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SMALL CLAIMS COURTS VERSUS JUSTICES OF THE PEACE

LEE SILVERSTEIN

"The courts of this State shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay."

—W. VA. CONST., art. 3, § 17.

THE purpose of this essay is to appraise justice of the peace courts in West Virginia and suggest possible improvements. Discussion will center on civil rather than criminal jurisdiction. Both constitutional and statutory methods of reform will be considered.

1. THE PROBLEM

Recently a man employed as a concrete mixer came to the office of the Charleston Legal Aid Society. He asked for help in collecting $13.50 due him in wages. He said that he had worked for three days on a job but that his contractor insisted it was only two days and refused to pay for the third day. The concrete mixer said he could prove his claim by the testimony of other men working on the same job. What could this workman do to assert his right? The legal aid attorney could only suggest that the man file suit in a justice of the peace court.

The office of justice of the peace has a venerable origin in medieval England. It was transplanted to the American colonies in the seventeenth century. Justices played an important role in local law enforcement in the settlements along the coast, and settlers later carried the institution with them as they crossed the Alleghenies into the west. When West Virginia was organized as a new state the framers of the constitution provided for continuation of the justice of the peace system. At that time there were only

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*Member of the Kanawha County bar.
1 Records of Charleston Legal Aid Society, Charleston, W. Va.
2 8 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES, Justice of the Peace 524 (1932).
4 W. VA. CONST. 1863, art. 7, §§ 1, 2, 8, 9; W. VA. CONST. 1872, art. 8, §§ 1, 19, 28 (quoted infra, part II). The constitution of 1872 is the present constitution.
400,000 people in the state. Most of them lived on farms and in villages along the rivers. Travel even to the county seat was difficult; roads were sometimes impassable for weeks during the winter. Under these conditions the justice of the peace system was a useful and necessary part of local government.

Today West Virginia is largely an industrial state. The population exceeds two million. Probably half this number already live in urban areas, and these continue to grow as new factories are built in the state. Hard roads link all sections of each county to the county seat, and the use of automobiles increases each year. Yet in the face of all these changes the justice of the peace system continues to operate within the same framework as it did when the state was created.

The justice of the peace in West Virginia has civil jurisdiction up to $300 and minor criminal jurisdiction. Each county is divided into three to ten magisterial districts, and each district has two justices of the peace (except that districts having 1200 people or less have one justice). A justice is elected by the people of his district for a term of four years, and he may succeed himself. Although there are 353 magisterial districts in West Virginia there are only about 400 justices. The office remains vacant in many districts, probably because the potential income is too low to attract candidates.

A workingman, such as the concrete mixer mentioned above, is at a disadvantage when he brings suit in justice court. The justice can require payment of the costs in advance. This is usually $5.00 ($3.50 for the squire and $1.50 for the constable) but will be more if the defendant is a partnership or corporation. There is no provision for waiver of costs in suits brought by poor persons. Hearing are usually held during working hours, so that

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5 See SHAMBERGER, COUNTY GOVERNMENT AND ADMINISTRATION IN WEST VIRGINIA 10-18 (1952).
6 W. VA. CODE c. 50, art. 2, § 1, and art. 18, § 1 (Michie 1955).
7 W. VA. CONST. art. 8, § 27.
8 Ibid.
10 W. VA. CODE c. 50, art. 17, § 5 (Michie 1955).
11 Id. §§ 1, 2.
12 A poor person may sue without costs in a court of record, upon affidavit that he cannot pay costs or his statement to that effect certified by a legal aid
a workman often must give up some of his earnings to appear. This also makes it hard for him to persuade his witnesses to attend. When the plaintiff goes to the hearing he may find that the defendant has obtained a continuance without any notice to the plaintiff. This causes further loss of time from work. At the hearing the defendant is often more at ease and better able to present his case. Finally, even if the plaintiff wins, the defendant may appeal—except where the amount in controversy is for a mere $15.00 or less, exclusive of costs. If the appeal is not bona fide, there is unwarranted delay. The plaintiff must now prove his case again in circuit court, and this time he needs a lawyer. But if the claim is small the fee of a lawyer may be prohibitive. Such are the obstacles a plaintiff faces in the justice courts of West Virginia. If the system had been deliberately designed to impede collection of small claims, it could hardly be more cruelly effective.

When the workingman is defendant in justice court he fares little better. Now the plaintiff is likely to be a credit store, collection agency, or small loan company which brings many suits before the same justice. Under the statute the losing party pays the fees of the justice and constable. Hence the justice is likely to favor such a plaintiff. The fee system makes a justice's income depend in part on which way he decides. No wonder that people say j. p. means judgment for the plaintiff! Another possible hardship for defendants is that the plaintiff may select a justice in any district in the county, no matter how far it is from where the defendant lives or works. Technical rules of pleading may also hurt the defendant, such as the provision that in a suit on contract if the plaintiff files an affidavit of claim, the defendant must file a counter-affidavit in order to deny the claim, otherwise the justice must enter

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attorney. *Id.* c. 59, art. 2, § 1, and art. 1, § 36. But there is no such provision for justice courts, although this is where a poor person is most likely to want to sue.

13 Many justices grant a continuance as though it were a matter of unqualified right, although the statute requires the defendant to make oath "... that he has just defense to the suit or is justly entitled to a credit or counterclaim not admitted by the plaintiff." *W. VA. Code* c. 50, art. 4, § 25 (Michie 1955).

14 *Id.* c. 50, art. 15, § 1.

15 E.g., in Kanawha County the minimum recommended legal fee for trial of a j. p. appeal case is $50.00, and for trial in justice court $25.00. Charleston Bar Ass'n, Schedule of Minimum Fees (1952).

16 *W. VA. Code* c. 50, art. 17, § 10 (Michie 1955).

17 *Id.* art. 2, § 4.
judgment for the plaintiff.\textsuperscript{18} When the wage earner cannot pay a judgment he is in a predicament. Some employers fire a man immediately if a suggestee execution\textsuperscript{19} is turned in against him. If the employer honors the suggestee, the employee may fall behind on other bills. Then these creditors in turn can take judgment and have suggestees issued. Mounting court costs add to the burden. There is no procedure in justice court by which the defendant can pay a judgment in installments. With rare exception\textsuperscript{20} his only relief short of bankruptcy or a wage earner’s plan\textsuperscript{21} is to file a sworn schedule listing his household goods or wages or both as exempt from execution.\textsuperscript{22} However even this procedure has its technicalities—the defendant must deliver the schedule to the constable, not the justice,\textsuperscript{23} and must file a new schedule as each new execution is issued.\textsuperscript{24} A new schedule for wages must be filed each pay period.\textsuperscript{25}

There are other complaints against the justice courts. Some justices operate their civil business as a collection agency, regularly exacting a commission on what they collect, in addition to their costs.\textsuperscript{26} In many j. p. offices the records are poorly kept\textsuperscript{27} (records

\textsuperscript{18}Id. art. 4, § 17.

\textsuperscript{19}A suggestee execution is an execution against wages or other money due the judgment debtor. Id. c. 38, art. 5A, § 8. The judgment creditor may have 20% of the defendant’s wages above $10.00 a week. The $10.00 exclusion was provided in 1939 and is too low for today’s cost of living. Public employees are subject to suggestee execution. Id. c. 38, art. 5B, § 3.

\textsuperscript{20}In Charleston the Retail Credit Association offers a service whereby a debtor pays a set amount at regular intervals to the Association, which distributes the funds pro rata among his various creditors. A number of legal aid clients have been referred to the Association.

\textsuperscript{21}52 STAT. 938, 11 U.S.C., c. 13 (1952). This plan is somewhat cumbersome. The filing fee is only $15. Id. § 623.

\textsuperscript{22}W. VA. CODE c. 38, art. 8, §§ 3, 7 (Michie 1955). The exemption is limited to husbands and fathers. Id. § 1. There are certain other exemptions, such as a mechanic’s tools to the value of $50, ibid., and workmen’s compensation benefits, id. c. 23, art. 4, § 18. Social Security benefits are exempt. 49 Stat. 609 (1935), 38 U.S.C. § 307 (1952).

\textsuperscript{23}W. VA. CODE c. 38, art. 8, § 3 (Michie 1955).

\textsuperscript{24}The execution must be returnable within 60 days. Id. c. 50, art. 14, § 11. The constable in making his return of execution includes the defendant’s schedule of exempt property.

\textsuperscript{25}Id. c. 38, art. 5A, § 9, and art. 5B, § 12.

\textsuperscript{26}House Bill 160, introduced in the legislature in 1955, would have curbed this practice by providing much stricter regulation of collection agencies. The bill died in committee. W. VA. J.H.D. 145 (1955). In Virginia the trial justices may not accept claims for collection. VA. CODE § 16-66 (Michie 1950).

\textsuperscript{27}In a case handled by the Charleston Legal Aid Society a justice issued a suggestee execution on a judgment which had already been paid off under a
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of criminal cases are discussed below). Some justices are arbitrary, ignorant of the law, or prejudiced in favor of local people and against outsiders, especially creditors.

The system by which justices collect fines for the state in criminal cases is not very satisfactory. The statute requires the justice to pay fines collected to the sheriff immediately and to make a quarterly report of such fines to the county clerk and state tax commissioner. The exact amount collected each year is not known, but the current state budget estimates income from this source at $350,000 a year. Periodically an auditor from the tax commissioner's office examines the justice's criminal records (audits of civil records are made only when requested by the county court). Usually the records of each justice are audited about once every two years. Of the commissioner's staff of twenty-nine field auditors, five are assigned to justice courts. The audit consists of an examination of the justice's official receipt books, dockets, case papers, and other records. This is to determine whether the justice owes the state any money for fines not properly paid over. Some justices apparently do not know how to keep the receipt books correctly, and by the time the field auditors instruct the justices, many of them have been replaced by new justices who must also be taught. Some justices do not pay any money to the county sheriff until the audit is made; then they pay the full amount. Some justices use a part of the state's money for their own purposes,

prior suggestee execution. Investigation showed that the justice had taken office after the first suggestee and that he could not tell from the records that the judgment had been paid.

A motor freight company took bankruptcy and was being operated by a bankruptcy receiver. A former driver sued in a j. p. court in Kanawha County for wages due him. The justice levied on a huge tractor-trailer passing through the county and refused to release it, even when told that he had no jurisdiction and that the plaintiff should file his claim in the bankruptcy. The receiver decided it was quicker and cheaper to pay the judgment than to get a writ of prohibition.

A different justice in Kanawha County permitted his constable to advertise for sale under levy a defendant's real estate.

It is said to be very hard to collect a small claim in Lincoln or Putnam County. There may be others the writer does not know.

The material in this paragraph is based largely on an interview with J. S. Soto, Assistant State Tax Comm'r, on Jan. 18, 1956.

W. VA. Code c. 50, art. 17, §§ 15, 16 (Michie 1955).

Id. c. 6, art. 9, § 7.

Id. c. 50, art. 17, § 18.

Soto (note 28 supra) estimates that only about half the justices observe the statutory requirements.
especially during hard times. Thousands of dollars are due the state from present and former justices, e.g., a recent audit in Raleigh County showed that one justice owed $2,251.07. Most of this had been carried over from prior years. In a typical criminal case the justice collects $3.50 costs for himself and $5 to $25 for the state. This may amount up. For example, one justice in Logan County had criminal business (total fines and costs) of $49,000 in 18 months (his civil business was probably larger). It may be questioned whether $10,000 is an adequate bond for such a thriving court.

Such is the ugly picture of the justice courts in West Virginia, so aptly nicknamed "courts of injustice." It is ironic to contrast this system with the constitutional provision quoted above, which guarantees the administration of justice "without sale, denial or delay." The abuses cry for remedial action. The public deserves it. Consideration of what can be done is therefore appropriate.

2. The Constitutional Question

Any proposal to modify the justice of the peace system in West Virginia, as in most other states, must first pass the constitutional test. Article VIII, of the constitution, entitled "Judicial Department," provides:

Sec. 1. The judicial power of the State shall be vested in a supreme court of appeals, in circuit courts and the judges thereof, in such inferior tribunals as are herein authorized and in justices of the peace.

Sec. 19. Courts of Limited Jurisdiction. The Legislaturc may establish courts of limited jurisdiction within any county,

38 A justice in McDowell County collected large sums but failed to make accounting to the state and to civil plaintiffs. When he was finally brought to account he had spent the money and his surety had to pay off. However, the amount of the bond was too low to cover all the claims, and a chancery suit was necessary to decide priorities and distribution.

37 The county court may fix the bond at any amount from $3,500 to $10,000. W. Va. Code c. 6, art. 2, § 10 (Michie 1955).

38 The j. p. system has often been criticized by both laymen and lawyers. Dawson, Justice of the Peace Racket, 47 AMERICAN MERCURY 310 (1939), Readers Digest, July 1939, p. 88; Gallagher, Our Reeking Halls of Justice: the Inferior Courts, 17 VITAL SPEECHES 79 (1950); Allen, Administration of Minor Justice in Selected Illinois Counties, 31 ILL. L. REV. 1047 (1937); Kennedy, The Poor Man's Court of Justice, 23 J. AM. JUD. SOC'Y 221 (1940); Smith, Justice and the Poor 41 et seq. (3d ed. 1924); Willoughby, Principles of Judicial Administration 304 (1929); Warren, Traffic Courts c. 13 (1942); National Conference of Judicial Councils, Minimum Standards of Judicial Administration 806-16 (Vanderbilt ed. 1949).
incorporated city, town or village, with the right of appeal to the circuit court, subject to such limitations as may be prescribed by law; and all courts of limited jurisdiction heretofore established in any county, incorporated city, town or village, shall remain as at present constituted until otherwise provided by law. The municipal court of Wheeling shall continue in existence until otherwise provided by law, and said court and the judge thereof, shall exercise the powers and jurisdiction heretofore conferred upon them; and appeals in civil cases from said court shall lie directly to the supreme court of appeals.

Sec. 28. Jurisdiction of Justice of the Peace. The civil jurisdiction of a justice of the peace shall extend to actions of assumpsit, debt, detinue and trover, if the amount claimed, exclusive of interest, does not exceed three hundred dollars. The jurisdiction of justices of the peace shall extend throughout their county; they shall be conservators of the peace and have such jurisdiction and powers in criminal cases as may be prescribed by law. And justices of the peace shall have authority to take the acknowledgment of deeds and other writings, administer oaths, and take and certify depositions. And the Legislature may give to justices such additional civil jurisdiction and powers within their respective counties as may be deemed expedient, under such regulations and restrictions as may be prescribed by general law, except that in suits to recover money or damages, their jurisdiction and powers shall in no case exceed three hundred dollars. Appeals shall be allowed from judgments of justices of the peace in such manner as may be prescribed by law.

A reading of these sections together shows that complete abolition of the justice courts would require a constitutional amendment. This was attempted in 1940. Under the progressive leadership of Governor Homer A. Holt the legislature approved and submitted to the electorate an amendment which would have rewritten the judicial article of the constitution. The amendment, inter alia, would have eliminated justices of the peace and substituted summary courts with civil jurisdiction up to $1,000 and minor


certain criminal jurisdiction. These courts would have been comparable to the Virginia trial justice courts (infra, part IV). The judiciary amendment was rejected by more than two to one. One may draw two conclusions from this defeat: first, that the judicial article can be amended only when a substantial number of influential persons and groups support the amendment (it is hoped that the lawyers and other interested groups will undertake this project). The other conclusion is that in the meantime statutory reform should be attempted.

Is nonconstitutional revision of the justice of the peace system possible in West Virginia? On rereading sections 1 and 19 of article VIII quoted above, it appears that the language of these sections would permit the legislature to create courts having jurisdiction concurrent with the justice courts. Indeed, this is exactly what the legislature has already done in the limited area of criminal jurisdiction. This has been accomplished in three stages. First the legislature included in the charters of various cities the authority to establish municipal police courts. Next came the Municipal Home Rule Law of 1937, which provides that any city which becomes a Home Rule city and which has 2,000 people or more may establish a police court having jurisdiction concurrent with a justice of the peace. Finally in 1943 the legislature authorized any city of 20,000 or more to establish a municipal police court. The jurisdiction of such a court is the same as a mayor may exercise ex officio,

41 Another section would have authorized the Supreme Court of Appeals to supervise all lower courts. Another section would have opened the way for reform of the county court system and creation of probate courts.

42 The vote was 311,000 to 133,000. The amendment was approved in five of fifty-five counties—Berkeley, Cabell, Jefferson, Kanawha, and Wood. W. VA. BLUE BOOK 830 (Watkins ed. 1941); W. VA. BAR ASS'N, 1940 ANN. REP. 142-44, 1941 ANN. REP. 133. The Association actively supported the amendment.

43 See STURM, THE NEED FOR CONSTITUTIONAL REVISION IN WEST VIRGINIA 40 (1950).

44 Cf. Sunderland, Constitutional Problems Affecting Minor Courts, 30 J. AM. JUD. SOC'Y 167 (1947), at 168: "The most common form of state constitution is one providing that the judicial power of the state shall be vested in certain named courts and in such other courts, or such inferior courts, or such courts inferior to the supreme court, as shall be established by law. [West Virginia is in this class.] Under such constitutional provisions there is ample power in the legislature to create whatever minor courts would best meet the needs of the state."


46 W. VA. CODE c. 8A, art. 4, § 5, and art. 1, § 4 (Michie 1955).

47 Id. c. 8, art. 4, § 8a.
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cio,48 except as limited by the city charter. Thus a person arrested for drunken driving within a city may be prosecuted either before the municipal police court or before a justice of the peace. The municipal courts usually have law-trained judges who draw a fixed salary. Costs are paid to the city treasury, whereas in j. p. court the justice and constable receive the costs. Fifteen cities in West Virginia have police courts, including such smaller cities as Dunbar, Grafton, Kenova, Salem, and St. Albans.49 The establishment of a well-regulated police court in every city of 5,000 or more should be encouraged.50 The constitutionality of municipal police courts in West Virginia has never been challenged.

The municipal court of Wheeling referred to in the Constitution of 187251 had civil as well as criminal jurisdiction. This court had been created by the legislature in 1865,52 while the constitution of 1863 was in effect.53 This constitution had judiciary provisions similar to the present constitution.54 The municipal court of Wheeling was given the criminal jurisdiction of a justice of the peace and civil jurisdiction of cases of $100 or more, excluding chancery matters and cases involving title to real or personal property. The court also had unrestricted civil jurisdiction in actions to recover taxes due the city. Appeals lay to the circuit court. The constitution of 1872 (art. 8, § 19) recognized this civil jurisdiction. From this it may be argued that the municipal court of Wheeling is an example of an inferior court which may be created by legislative

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48 Id. §3. This jurisdiction is the same as the criminal jurisdiction of a j. p.; a mayor may also issue an attachment in a civil case but the attachment must be returnable before a j. p.

49 W. VA. BLUE BOOK 562-614 (Myers ed. 1955). Other cities are Beckley, Bluefield, Charleston, Clarksburg, Huntington, Morgantown, Parkersburg, South Charleston, Weirton, and Wheeling.

50 See WARREN, TRAFFIC COURTS (1942); NATIONAL CONFERENCE OF JUDICIAL COUNCILS, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION c. 7 (Vanderbilt ed. 1949).

51 Article 8, § 19 (quoted at beginning of part II supra).


53 This was the original constitution enacted when West Virginia became a state in 1863.

54 Article 6, § 1 provided: "The judicial power of the State shall be vested in a supreme court of appeals and circuit courts, and such inferior tribunals as are herein authorized." Article 6, § 17 provided: "The legislature may establish courts of limited jurisdiction within any incorporated town or city, subject to appeal to the Circuit Courts." Article 7, § 8 defined the civil jurisdiction of a justice of the peace. The three parallel sections of the present constitution are quoted at the beginning of part II supra.
action.55 The court is no longer in existence however, for it was abolished by the legislature in 1889.56 Criminal cases were transferred to a newly created police court and civil cases to the circuit court. Municipal courts with civil as well as criminal jurisdiction were also established in Grafton in 1875 and Huntington in 1879, but both courts were later abolished.57

Twenty-three states have a constitutional provision on justices of the peace similar to section 1 quoted above.58 In thirteen of these twenty-three states some form of small claims procedure for civil cases has been provided without changing the constitution (in the other ten there is no small claims procedure). Of the thirteen states four have authorized a separate system of small claims courts;59 eight states have provided for small claims procedure in existing justice of the peace or municipal courts;60 and one state, North Carolina, has a small claims division in the superior court of one county (equivalent to circuit court in West Virginia), and the judicial council has recommended that the same procedure be adopted on a state-wide basis.61

3. The Movement to Establish Small Claims Courts

The first small claims courts in the United States were established in 1913, and today there is some form of small claims or

55 It may also be argued that the provision about the municipal court of Wheeling was intended as an exception to the general provision about inferior courts found in the preceding sentence. But see note 40 supra.
58 Sunderland, supra note 44. They are Arizona, Delaware, Florida, Idaho, Illinois, Kansas, Maryland, Michigan, Minnesota, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, Utah, Washington, Wisconsin, and Wyoming.
61 N.C. Laws 1951, c. 1057. The small claims division has jurisdiction up to $1,000 of claims for a money judgment only. Costs are reduced by half and jury trials are discouraged.
trial justice procedure in twenty-nine states and the District of Columbia.\textsuperscript{62} The United Kingdom has a similar system of county courts which dispose of over a million claims a year, most of which involve less than 20 pounds.\textsuperscript{63}

Judge Cayton of the District of Columbia wrote that "Though the various plans [of American small claims procedures] differ in detail, the basic features and purposes are the same: to provide a friendly forum where the citizen without means, or of a limited means, may present his claim or defense with a minimum of confusion, delay, and expense, with or without the aid of a lawyer, and without forbidding court formality; and be assured of a prompt decision according to law—'judgment in time to enjoy it.' Today we find this plan operating successsfully in practically every section of the country, in the largest and the smallest cities, in agricultural as well as industrial areas."\textsuperscript{64}

In some jurisdictions the small claims courts offer a conciliation service to the parties.\textsuperscript{65} Reginald Heber Smith in his inspired study, \textit{Justice and the Poor}, defines judicial conciliation as "... an entirely voluntary affair, an informal proceeding by which the two disputants are enabled to discuss the issue before a trained and impartial third person having the dignity of judicial office, who explains to them the rules of law applicable, informs them of the uncertainties and expense of litigation, tries to arouse their friendly feelings and suppress their fighting instincts, and if an adjustment agreeable to the parties is reached, draws up a proper agreement, has it executed, and enters it as a judgment. All this is done without prejudice to the parties if adjustment fails and a trial is ren-


\textsuperscript{64} Cayton, supra note 62, at 59.

\textsuperscript{65} This service is available in Cleveland, New York City, the District of Columbia, and Minnesota. In the District of Columbia a suit need not be
dered necessary. The concept of judicial conciliation should be compared with the pre-trial conference in courts of record and with the provision for arbitration in justice courts.

Provisions of the various statutes and court rules governing small claims procedures vary widely from state to state. Maximum jurisdiction ranges from $20 in Kansas and Washington, which is probably too low, to $500 in Maryland and Wisconsin, which makes the court more than a small claims court. In Texas the limit is $50 except for wage claims to $100. The cost of filing suit is usually very low, from $1.00 to $2.50, and some states provide that the judge or clerk may excuse payment if the plaintiff is a poor person—and without his having to make affidavit that he is a pauper. In some jurisdictions a statutory form of complaint is provided, and the clerk is required to offer to help the plaintiff fill it out. Some jurisdictions limit the class of persons who may sue in small claims courts, e.g., Texas bars finance companies, collection agencies, and assignees, while Colorado forbids suits by attorneys and other agents. Another device is to exclude corporations and partnerships. Smith asserts that it merely hurts the poor to exclude such

pending for the parties to obtain conciliation service. In North Dakota there are conciliation courts but no small claims courts. N.D. Laws 1921, c. 38. See Smith, op. cit. supra note 62, c. 9; Cayton, supra note 62, at 61; Smith and Bradway, op. cit. supra note 62, c. 8. Conciliation courts have been very successful in Norway and Denmark. Smith, op. cit. supra note 62, at 61-2. Conciliation and arbitration are a popular method of settling disputes in China and Japan. Wicmore, Panorama of the World's Legal Systems 148-150, 489-503 (1928).

68 At page 60.
69 Institute of Judicial Administration, op. cit. supra note 59, passim.

In Kansas the poor debtor's courts, as they are called, are little used. Oglesby and Carr, The Small Claims Court in Texas, 3 Kan. L. Rev. 238 (1955). In Virginia the trial justices have exclusive jurisdiction of claims up to $200 and jurisdiction concurrent with the circuit court from $200 to $1,000. Va. Code §16-66(3) (Michie 1950). North Carolina is another exception. See note 61 supra.

71 E.g., Col. Rev. Stat. c. 127, art. 1, § 3, and c. 33, art. 1, § 3 (1953); 2 Fla. Stat. § 42.11 (1951).
plaintiffs since they will seek other courts where the costs are higher, and the defendants usually have to pay the costs anyway.\textsuperscript{74} And is it not better that the defendant be sued where he will have a fair hearing rather than where all the advantages are on the plaintiff's side?\textsuperscript{75}

Cost of service of process in small claims courts is reduced by permitting service by registered or certified mail with return receipt (ordinary methods of service are also permitted).\textsuperscript{76} Service by mail has been upheld as satisfying the requirement of due process.\textsuperscript{77}

Small claims cases are usually set for trial within five to fifteen days after service, as under present West Virginia practice in justice courts. However, continuances are discouraged except for good cause.\textsuperscript{78} The right of trial by jury is usually preserved, but experience has shown that there are comparatively few jury trials.\textsuperscript{79} The same is true in both justice and police courts in West Virginia. In Massachusetts if the plaintiff elects to use the small claims procedure rather than the regular procedure he automatically waives the right to jury trial; however, the defendant may obtain jury trial upon affidavit that he has a bona fide defense.\textsuperscript{80} At the trial the procedure is usually informal and friendly, but the rules of substantive law are applied. In the District of Columbia the judge is under a duty to elicit from the defendant the nature of his defense.\textsuperscript{81} In some areas the court holds sessions at night, so that parties and witnesses need not leave their work to attend.\textsuperscript{82}

Some states, in an effort to help the defendant of small means, provide that he may pay the judgment in instalments.\textsuperscript{83} Smith urges that the court should also have authority to act as receiver for the

\textsuperscript{74} SMITH, JUSTICE AND THE POOR 54.
\textsuperscript{75} MYERS, The Small Claims Court in the District of Columbia, 287 ANNALS 21, 26 (1953).
\textsuperscript{76} E.g., CAL. CODE CIV. PRO. c. 5-A, § 117c (West 1950); MASS. ANN. LAWS c. 218, § 22 (1954).
\textsuperscript{77} Wise v. Herzog, 114 F.2d 486 (App. D.C. 1940).
\textsuperscript{78} Cf. note 13 supra.
\textsuperscript{79} In some courts the party asking jury trial must deposit the costs in advance, e.g., §10 in the District of Columbia. Myers, supra note 75 at 22, 25.
\textsuperscript{80} MASS. ANN. LAWS c. 218, § 23 (1954).
\textsuperscript{81} Myers, supra note 75, at 23.
\textsuperscript{82} E.g., New York City and Washington, D.C. Bloom, Justice at Your Convenience, Rotarian, Aug. 1955, p. 87; same condensed under title Justice You Can Afford, Readers Digest, Sept. 1955, p. 186; INSTITUTE OF JUDICIAL ADMINISTRATION, SMALL CLAIMS COURTS IN THE UNITED STATES 17 (1955).
\textsuperscript{83} E.g., District of Columbia, Florida, Minnesota. INSTITUTE OF JUDICIAL ADMINISTRATION, op. cit. supra note 82, at 17, 18, 24. In the District of
defendant who owes numerous creditors. Under this plan the court would receive payments from the defendant and apply them to his various debts (this procedure is in common use in England).84 This would obviate the formality and delay of a chapter 13 wage earner's plan.85

Appeals from judgments of small claims courts are usually discouraged, apparently on the theory that the parties have had a fair hearing and that the successful plaintiff ought not be delayed by an appeal.86 In Massachusetts the plaintiff waives his right to appeal by electing to use the small claims procedure.87 In Colorado the plaintiff may appeal only on wage claims, and the defendant may appeal only if, inter alia, he pays the full amount of the judgment to the appellate court before the new trial.88 (The principle of limited appeal obtains in present West Virginia practice in justice courts: one may appeal only if the amount in controversy is $15.00 or more, excluding interest and costs).89

4. THE VIRGINIA SYSTEM OF TRIAL JUSTICES

The trial justice courts of Virginia have many characteristics in common with the small claims courts of other states.90 The system was established on a state-wide basis in 1934, following experimentation with such courts in a few cities and counties. The trial justice has exclusive civil jurisdiction of claims of $200 or less and minor criminal jurisdiction; he also has civil jurisdiction concurrent with the circuit court of claims from $200 to $1,000.91 Court costs

Columbia the plaintiff who gets a judgment for wages may examine the defendant as to his financial status. Cayton, supra note 72, at 63.

84 SMITH, JUSTICE AND THE POOR 57. The Conciliation Court of Duluth has this procedure. INSTITUTE OF JUDICIAL ADMINISTRATION, op. cit. supra note 82, at 25.
86 See Myers, The Small Claims Court in the District of Columbia, 287 ANNALS 21, 22 (1933).
87 MASS. ANN. LAWS c. 218, § 23 (1954).
88 COLO. REV. STAT. c. 127, art. 1, § 6 (1953).
89 W. VA. CODE c. 50, art. 14, § 1 (Michie 1955).
90 VA. CODE tit. 16, c. 1-4 (Michie 1950); Overbey, The Place of the Trial Justice in the Judicial System of Virginia, W. VA. BAR ASS'N 1940 ANN. REP. 205, 52 VA. STATE BAR ASS'N REP. 289 (1940); BURKE, PLEADING AND PRACTICE 31-40 (4th ed. 1952); Kingdom, The Trial Justice System of Virginia, 23 J. AM. JUD. SOC'Y 216 (1940).
91 VA. CODE § 18-67(3) (Michie 1950).
are low, only $2.50 for summons (issuance and service) and trial.\textsuperscript{92} The office of justice of the peace has not been abolished, but his authority is limited to issuance of summonses and warrants and to the powers of a notary public.\textsuperscript{93} The circuit court appoints the trial justice, except that cities of 10,000 to 45,000 elect their own civil-and-police justices and cities of more than 45,000 have civil justices elected by the state legislature.\textsuperscript{94} Two or more counties or a city and county may combine together and have a single trial justice.\textsuperscript{95} The justices receive salaries ranging from $900 to $5,000 a year, depending on the population of the area they serve.\textsuperscript{96} The trial justice's books and records, civil as well as criminal, are examined regularly by the auditor of public accounts.\textsuperscript{97} Trial justices need not be lawyers, but in most counties they are.\textsuperscript{98}

Several states have courts more or less similar to those of Virginia. In North Carolina a small claims division has been created in the superior court of one county with civil jurisdiction up to $1,000.\textsuperscript{99} New Mexico has a similar court in one county with jurisdiction up to $2,000.\textsuperscript{100} The Wisconsin and Maryland provisions for small claims courts, with civil jurisdiction up to $500, are also comparable.\textsuperscript{101}

Can the Virginia system of trial justices be copied in West Virginia? The answer is yes, but only if the constitution is amended (see part II supra). In Virginia the system was established without the need of constitutional amendment because of the difference in wording of the judiciary provision.\textsuperscript{102}

\textsuperscript{92}Id. § 14-133. The court may permit a poor person to sue or defend without payment of fees and without making a pauper's affidavit. Id. § 14-180.

\textsuperscript{93}Id. § 39-4.

\textsuperscript{94}Id. §§ 16-51, 16-84, 16-111.

\textsuperscript{95}Id. §§ 16-52, 16-53.

\textsuperscript{96}Id. § 14-51.

\textsuperscript{97}Id. § 2-136; Overbey, supra note 90, at 208.

\textsuperscript{98}Overbey, supra note 90, at 208.

\textsuperscript{99}Note 61 supra.

\textsuperscript{100}N. M. Stat. c. 16, art. 5 (1953); Institute of Judicial Administration, Small Claims Courts in the United States 28 (1955).

\textsuperscript{101}Wis. Laws c. 254 (Burke & Wood 1953); note, Legislation—Uniform Small Claims Court Act, 1950 Wis. L. Rev. 363; Md. Acts 1955, cc. 151, 672; Institute of Judicial Administration, op. cit. supra note 100, at 22-23.

\textsuperscript{102}Va. Const. art. 6, § 87 provides: "Judiciary Department. Composition and Jurisdiction—The judicial power of the State shall be vested in a Supreme Court of Appeals, circuit courts, city courts, and such other courts, inferior to the Supreme Court of Appeals, as are hereinafter authorized, or as may be hereafter established by law. The jurisdiction of these tribunals, and
5. A Proposal for Small Claims Courts in West Virginia

Considering the serious defects of the justice of the peace system in West Virginia and the satisfactory experience of other states in modifying the system, the writer feels that the time has come for reform in this state. In fact, reform is overdue. Because of the defeat in 1940 of the judiciary amendment to the constitution the statutory method of reform recommends itself. It is submitted that the legislature should provide for small claims courts in West Virginia. The purpose of such courts would be to provide a forum for prompt, simple, inexpensive, and fair determination of contract claims for goods and services. Rent and damage claims might also be permitted. It is believed that the upper monetary limit should be fairly low, say $100, in keeping with the objectives stated and with the practice in other states. The subject-matter jurisdiction of the small claims courts should be no broader than that of the justice of the peace courts, so that a plaintiff could choose either type of forum. It is believed that small claims courts with jurisdiction thus limited would meet the requirements of the constitution of West Virginia, especially the provision in the bill of rights quoted at the head of this essay.

There are several ways in which small claims courts could be established. The legislature could pass a law creating such a court in each county, possibly providing that two or more counties may combine together as in Virginia. A second method is to authorize each county to create its own small claims courts by action of the county court. A third method, which could be combined with the first or second, is to authorize any city of a certain minimum size to create its own small claims court, either independently or, where possible, as a civil division of a police court already in existence. Still another method is to create the courts in general form and to authorize the Supreme Court of Appeals to prescribe the details of procedure.

of the judges thereof, except so far as conferred by this Constitution, shall be regulated by law.

"The Governor may be authorized by law to appoint judges pro tempore."
Cf. West Virginia provisions quoted in part II supra.
103 Note 42 supra.
104 See discussion supra, part II.
105 Note 95 supra. There was a similar provision in the judiciary amendment of 1940, note 49 supra.
106 Cf. the statute permitting any city of 20,000 or more to create a police court, note 47 supra.
107 The Supreme Court of Appeals already has the rule-making power for courts of record. W. VA. CODE c. 51, art. 1, § 4 (Michie 1955). In Massachu-
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The geographical jurisdiction of the county small claims courts should be the whole county, the same as justices of the peace. Municipal small claims courts should hear only cases where the defendant resides in the city, except by agreement of the parties.

The county small claims courts should be permitted to hold sessions anywhere in the county. This would accommodate litigants residing in remote areas in the larger counties.

Court costs should be very low, e.g., $1.00 to cover filing of suit, service of process, and trial. The court and clerk or either should have authority to excuse poor persons from paying costs, and without a pauper's affidavit. All costs should be paid to the county or city treasury. The losing party should pay the costs as under present j. p. practice.

It would be desirable for economy and good administration to provide that existing circuit clerks and city clerks should serve ex officio as clerks of small claims courts for their respective jurisdictions. A part of the clerk's duties should be to assist the litigant in preparing his complaint or answer if requested. The clerk should be required to keep proper books and records, subject to audit by the state tax commissioner.108

The law should authorize service of process by registered mail with return receipt (cost 50¢) or by certified mail (a new service by which letters are carried by ordinary mail with a return receipt—the cost is 15¢). Service by any other usual method should also be permitted.

The judge of a small claims court should be a lawyer with at least some experience in active practice, e.g., two years. His income should be a fixed salary, not dependent on the fees paid to his court by losing parties. Salary should be based on the population served by the court and on volume of business.109 Although judges in West Virginia are usually elected, consideration should be given to a system of appointment rather than election of small claims judges, preferably from a list of names submitted by the local bar asso-


citation. The method of appointment seems better because of the special nature of small claims courts.

Trials should be conducted informally. Night sessions should be permitted and even encouraged where local conditions warrant them. There should not be any strict requirements as to pleadings and other matters of procedure. Liberal rules should obtain as to joinder of parties and claims and as to counterclaims, cross-claims and third-party claims. If the defendant should file a counterclaim, third cross-claim, or third-party claim exceeding the monetary jurisdiction of the small claims court, then the case would be transferred to the circuit court, where the informal procedure of the small claims court should continue to apply insofar as practicable. In spite of the informal procedure, however, the court should decide cases according to the principles of substantive law. The judge should be under a duty to assist the litigants in presenting their cases where necessary in the interest of justice. The judge should also have authority to offer conciliation in appropriate cases. An agreement reached by conciliation should have the same effect as a judgment. Although the right of trial by jury is guaranteed by the constitution in matters involving $20 or more, it may be desirable to require that a party desiring jury trial make demand a reasonable time in advance and pay the costs in advance. This would make for better juries and less delay.

Appeals should probably be permitted upon the same basis as appeals in justice courts, in order to maintain parity of rights as between the two types of courts. However, it is hoped that because of the caliber of the small claims judges there would be few appeals. In order to discourage purely dilatory appeals it would be desirable to require prompt hearing of small claims cases on appeal and to impose a penalty against the appellant where the judgment is affirmed.

Execution and suggestee execution should be permitted as in justice courts, but with only small costs added to the judgment. Service of the suggestee execution should be permitted by registered or certified mail, like service of process. Judgments should

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  \item[110] Cf. preliminary draft of West Virginia Rules of Civil Procedure, Rules 13, 14, 18, 20 (1955). These rules are substantially the same as the Federal Rules of Civil Procedure for District Courts.
  \item[111] W. VA. CONST. art. 3, § 13.
  \item[112] W. VA. CODE c. 50, art. 15 (Michie 1955).
  \item[113] See Note, 43 HARV. L. REV. 118 (1929).
  \item[114] W. VA. CODE c. 50, art. 14, §§ 9-29, and c. 38, arts. 5A, 5B.
\end{itemize}
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be executed by the county sheriff or a municipal sergeant rather than by a constable; the officer performing this duty should receive a set fee for it from the county or city rather than a commission on the proceeds of sale.

The court should be permitted to allow payment of judgments by reasonable instalments where the defendant has limited means. Legal aid standards might be used as a guide. It would also be helpful to authorize the clerk to serve as a receiver for a defendant who owes several creditors, so that the defendant may pay a regular monthly amount to the clerk for pro rata distribution among the creditors. The procedure for claiming household goods or wages or both as exempt from execution should be simplified. The judgment debtor should be permitted to file his schedule of exempt property with the clerk. The exemption should remain in effect for a reasonable time, e.g., two to six months depending on the circumstances.

Small claims courts as outlined here could exist side by side with the justice of the peace courts. At such time as the constitution is amended so as to permit reorganization of the courts, the county small claims courts could become a division of the circuit courts and the municipal small claims courts could become independent courts subject to judicial supervision by the circuit courts.

What would be the effects of establishment of small claims courts? They would help the working man by providing a court where he could collect wages due him. He would also be accorded a fair hearing in suits brought against him and a fair method of paying judgments. Small claims courts would assist the small grocer, hardware dealer, and garage man in collecting their accounts. Justices of the peace would still have a reasonable volume of business since they would handle practically all claims from $100 to $300 and would receive some business from plaintiffs who preferred to sue in their courts. The small claims courts would help build up public confidence in the administration of justice and improve the public relations of the bar. Most important of all, these courts would make possible the righting of many wrongs which would otherwise lack an effective remedy.

115 See note 84 supra.
116 See notes 23, 24, 25 supra.