	—	—	23	3.6
Nonsuit	—	—	65	10.2
Continued or No Disposition Given	—	—	58	9.1
Appealed ³⁹⁹	2	3.0	17	2.7

398. The "indeterminable" category includes detainer cases which sought only possession of property. The figure for Davidson County also includes cases in which the warrants did not state the amount sought and cases for which the warrants were unavailable.

399. For Bedford County, the initial disposition of appealed cases is included in this table. In Davidson County, the disposition in general sessions for cases that were appealed was unavailable.

TABLE 5
Default Judgments (Davidson County)⁴⁰⁰

Date	No. of Cases Set for Trial	No. of Default Judgments	% of Defaults
Tuesday, September 24, 1974	136	94	69.1
Wednesday, September 25, 1974	79	50	63.3
Thursday, September 26, 1974	250	202	80.8
Friday, September 27, 1974	57	28	49.1
Monday, September 30, 1974	115	64	55.7
Total Week	637	438	68.8

TABLE 6
Litigants with Attorneys of Record⁴⁰¹
(Davidson County)

Litigant	No. of Suits Docketed Listing Attorney	%
Plaintiff	614	96.4
Defendant	16	2.5

400. The number of defaults was not available from the docket in Bedford County. *But see note 170 supra.*

401. Figures were not available from Bedford County. These statistics, particularly concerning defendants, are unreliable for Davidson County. *See note 162 supra.*

APPENDIX B**SMALL CLAIMS COURT INFORMATIONAL
PAMPHLET**

The following is a suggested text for an informational pamphlet on the Tennessee small claims court. Copies of information pamphlets should be readily available in courthouses, police departments, and post offices throughout the state. Combined with publicity in the news media, this pamphlet can serve to educate the citizens of the State of Tennessee about the existence and operation of the small claims courts. Hopefully, this publicity will encourage citizens to utilize the small claims court as plaintiffs, and may be a significant means of reducing the high rate of default that has existed in general sessions courts in the past by encouraging defendants to appear in court.

The information should be printed in booklet form. Examples of other small claims pamphlets that may be of use include the California and New York booklets, both available upon request from the Department of Consumer Affairs of those states.

* * * * *

**HOW TO SUE AND HOW TO DEFEND IN SMALL
CLAIMS COURT AND HOW TO COLLECT A
JUDGMENT**

If you have been cheated, or if a person or business owes you money, you can sue in small claims court. You cannot use a lawyer; the procedure is very simple so that you can represent yourself. This informational pamphlet tells you how to do it.

Remember that the Tennessee small claims court is a tool designed for your use. It can help you, but only if you take an active interest in your case and are willing to take the time to find out extra information when needed.

Important Note!! The rules of the small claims court allow any person to sue only 3 times at most in any one

week, or 25 times in one year. This is to prevent misuse of the court. If you sue more times than the limit allows, you will automatically lose those suits over the limit. Please observe this rule—it is very important.

* * * * *

You can sue in small claims court if:

- Someone owes money to you and won't pay;
- You worked for someone but have not received the full amount of pay agreed;
- You have paid someone to perform some work or repair something and he has not done it;
- You have purchased something from a business but it breaks down and the business refuses to replace it;
- Someone has carelessly damaged something you own and refuses to fix or pay for the loss or damage;
- You leave property of some kind to be repaired or cleaned at a business and the business loses your belongings or returns them damaged but refuses to pay for its mistake;
- You have paid a security deposit on an apartment and have not damaged the apartment in any way but the landlord refuses to return your deposit.

IF YOU WANT TO SUE IN SMALL CLAIMS COURT, GO TO THE NEXT PAGE. IF YOU ARE BEING SUED IN SMALL CLAIMS COURT, GO TO PAGE 802

* * * * *

Remember that small claims court is a people's court—the rules are simple. If you sue someone, no lawyer will come in to argue against you; lawyers are not allowed to represent people in small claims court. This rule makes it inexpensive to sue and defend, and helps you use the courts to stand up for your rights.

WHAT IS A SMALL CLAIMS COURT?

It is a court in each county or city in Tennessee that is designed to handle claims of two hundred fifty dollars (\$250) or less, quickly and easily without the use of a lawyer.

The small claims court can also order people to do certain things, such as repairing something as they promised. These are called "equitable claims."

Anyone over eighteen (18) years of age, who has a claim for money of \$250 or less, or who has an equitable claim of a value of \$250 or less may use the small claims courts.

You may find the local small claims court by checking in the White Pages of the Telephone Directory under "County Court—General Sessions, Small Claims Division." (if you live in a major city, you may have to look under municipal courts of the city, or metropolitan courts if in Davidson County), *or* look at the last page of this pamphlet, where the addresses of the small claims courts for each county are listed.

* * * * *

HOW TO START A SUIT IN SMALL CLAIMS COURT

If you believe you have a claim against someone for \$250 or less, simply go to the office of the general sessions clerk (who is also the small claims court clerk) and tell the clerk that you wish to file a small claim. The clerk will explain how to fill out the necessary forms and papers that simply give the court enough information to notify the defendant (the person you are suing), so that your suit can proceed.

At this time you will be charged a filing fee of \$5.00, which includes the cost of sending a copy of your claim to the defendant by registered mail (this is called service of process). Because registered mail is not forwarded by the post office, if the defendant has moved it will be necessary to deliver a copy of your claim to the defendant in person. This will be done by the sheriff's office.

Be sure to have the correct name and address of the defendant when you go to file your claim—if the defendant is a business or a corporation, go to the county clerk's office in the courthouse and ask the employees to help you find the company's correct legal name so that your suit will not be delayed.

* * * * *

WHAT HAPPENS AFTER YOU FILE A CLAIM

The clerk will give you a notice with the time and date of the hearing and the DOCKET NUMBER—remember these and always refer to the docket number if you call the clerk about your case. The clerk will probably tell you what you need to bring to court the day of your case. You should bring all the bills, receipts, or other papers that support your claim. Write down the details of the facts or events to help you present your side at the hearing. Tell the whole story, but give only the necessary facts; making your story long for no reason will not help. The day before the trial, call the clerk to be sure that the defendant received his copy of your claim.

Be sure to appear in court at the proper time to present your case—if you do not, the defendant may present his side and convince the court that you should not win.

* * * * *

WITNESSES IN THE SMALL CLAIMS HEARING

You are allowed to bring witnesses to your small claims hearing. A witness is anyone who has firsthand knowledge about your claim. For example, someone you told about your claim is not a witness, but someone who went with you when you bought a defective product or who saw the product break is a witness.

If an important witness in your favor does not want to go to your hearing for some reason, you can have the small claims court order him to come by having the clerk issue a subpoena, which is a legal form requiring a person to appear as a witness in a trial. To do this, contact the small claims clerk and he will explain the details of the procedure to you and take the necessary information.

THE SMALL CLAIMS COURT TRIAL

At the trial both sides will tell their side of the story. The judge will listen and ask questions. After hearing all the evidence, the judge will tell you who he thinks is right and who

wins. In most cases the judge will explain his decision. **If you win, try to get the other person to pay immediately.**

* * * * *

HOW TO COLLECT A SMALL CLAIMS JUDGMENT

If you win a small claims case, you have a legal right to have the court make the person pay you. This process, called execution on a judgment, is complicated and often slow, so when possible try to arrange payment through personal contact with the person who owes you.

If your judgment is against a business that refuses to pay, contact the Better Business Bureau and Local Chamber of Commerce and file a complaint. In addition, in many communities there are consumer protection bureaus that may help you.

If your judgment is against an individual who owns property, or against a corporation, you may be able to file an attachment—this is a legal order that directs the sheriff to take some of the debtor's (the party who owes you money) assets and sell them to satisfy your claim. If your judgment is against an individual who is employed, you may be able to get a writ of garnishment—this is a legal order directing the debtor's employer to hold back some of the debtor's wages on payday until the claim is satisfied. There are many legal rules about these forms of execution, and the clerk can explain them to you if it is necessary for you to file one of these forms. There will be an additional fee for court-ordered execution also. The clerk will help you fill out any necessary papers and explain and answer any questions you have.

* * * * *

WHAT TO DO IF YOU ARE SUED IN SMALL CLAIMS COURT

If you receive a notice by registered mail that says that there is a claim against you, and it is sent from the small claims court, you are being sued. This notice will tell you the plaintiff's name (the person who is suing), the type of claim

filed against you and for how much, and the time and date of the hearing.

First, make sure you remember the time and date of the hearing and the location of the court. If for a good reason you cannot be at the hearing, call the small claims court immediately and a new date will be set. If you do not appear, the judge might decide against you and order you to pay.

Do not worry about having to pay an attorney to help advise or defend you; attorneys are not allowed in small claims court—the procedures are simple enough that you can defend yourself.

If you agree that you owe the money for which you are being sued, you may agree to pay before the court hearing to end the problem. If you don't have enough money to pay the full amount but agree that you do owe it, you should write down how much you can afford to pay each week and give this to the judge at the hearing. He can set up a monthly payment schedule instead of ordering you to pay the full amount at once.

If you don't owe anything or for some reason you don't believe that the claim is valid, you should go to court on the day of the trial and bring with you any proof you have that the claim does not exist. This proof may include papers, bills, receipts, account books, and witnesses. Take the time to go to court and defend yourself—as stated above, if you can't make the trial date, contact the court to have a different time set for your trial. The small claims court procedures have been developed to help you defend yourself and to reduce the number of default judgments (a judgment entered against a defendant who does not appear).

* * * * *

Set forth the addresses and phone numbers of each county small claims court and the names of the clerks on a separate page of the pamphlet.

* * * * *

Remember—the small claims court is developed to help you, so if you have a claim, *use* the court. If you are sued, *defend* yourself. The Judge will be fair and the procedure is informal. Tell your friends about the court, and encourage them to pick up one of these pamphlets from the local courthouse, police department, or post office.