REPORT ON SMALL CLAIMS SEMINAR HELD ON 6TH MAY, 1978 IN EDINBURGH

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FOREWORD

One of the first responsibilities of the Scottish Consumer Council when it was appointed in 1975 was to clarify the variations between English and Scottish law and legal procedures which had resulted in differences between the protection available to consumers north and south of the border.

In a discussion paper Consumer Law in Scotland Mr. Matthew Clarke, then a member of the law faculty of the University of Edinburgh, helped us to analyse these differences. It was apparent that the absence of any simple, quick, cheap small claims procedure in Scottish courts, comparable to the County Court procedure in England and Wales was an effective bar to the full enforcement of civil consumer laws. Without such a procedure consumers would rarely go to court to enforce their legal rights however good their case.

This issue appeared to the Council of such central importance to the interests of Scottish consumers that we set up a Working Party under Mr. Clarke's chairmanship, including members of the legal profession, of chambers of commerce, of consumer advice services and of Regional consumer protection services as well as consumers. Their long and difficult consultations over many months resulted in a scheme for voluntary settlement of small claims which itself formed the basis of the discussions at the Seminar here reported. They have also led, as we ardently hoped, to serious consideration of a simple small claims settlement procedure within the courts themselves through an experiment approved by the Lord Advocate and devised by the Scottish Courts Administration.

In issuing this report - which itself is only a stepping stone to the simplified procedure we seek - the SCC would like to record its profound gratitude to more people than space permits. Many of their names will be found as participants in the Seminar. But I am sure all of them would agree with my singling out for special thanks Lord Hunter, who led the seminar as Chairman; Mr. J.P.H. Mackay, the Dean of the Faculty of Advocates, who so ably chaired the plenary session; Sheriff I.D. Macphail and Mr. M. Birks whose speeches set the scene for a truly constructive discussion; Mr. Matthew Clarke whose chairmanship of the Small Claims Working Party and whose contributions to the seminar have been authorative and constructive throughout; Mr. Douglas Purdon, Legal Research Officer of the SCC, who was largely responsible for organising the Seminar and was Secretary to the Working Party from its inception.

We must also give special thanks to all those members of the SCC Small Claims Working Party whose work and hard thought over many months prepared the way for the Seminar. (Their names are in Appendix 3).

The SCC now hopes that the consumer initiative which resulted in the Seminar will continue to gather momentum and to receive generous and serious consideration by the legal profession on whom the early fulfilment of the consumer hopes must rest. We shall continue to play our part in ensuring that the vital consumer interest in this project is at no stage overlooked.

JOAN MACINTOSH.
INTRODUCTION BY THE CHAIRMAN, THE HON. LORD HUNTER, V.R.D.

Lord Hunter thanked the Scottish Consumer Council for their invitation to chair the Seminar.

The summary cause procedure which replaced the small debt action had not, said Lord Hunter, exactly received a hero's welcome. Critics of the summary cause argue that it involves excessive formality and is unduly expensive. Lord Hunter continued by saying that, although it is easy to advance criticisms, a certain degree of formality and some expense are usually necessary to provide a fair hearing of a dispute with the object of reaching a just decision according to law. The introduction of cheaper and less formal procedures might make it less easy to achieve these objectives. It should be borne in mind by those who criticize the summary cause as unduly expensive that lawyers are running a business where outgoings have been increasing steadily and inexorably. It is essential that each partner brings in an adequate return for his work. Any idea, however, that the legal profession in Scotland is hostile to the introduction of a more satisfactory procedure for settling small claims would be totally false.

Lord Hunter said that he saw the following objectives in the proposed experimental small claims scheme:

1. Cheapness
2. Speed
3. Simplicity
4. A decision-making institution with a human face
5. Effectiveness, especially in enforcement

If these were the objectives, he continued, there would have to be some compromise with principle, and a greater chance of mistakes or injustice to the parties might have to be accepted.

/...
In order to achieve the five objectives which he had mentioned Lord Hunter thought considerable practical difficulties would have to be overcome. For example, who is to do the following:

Write the necessary letters?
Effect service?
Cite the parties and witnesses?
Also, what kind of procedure should the scheme have?
What stages should be essential?
Should there be a preliminary hearing?
Should the scheme be compulsory or voluntary?
Should the settlement of the claims be by litigation or arbitration?
Should claimants using the scheme be restricted to consumers?

Other questions also arise:
Should legal representation or quasi-legal representation be allowed? or should there be party litigants on both sides?
Should a purely inquisitorial procedure be followed?
There are also practical matters to be considered, continued
Lord Hunter:
What kind of staffing would be necessary?
When and where would the court sit?
What type and design of court would be most suitable?
What money is required to establish and operate the scheme?
Should there be any appeal from the adjudicator's decision and if so, on what grounds?
How can cheap and effective enforcement be provided for?

Lord Hunter concluded by saying that in the end of the day, for any scheme to be successful, some sort of compulsion would probably be necessary. He hoped that today the Seminar would be able to evolve solutions or part solutions to some of the questions he had posed.

/...
THE NEED FOR A NEW SMALL CLAIMS PROCEDURE - MR. M.G. CLARKE

I see my task this morning as the rather lowly one of setting the scene for the contributions and discussions which we are to hear and engage in today and, indeed, to present, to some extent, the historical background leading up to today's Seminar.

The title of my contribution this morning is given as "The Need for a New Small Claims Procedure".

Now, I do not think it would be unfair to say that in Scotland the identification of such a need has, to a large extent, been in response to the introduction of the new summary cause procedure in the sheriff court in September 1976.

Most of this audience will recollect the background to the introduction of the summary cause - the Grant committee established in the sixties to examine the scope, function and procedure of the sheriff court in Scotland, its report in 1967, which inter alia recommended the abolition of the small debt action and the summary action and their replacement by a new form of procedure, the summary cause. There then followed the resultant legislation, the Sheriff Courts (Scotland) Act 1971 which implemented the Committee's recommendations in this regard setting out in broad outline the essence of the new summary cause and empowering the body known as the Sheriff Court Rules Council to draft the Rules which would embody and implement that essence. The Rules Council took approximately five years to produce the goods and the new summary cause was eventually launched upon the public in September 1976.

Now observe, ladies and gentlemen, that just as all of this process of examining, reviewing and ultimately reforming the
sheriff court and its procedure was being undertaken in the late nineteen sixties and early seventies there was simultaneously being witnessed the great explosion in law reform measures specifically designed to protect the consumer and to confer on him new rights and remedies. That was a process not confined to the United Kingdom of course, and in other jurisdictions where the drive for consumer protection as such had, perhaps, an earlier start than in the United Kingdom there was a quick realisation that such rights and remedies are only of value if they are readily enforceable. The time and expense involved in the luxury of a full-blown investigation of a dispute under the traditional adversary system of litigation was seen to be inappropriate for small claims - where the cost of the procedure could often far exceed the value of the claim. And so in various European countries, in the United States, in Australasia, special procedures to provide quick, simple, inexpensive and accessible justice in small claims disputes had been adopted or were in the process of adoption. While the Rules Council in Scotland were drafting the Rules for the summary cause developments were also taking place south of the border. A Consumers' Association pamphlet "Justice out of Reach" had complained that the county court in England and Wales did not provide a suitable forum for the airing of small claims being too formal, too costly and too slow. In some measure in response to these criticisms, experimental small claims arbitration schemes were set up in Manchester and Westminster about which we will hear more later today. The political response to these criticisms and developments in England and Wales was that the Government introduced reforms of county court procedures specifically designed to cater for what was seen as the need for special small claims procedures and these too will be spoken of later today. So the movement for introducing such new procedures has been virtually world-wide and in recent years has been going on close to our own door-step. And in this connection I think
a little note of chauvinism should be allowed. It is always as well to remind ourselves that the small debt court in Scotland for 150 years or more incorporated some of the essential features of a modern small claims tribunal, but unfortunately in its latter days it had largely developed into a debt collecting system. Its potential as a small claims court as such was only too late in the day recognised by those involved in consumer affairs. It is really rather fascinating in fact to look at the periodical literature of the early 19th century such as the Journal of Jurisprudence to see there very heated discussions about the introduction and function of the small debt court which raise many of the issues that the small claims debate has raised more recently -there really isn't anything new under the sun!

In any event, the hope had been among consumer organisations that the architects of the new summary cause, aware of developments in other jurisdictions with regard to radically new procedures to cater for small claims would have taken these into account and would have incorporated something of their spirit into the Rules they produced. Their disappointment was considerable when the Rules were published because though in some ways they were seen to provide at least a degree of flexibility and lessening of technicality, they were firmly rooted in the traditional adversary system of adjudication with all that this entailed. On closer scrutiny indeed, it was considered that there were features of the procedure which acted as a disincentive to the consumer of goods or services from using it to vindicate his rights against the suppliers of those goods or services. One of the problems I think it is fair to say was perhaps that the new Summary Cause Rules tried, and were expected to do too much. They are designed to set out the procedure, not only for claims in respect of goods and services, but all civil claims below now, £500 monetary value. They had not
only to cater for the small claimant bringing his consumer claim but for the busy sheriff court practitioner. The result has been that not only have they failed to satisfy the requirements of the consumer lobby but they have failed to satisfy the sheriff court practitioner. These, of course, are two very demanding customers and it may be that we shall hear in the course of the day a spirited defence of the summary cause as having been unjustly criticised, but there can be no doubt that it has had a very bad press. The complaints of the consumerists have been matched at least in volume and detail by the complaints of many of those members of the legal profession who are called upon to use this procedure regularly. Their complaints, I think, can be said to be directed to the uncertainty that has arisen from the matters not covered in the Rules as well as to the uncertainty and undue technicality of some of the Rules themselves. These complaints have resulted in a full and detailed critique of all 93 of the Rules being produced by the Law Society of Scotland, which, I understand, the Rules Council are now considering.

It is neither my intention, nor within my power, to set out in detail the criticisms of the summary cause Rules which have been made by sheriff court practitioners, but I should mention some of their features which are seen as making it an inappropriate forum of procedure for the bringing of small claims.

There are complaints about the lay-out and language of the forms. They do not indicate clearly the various stages in the summary cause action and simple, but important, matters like describing the difference between the Return Day and the First Calling are not dealt with.

To commence the procedure it is necessary to instruct a sheriff officer or solicitor to serve the summons and to
cite witnesses. A party is only entitled, as of right, to be represented by a lay person at the first calling of the case. A lay person may, with permission of the court, represent a party at any subsequent hearing only where the cause is not defended on the merits or on the amount of the sum due. The strict rules of evidence in respect of relevancy, corroboration, proof by writ or oath and so on have not been radically modified. The effectiveness and usefulness of an important Rule for this type of dispute, namely Rule 35, which provides for the sheriff remitting the matter to a man of skill is much reduced by the fact that only if the remit is made of consent of the parties can the report of the man of skill be final and conclusive on the matter or matters remitted to him. If a defender does not lodge a notice of intention to appear or an offer to pay by instalment, then a pursuer or his legal representative must enter a minute in the Book of Summary Causes for decree.

This means that a pursuer may have to take time off work or instruct a solicitor for this purpose. This may be a considerable inconvenience when the defender is not resident or carrying on business in the same sheriff court district as the pursuer. Legal expenses are recoverable in the summary cause just as in ordinary court procedure. Thus, if an individual raises an action without legal representation but the defender can afford to employ legal representation, then the individual if he fails to convince the court of the merits of his claim, may be faced with the other side's legal expenses which in the event, may even exceed the value of his claim. There is nothing equivalent to the "No Costs" rule in the county courts in England and Wales which we will hear of no doubt later.

That, I think, should be sufficient criticism of the Rules as such to indicate why the consumer bodies have not seen
the summary cause as, in any real sense, incorporating the spirit of procedures which have increasingly come to be seen elsewhere as appropriate and necessary for the handling of small claims.

It did, however, seem fairly clear that despite these almost immediate criticisms of the summary cause, no early reform was likely to be undertaken. Partly as a result of this the Scottish Consumer Council decided to set up a Working Party to look at the procedures which had been adopted in other jurisdictions for this sort of business and to consider if, and how, such procedures might be introduced into the Scottish system. The Scottish Consumer Council were indeed fortunate in the persons who were willing and able to form the membership of the Working Party. The membership comprises a Sheriff who sits daily in Glasgow Sheriff Court, two highly experienced court practitioners, nominated by, though not strictly speaking, representing the Law Society, the Director of Consumer Protection for Lothian Regional Council, the former Director of Consumer Protection in Fife, a Glasgow solicitor who is also a member of the Scottish Legal Action Group, the Secretary of Glasgow Chamber of Commerce, and a Citizens' Advice Bureau worker who is also a qualified solicitor and who lectures in consumer law at Queen Margaret College, Edinburgh.

Now I think it would be true to say that some of these persons approached the study of these matters with feelings of scepticism and reservation that may well be matched by those existing in at least some members of today's audience, yet it has been remarkable how great a degree of general unanimity has, in fact, emerged as a result of the Working Party's deliberations.

The Working Party set to work in November 1976 and devoted
considerable time and effort to examining and discussing other small claims systems and the various issues which form the basis of today's Seminar.

All of that resulted in a proposal for setting up an experimental small claims scheme in Scotland, modelled to some extent on Manchester and Westminster schemes, which was published, together with draft rules in June 1977. These were circulated widely and were, on the whole, well received. The Lord Advocate, however, on receipt of them expressed some concern. He took the view that the summary cause had not really been given a proper chance and that the setting up of an unofficial scheme on the lines which the Working Party proposed would carry with it the danger of confusing the public.

The Working Party accepted these points to some extent and, as a result, discussions with the Lord Advocate and his officials were arranged. The remarkably speedy outcome of these was an agreement to consider grafting on to the summary cause, as it were, something like the Working Party's scheme as an experiment in a selected Sheriff Court District. The Lord Advocate's approach, I think it is fair to say, is at the moment to see the summary cause itself as an experiment or perhaps as being on a probationary period and under constant review. The opportunity of observing how such a small claims scheme as that suggested by the Working Party might become part of the summary cause by trying it out in a selected district, can be seen as part of that review.

The Lord Advocate and his officials have been busily working out the detail of all of this in recent months and perhaps on behalf of the Working Party I might express their thanks for the courtesy, co-operation and ready response that has been given in this way to them.
The present position is that a draft proposal and rules for such an experiment has been prepared and, it is hoped, the experiment will be introduced shortly. It may therefore be appropriate for me to provide you with a broad outline of what the experiment will amount to and I know that the Lord Advocate's officials who are here today are interested to hear your reaction to them.

The plan is that in a selected Sheriff Court District a person with a small claim, as defined, will be told that instead of raising a summary cause as such, there is the possibility of employing a new, informal and voluntary procedure for airing his grievance. He will learn of this through the local advisory and counselling services, such as the Citizens' Advice Bureau or Consumer Protection Department and at the sheriff-clerk's office itself. The rules governing this new procedure are to be simple, short and few in number. A very simple claim form will be filled in at the sheriff-clerk's office - the sheriff-clerk will be able to assist with this. A small fee will be payable. The form will set out the names and addresses and nature and grounds of the claim. The sheriff-clerk will send a copy of it by post to the defender with a notice requesting the defender to return it to the clerk within ten days.

A copy of the rules will also be sent to the defender. The notice will invite the defender to agree or decline to have the case disposed of under the new procedure. If an acceptance is received from the defender then the sheriff-clerk will send the papers to an "adjudicator" who will be a sheriff. If the defender declines to have the case disposed of by the new procedure, or fails to answer, a summary cause can then be raised by the claimant and no further fee will be payable.

/...
In the new procedure the adjudicator will be charged to handle the matter in an "inquisitorial" fashion, combining in effect the roles of investigator and judge, and in some cases conciliator. He may enlist the help of an expert if he decides this is necessary. He may decide to resolve the matter without a hearing but if that is so he will inform the parties who can insist on one. He will be the master in ascertaining the facts and the law. He may seek conciliation between the parties where he deems that an appropriate means of disposing of the matter or at least suggest a compromise to them. The strict rules of evidence will not apply, for example, it is even envisaged that the sheriff might accept evidence by telephone. The hearing itself will take place in a very informal atmosphere. Legal representation will be prohibited but a lay person will be allowed to speak on a party's behalf. On reaching his decision the sheriff will determine liability for expenses which will normally only be the court fees. The order of the adjudicator may be enforced as a decree-arbitral by being recorded in the sheriff court books of the court concerned. There will be no appeal from his decision.

That, then, in broad outline is what is going to be tried - somewhat radical you may think - and it does provide its own answers to some of the questions which we will be discussing today. Whether or not they are the correct answers will, no doubt, give rise to some debate today. The plan is to monitor this experiment very closely over a trial period.

Now, perhaps lastly, I might be allowed to highlight some of the problems and difficulties which I personally see arising from any such scheme. The first is that the success of any such venture will stand or fall largely on the ability of the adjudicators. A great deal is expected of them. The task, I think, calls for great skill, knowledge and judgement. It will be a challenging role and undoubtedly a demanding one. The second doubt relates to the problem
of persuading claimants to use the procedures and in the case of voluntary schemes such as the one planned, the difficulty in persuading defenders to submit to the procedures. No matter how simple, cheap and accessible procedures are made, persuading people with genuine complaints to come forward and use them is a universal problem. Indeed, this results in a view being expressed that the small claims movement is much ado about nothing - there is no so-called "unmet need". It is pointed out for example that the numbers using the new procedures in England and Wales, while increasing, are not high. Thirdly, is it right to ban legal representation - is it right to remove what has been seen, at least in this country, as a fundamental right of all citizens, from this sort of business? That becomes all the more an acute point when it is considered that corporate bodies, while not legally represented, may be expertly represented by an official who may handle these claims very regularly, and thereby gain an expertise in so doing. Fourthly, what in fact is meant by conciliation in this context and how is it best achieved? Is it right to consider that this should become one of the essential techniques of the professional lawyer or judge in this sort of context without considering whether it has a place in the overall administration of justice? Fifthly, how is a "small claim" to be defined - by its monetary value or its nature or a combination of both?

And lastly, a matter which I consider has been insufficiently discussed. While the consumer movement has been pressing for simplification of procedures so that consumers can take advantage of the great advances in the extent and nature of the rights provided by the substantive law that substantive law has itself got no simpler - quite the reverse. There is, in some respects, no more technical a branch of law than the law of sale, the law of consumer credit, the law relating
to misrepresentation and most recently unfair contract terms. These are reforms which the consumer movement has pressed for and, on the whole, are quite pleased with but their proper application does require expertise, argument and time. This, I think, results in a dilemma which I consider has been too little discussed and considered. Are consumers prepared to sacrifice the luxury of a proper and considered application of the substantive law for the reward of a quick, inexpensive solution to a dispute? And there is a related point which might at least concern those interested in the proper development of this branch of the substantive law and it is this - if these disputes are ultimately all taken into these new types of procedures, with no appeals, let alone full argument of the law, then the growth and development of that law might well be stultified. We only have to recall the impact on the development of the law that one small claim had, which arose from the purchase of a bottle of ginger beer at 8.50p.m. on 26th August 1928 in the Wellmeadow Cafe, Paisley to take that point. (Donoghue v- Stevenson 1932 SC. (HL).31).

That the small claims debate and the possible introduction of such new procedures into Scotland raises these issues I consider is reason enough for having this important Seminar today.

THE ROLE OF THE SHERIFF COURT IN PROVIDING A CHEAP, QUICK, SIMPLE PROCEDURE - SHERIFF I.D. MACPHAIL

I have been asked to consider with you the role of the sheriff court in providing a cheap, quick, simple procedure for the settlement of small claims. As you know, the only official small claims procedure in Scotland at the present day is the summary cause procedure in the sheriff court.
I should like to explain very briefly how that procedure came into being, to describe its main features in outline and then to spend a little time on an assessment of it as regards cheapness, speed and simplicity especially from the point of view of a lay person who decides to pursue or defend a claim.

What follows is an entirely personal evaluation, and one which is based on limited experience of the operation of the summary cause procedure. I have no reason to suppose that my views are in any way typical or representative of the other Scottish sheriffs; and as to experience, it is necessary to remember that the summary cause Rules came into operation as recently as 1st September 1976, and there is therefore a risk of arriving at premature conclusions. But I think the procedure has now been in operation long enough for us to form at least some provisional opinions as to its efficacy.

Briefly, then, a few words about the origin of the summary cause Rules. They replace the earlier small debt and summary civil cause procedures. The small debt court went back to 1825; and in 1907 there was introduced the summary civil cause with an upper limit of £50, and the small debt limit was raised from £12 to £20. In 1963 these limits were raised, in turn, to £250 for the summary cause and £50 for the small debt court. Then came the grant Report on the Sheriff Court in 1967, which recommended that the small debt and summary cause procedures should be replaced by a new summary procedure, "very closely akin to the existing small debt procedure", which would apply generally to actions up to £250 in value (Cmd. 3248, para 145). They wanted something "much less cumbersome" than ordinary court procedure (i.e. procedure in actions for more than £250) (paras. 552-554, esp.553): "a standard summary procedure which would largely assimilate actions to the existing small
debt procedure, and would not resemble ordinary procedure" (para. 611).

You will see, however, that that is not quite what we now have. After the Grant Report there came the Sheriff Courts (Scotland) Act 1971; the Sheriff Court Rules Council was reconstituted and applied itself to the task of drawing up Rules for the new summary cause; and these Rules were promulgated in 1976, coming into operation, as I have said, on 1st September of that year. The upper limit was, in the event, £500, not £250.

I am not going to take up your time with a long description of the new procedure. I shall try to avoid technicalities, and I shall confine myself to actions for payment of money, in which I think we are primarily interested. I shall say nothing about actions for recovery of possession of heritable property and other particular forms of action which all have their own special rules.

In outline, then, a summary action for payment of money begins with a summons for payment, in which the pursuer has to set out his claim in writing. This summons is then served on the defender, who is entitled to fill up one or other of two forms, Q or R, depending on whether he wishes to defend the action or to admit the debt and offer instalments. If either form is returned, and if in the case of Form R, the instalment offer is rejected, the case duly calls in court. Where the defender wishes to defend the action he states his defence, which is noted on the summons by the sheriff-clerk, and the court fixes a proof. If the dispute is only about instalment payments, it is resolved there and then by the court. If there is to be a proof, then before: -hand witnesses have to be cited to attend, documents may have to be recovered by official procedure, and at the proof...
itself the ordinary rules of evidence and the conventions of adversary procedure apply.

So as far as the preparations for and conduct of the proof are concerned, the summary cause is very like an ordinary action. Otherwise however there are important differences; the procedure is simpler to the extent that written defences are not absolutely necessary; there is no period of time set aside for the adjustment of written pleadings and no provision for reproducing them in their final form in a closed record; there are no preliminary debates before the proof; no shorthand notes of the evidence; and in general no delay after the proof while the sheriff composes a reserved written judgement. Normally the sheriff pronounces his decision orally at the conclusion of the proof; and then there is only a limited right of appeal on questions of law to the Sheriff Principal by way of stated case. There may be a further appeal to the Court of Session, but only if the Sheriff Principal certifies that the cause is suitable for appeal to the Court of Session.

It is therefore possible to point to these features of the new summary cause procedure and say that it is in these respects less complicated than ordinary civil procedure. But the first question which interests us today is, How complicated is it from the point of view of a layman or woman who wants to represent himself or herself, either as pursuer or defender?

Before we look at a few details it may be important to consider just to what extent the procedure is actually operated by lay people in contested cases. In Glasgow last year (1977), the total number of summary actions for payment which were raised was 25,817. The total number of other summary causes raised was 17,797, giving a grand total of 43,614. Of these, proofs were fixed in 646. It is thought
that about 150 proofs actually proceeded. It seems that
difficult questions of fact or law seldom arose because in
only 21 cases did the sheriff think it necessary to issue
a written decision; there was 17 appeals to the Sheriff
Principal, and in only 6 of these did the Sheriff Principal
issue a written decision. There were no appeals to the
Court of Session - indeed there have never been any from
Glasgow under this procedure. If that is any guide to
the comparative simplicity of the issues in summary causes,
it is all the more significant that in Glasgow - I have no
figures for the country as a whole - we have never had a
case of a party pursuer conducting his own case in a summary
cause which was defended on the merits and went to proof
before a sheriff. As to defenders, we have of course had
many defenders filling in the appropriate form and attending
court to make representations about instalments; but there
have not been many cases of a lay defender contesting the
merits of the claim and conducting his or her own case at a
proof.

Why, then, do we see so few party litigants in summary cause
procedure? One of the reasons is, I think, that virtually
every stage of the procedure can be a major hurdle for a
layman. It may be observed at the outset that the litigant
must either instruct a lawyer or represent himself, for all
practical purposes. In other small claims systems, it is
possible to have a representative other than a lawyer
presenting all stages of the case on your behalf; but the
summary cause Rules provide for such a representative only
if the court is satisfied that he is suitable and only where
the cause is not defended.

Let us look at the procedure firstly from the point of
view of a pursuer. His first requirement is advice and
information. If he does not go to a lawyer, he may go to
a Citizens' Advice Bureau. If he goes to the sheriff-
clerk's office, he will be given the leaflet entitled "Guide
to the new summary cause in the sheriff court", which is
issued by the Scottish Information Office on behalf of
Scottish Courts Administration, and the procedure will be explained to him; but he will not be advised what action to take. The leaflet is accurate and as helpful as one could hope for in the available space, but it is obviously not as detailed and as useful as Mr. Michael Birks' "Small Claims in the County Court", which advises litigants in the English county courts how to sue and defend actions without a solicitor. If the Scottish lay pursuer wants more detailed information, he has to go to the Stationery Office and buy a copy of the Summary Cause Rules (properly called the Act of Sederunt (Summary Cause Rules, Sheriff Court) 1976).

At this stage we may envisage our imaginary pursuer becoming daunted at the outset, because the Rules, whatever their virtues, are not expressed in language which a layman could reasonably be expected to understand. There are 93 Rules, covering 28 pages. If he reaches Rule 18 (7) he will learn that the diet of proof will be a proof habili modo; and if his evidence is in danger of being lost, it is doubtful if he will be reassured by the provision in Rule 34 (1) that such evidence may be taken to lie in retentis. It seems a pity that the opportunity was not taken to express the Rules in simple language; but I suppose the argument against it was that if you take a concept which is expressed in conventional language in the rules for ordinary actions, and try to express it in simple language in the Summary Cause Rules, people may think that because you have chosen a different form of words your meaning must be different.

However that may be, let us suppose that the pursuer reaches the point of obtaining the appropriate form of summons. At this stage the major hurdle, where many need help, is the formulation of the statement of claim. Rule 2 requires: "There shall be appended or annexed to the summons a statement
of claim containing a concise statement of the facts which form the ground of action including, where appropriate, a note of the nature of any contract founded upon or any relevant statutory provisions. Without prejudice to the foregoing generality, where the cause arises from the supply of goods or services, the goods or services, and the date or dates on which they were supplied shall be specified".

Lay people find this difficult, and really need advice about drafting their claims. It is important that all the details required should be stated, because if they are not, there is a risk that the sheriff-clerk will refuse to sign the summons (which is an essential preliminary to service), or that the sheriff will dismiss the action as incompetent. Obviously, neither a sheriff-clerk nor a sheriff would do such a thing without giving the pursuer every opportunity and encouragement to redraft, but drafting the statement of claim remains a hurdle nevertheless.

Once the summons is drafted and signed, it has to be served on the defender. And that is not something the pursuer can do for himself. He must employ a sheriff officer, and pay him. He is entitled to charge up to £1.20 (Act of Sederunt (Fees of Sheriff Officers) 1977, Sched. Part II, para 2), but in practice, I understand, will charge a lay pursuer a modified fee.

If the action is undefended, or if there is only a question as to instalments, the unrepresented pursuer has no particular difficulty, except that if the defender does not pay up, the pursuer will have to instruct a sheriff officer in order to enforce the decree. But I shall say a little about diligence later.

If the action is defended, then the pursuer must prepare for the proof; and that presents him with some further
hurdles to clear. The leaflet does not help as to the preparation for and conduct of the proof. The pursuer must decide for himself how he is going to prove his case according to the rules of evidence; and very few laymen would be able to decide that without assistance. Having decided what witnesses and documents he needs, he must instruct a sheriff officer to cite the witnesses to attend at the proof, remembering to give them not less than seven days' notice. He must also remember to lodge any necessary documents or other productions not less than seven days before the proof. If the defender lodges productions, an unrepresented pursuer cannot borrow them, because productions may be borrowed only by a solicitor.

At the proof itself, as I have said, the ordinary rules of evidence and the conventions of adversary procedure come into play, as in an ordinary action. Let me say at once that there is nothing intrinsically wrong with having rules about evidence and procedure; quite the reverse. The judge in any litigation is occupied for nine-tenths of the time with getting at the facts; more often than not, once the facts are determined the law is clear, and the result is not in doubt. It is the fact-finding that is the problem, because the data may be very unreliable - the recollections, the biases and even the dishonesty of witnesses; and documents of doubtful origin, or which have been compiled in a way which cannot be distinctly ascertained. Such data are inherently less reliable than those available to the scientist, for example; and the rules of evidence and procedure are concerned with techniques for the collection, presentation and evaluation of the data upon which the Judge has to make his decision, so as to leave as little room as possible for error or unfairness. That is not to say that the present rules are perfect: of course they are not. But it would be a mistake to conclude from their imperfections that it would be better to have virtually no rules at all.
The major difficulty presented to the unrepresented party by our present system of procedure is this. The ascertainment of who is telling the truth and who is mistaken or even lying is not a simple problem. Diffident, honest people may give an impression of insincerity which is quite erroneous, and may be unable to cross-examine effectively, while aggressive personalities may display an apparent frankness and straightforward honesty which is equally misleading. Left to present his own case, the diffident man may well fail to bring out the good points in it, while the aggressive man may be considered to be convincing.

In that situation the sheriff can do little to help, because the traditional view of the role of the judge in both Scotland and England is that he should play a passive role and leave the conduct of the case to the parties; the court should act as an umpire to see that the parties play the game of litigation according to its rules and to give an answer at the end to the question, "Who's won?" It would be quite improper for the sheriff to intervene and give advice or assistance to one party rather than the other. Now judicial passivity may be all very well, or at any rate all very well up to a point, where each party is represented by a skilled advocate; but where that is not so, it is less than satisfactory. There is room for the view that, where there is no skilled representation, the sheriff should be free to call witnesses whom the parties do not call, to obtain documents and other material which the parties have not placed before him, to interrogate witnesses himself, to obtain the services of an expert to advise him on technical matters, and to investigate the law and take points of law which the parties do not take.

It is said in the Scottish Consumer Council's Proposal for an Experimental Small Claims Scheme in Scotland that the...
assumption of such a role would require some change of attitude by sheriffs trained in a different tradition. But I think, myself, that sheriffs would readily be able to adopt the appropriate attitude. I would commend to you the opinion of one of our judges of a generation ago, Lord Mackay, who said, in the course of one of his opinions: "...I wish to indicate very strongly that our sheriffs are not unreasonable beings" (Mottram v Butchart, 1939 SC 89, at p.98). I find that very comforting! The role of inquisitor is not quite unfamiliar to the Scottish sheriff, because it somewhat resembles the function of counsel called upon to advise a client about a legal problem - he calls for all the relevant information, favourable or unfavourable; requires witnesses to be interviewed; decides for himself the points of law which are involved in the case; comes to a view as to the relative strengths of the cases of either side, and is able to advise his client whether his case is sound or unsound.

So far, I have been considering the complexity of the summary cause procedure as far as an unrepresented pursuer is concerned. The position of the unrepresented defender is also difficult. If he chooses to do nothing, he will of course, have to pay the principal sum and expenses, plus the cost of enforcement of the decree if he does not pay up. If he considers defending, he has problems similar to the pursuer's as to obtaining advice and information. If he decides to admit the claim and offer instalments, he should complete Form R; and if, on the other hand, he decides to attend court to defend the action or dispute the amount claimed, he should complete Form Q. If he is offering instalments, he really ought to attend court to see whether his offer is accepted, because if different instalments are fixed, or if the pursuer obtains an open decree, there is no duty on anybody to intimate that fact to the defender. But that is not made clear to him.
Now, experience shows that many defenders do not understand what they have to do. They do not fill up the forms properly, or they do not send them in timeously, or they fail to attend court, with the consequence that decree passes against them and they have to lodge a minute for recall of the decree or, where they had intended to make an instalment offer, contact the pursuer's solicitor and try to come to some amicable arrangement about payment.

If a "Form Q defender" appears in court and states a defence, he will probably do so inadequately. If what he says leads the pursuer or his solicitor to consider that further inquiries are necessary - as not infrequently happens when a large corporation has sued on the basis of information which is out of date by the time of the first calling, or even was quite wrong in the first place - a continuation of not more than four weeks will be granted, and the defender will be handed a white card, explaining what has happened, telling him when to return to court and advising him about legal advice and legal aid.

If the defender has stated a defence and the pursuer's agent does not seek a continuation, the defence is noted, a date is fixed for the proof, and the defender is given a yellow card with the date of the proof, advice about procedure and legal aid, and the words: "You are advised, in your own interests, to consult a solicitor without delay".

The defender is exhorted to obtain legal advice because the court recognises that the complexity of a defended proof is such that most defenders cannot be expected to represent themselves adequately, and there is a risk that they will be left, at the end of the day, paying not only the principal sum but also the expenses of the pursuer as well as their own, and thus, in many cases, paying out in expenses an amount
in excess of the subject-matter of the cause.

This leads me to pass from the issue of complexity to
the issue of expense. In an undefended summary cause,
the court dues payable to the sheriff clerk range between
£1.50 and £7.50, depending on the sum sued for (Act of
Sederunt (Fees for Sheriff Clerks) 1977, amended by Act of
Sederunt (Amendment of Fees for Sheriff Clerks) 1978). If
a solicitor is instructed, the total expenses payable range
from between £10.19 and £24.70 (Act of Sederunt (Solicitors' Fees) 1976). Thus, a debt of £3 may carry expenses of more
than three times the sum sued for. These are expenses which
the defender has to meet, even although he has admitted the
debt all along.

In defended summary causes, the loser will ordinarily have
to pay the victor's expenses as well as his own; and the
total payable may well exceed the value of the cause. The
fees chargeable by solicitors are not excessive, but these,
together with the expenses payable to witnesses, make it
difficult to undertake a summary proof for less than £100
on each side. There is nearly always some element of risk
in litigation, and clearly few people are going to risk up
to £200, or even more, on a comparatively small claim. One
suspects that a number of valid claims are not brought, simply
for that reason: the procedure is too expensive.

The expense of diligence, or enforcement of the judgement,
can be very hard on the defender. It may, of course, arise
whether the action is defended or undefended. In a recent
undefended action in Glasgow, the sum sued for was £11. The
expenses amounted to £9.68: a total, then, of £20.68.
Diligence was done to the extent of a sale of furniture which
realised £35. But the expenses were such that there remained
a balance due by the defender of £33.13. In other words, the
defender, having failed to pay the debt of £11, had some of
his furniture sold for £35 and was still left with a bill for
£33.13. The charges were entirely proper, and the procedure

...
quite irreproachable. But the result seems indefensible, unless on the draconian ground that it was all his own fault for not paying the debt in the first place. But surely nobody, however much at fault, should have to suffer loss so disproportionate to his original debt. This branch of the law is, of course, under review.

The next factor to consider is speed. In Glasgow a defended summary cause goes to proof some three months after the action is raised. It is prudent to allow four weeks between that date and the date when the defender has to return his form, because he is entitled to fourteen days' notice and it is wise to allow for reservice if the summons does not reach him initially. Then seven days must elapse between the return date and the date of the first calling in court. If a defence is stated then, a proof is fixed for a date two months ahead. Thus, the procedure takes three months altogether. It would be preferable to fix the proof for only one month ahead, but in Glasgow the pressure of long-outstanding criminal business is such that we are having to discriminate to some extent in its favour.

I would sum up this assessment of our summary cause procedure by saying that while it is reasonably quick, it is not simple and it is not cheap; and to that extent it fails to measure up to the basic requirements of an acceptable small claims procedure. My final observation is that there is no provision in the rules for conciliation. The Summary Cause Rules, like the Sheriff Court Rules in ordinary actions and the Court of Session Rules, are framed, at any rate implicitly, on the footing that actions which are raised in the courts will proceed to proof. In fact, however, as we have seen, only a very small proportion of them ever reach that stage, so that the basic philosophy of the Rules does not match the realities of practice. May it therefore be desirable to reframe the procedure on the basis that most of the actions
which are raised will not proceed to trial, and to emphasise methods of disposing of contested cases without a final determination by the court? This may be of some social importance, because at present we have no means of knowing how many litigants are genuinely satisfied with the settlements which are at present achieved, and how many feel that an unsatisfactory settlement has been forced on them by the economics of litigation. Under the present system, the courts take little interest in such people, although they form by far the largest proportion of the courts' customers, and reveal what one might almost call social "ills" consisting of legal disputes or questions which cause anxiety, frustration and grievances which the courts, by their procedures, should try to minimise rather than increase.

Should the courts, therefore, provide some encouragement of conciliation, or even provide a conciliation service as an adjunct to the service of adjudication? Under such a service, if parties could not agree to a settlement between themselves, they might be assisted to reach a compromise without either of them being categorised as being the victor or the loser. Master I.H. Jacob, QC, the Senior Master of the Supreme Court, had this to say when commending the introduction of a conciliation process into the general law of civil proceedings: "It will certainly need a new type of approach and perhaps a new method of dealing with parties somewhat different from the approach of simply adjudicating between two parties as to which of them is right and which is wrong. Conciliation is a socially valuable process for adjusting relations between parties who are in controversy, even if the controversy concerns their legal rights and duties; it is a healing process, a method of producing greater social harmony and understanding, a process for bringing parties together rather than increasing the tension and estrangement between them; it will increase the quality of justice and the cultural level of the civilisation that adopts it as a method of..."
resolving legal disputes". ("Accelerating the Process of Law: A Preliminary Memorandum" (International Congress on the Law of Civil Procedure, Ghent, (1977), p.66)). In the field of small claims, a conciliation process may well be particularly valuable.

THE ENGLISH EXPERIENCE IN SMALL CLAIMS SETTLEMENT PROCEDURES - MR. MICHAEL BIRKS

Mr. Birks opened by saying he was gratified to find that the Seminar was interested in what goes on south of the border.

In county courts there are two categories of money claim:

1. A fixed sum where the plaintiff knows how much he is suing for; and

2. Where the plaintiff asks the court to decide the amount of his claim, e.g. a claim for damages.

1. In the first category no return day is fixed. If the defendant does not reply in 14 days after service, judgement is entered against him. The plaintiff can then proceed to enforcement. If a defence is filed a preliminary hearing before the Registrar is arranged. This is known as the Pre-trial Review.

2. In the second category of action a return day is fixed at the outset for a Pre-trial Review. This is stated in the summons when it is issued. The initial summons is normally served by the court using either the post or the bailiff. At least 75% of summonses are served by post. A form of defence or admission is enclosed with the summons which the defendant can fill in and return to the court. The court will help the defendant to a limited extent at this stage.

/...
The Pre-trial Review is generally held in private although some Registrars hold them in public. The object of the Pre-trial Review is to find out what the case is all about, i.e. to make sure the issues are defined; to ensure the parties have all the information they are entitled to; to ensure that relevant documents will be available at the trial; to fix the hearing date.

It also provides an opportunity for the parties to get together and the Registrar can try and promote settlement and also has the chance to strike out frivolous claims and silly defences.

It should be noted that the Pre-trial Review has "teeth". The Registrar has the power to enter judgement if either party fails to attend. This may strike one as draconian but since judgement can be entered easily, it can also be set aside easily. Before setting aside judgement, the Registrar should be satisfied that the defendant has a proper defence. The Registrar has power to impose terms on the defendant if there is a suspicion that he is merely delaying or if he is doubtful about the validity of his defence. The Registrar can direct that the defendant pays a sum into court.

Arbitration in the county court goes back to 1888. The judge had power with the consent of both parties to refer any action to arbitration on terms he considered just and reasonable. The County Court Act 1973 gave power to the court to refer disputes to arbitration on the application of one party and this is the origin of the English small claims procedure. At the same time, the monetary threshold for solicitors' costs was raised to coincide with the limit of the Registrar's jurisdiction to deal with arbitration. For small claims the court was thus in a position that enabled it to modify the strict rules of evidence, obtain expert reports, have private hearings etc. Since last October (1977) any claim
within the Registrar's jurisdiction (now £200) must, subject to certain exceptions, be referred to arbitration if the plaintiff asks in the summons or the defendant in the defence. Larger claims may also be referred to arbitration as before, unless the other party objects. It will be noted that the Registrar's jurisdiction (£200) is greater than the small claims costs threshold. This costs threshold is likely to be raised again in the near future*

The arbitrator is normally the Registrar. But the judge himself (if he agrees) can act as can an outsider if both parties agree. In practice, it is invariably the Registrar who acts as arbitrator.

How the County Court small claims scheme works in practice;

The criteria for an effective small claims procedure is as follows:-

1. To enable parties to bring and defend actions for reasonable amounts without the risk of being liable for solicitors' costs if the action is lost.

2. To keep attendances at court to a minimum and to dispose of cases quickly.

3. To ensure that the court knows the real issues and can be reasonably certain that all the relevant facts will be brought out.

4. To hear cases in an informal atmosphere which enables the parties to state their case without embarrassment yet maintain sufficient decorum to command respect for the Court.

1. MAKING THE CLAIM

Most laymen have difficulty in setting out all but the simplest claims in writing. To minimise this difficulty parties are provided with a selection of claim forms covering the ten most common situations. These forms are in simple question and answer style and seen to work in practice. The Pre-trial Review provides an opportunity for rectifying any mistakes

* (Editor's Note: This was done as from July 1978)
a party might have made. Unfortunately, the Pre-trial Review is not mandatory and there is an indication that many county courts are dispensing with the Pre-trial Review. This may lead to avoidable expense since the Pre-trial Review can save expenses for parties. Only if the Registrar has studied the papers himself beforehand might there be a case for dispensing with Pre-trial Review. The infrequency of settings in, for example, county districts might justify dispensing with the Pre-trial Review. On the question of including or excluding trade plaintiffs it has been estimated that in the county court 50% of all defendants are litigants-in-person. Any move to exclude traders from the system would therefore also exclude these defendants. Many of these defendants are credit purchasers who are dissatisfied with their purchase. They have therefore stopped payment and have been sued by the trader. Why should these defendants be excluded from the arbitration procedure?

By what is known as the default procedure 90% of creditors get default judgements. In the U.S.A. there is no default procedure and traders would clog small claims courts if they were not excluded.

Small traders or companies often cannot afford solicitors so there are a fair amount of purely commercial litigants using small claims procedure. Costs, and fear of them, are at the crux of the system. The higher the costs threshold is raised, the more clamour there is for solicitors' costs to be awarded in difficult cases. There are many claims under £200 of value where the award of costs is
justified, e.g. test cases. It is vital to have a "two door" system: (1) the ordinary jurisdiction with the solicitors' costs regardless of the amount of the claim and (2) the arbitration division with no solicitors' costs. In the ordinary jurisdiction, where the sum claimed is below the small claims limit the plaintiff should justify the grounds for employing a solicitor; otherwise the case should be transferred to the arbitration division. In the arbitration division the defendant should justify the grounds for transfer to ordinary jurisdiction.

2. MINIMUM ATTENDANCE

The plaintiff wants money rather than a trial. The defendant does not want a trial but merely does not want to pay. Default procedures keep down the number of attendances at court as much as possible. If the Pre-trial Review is used properly and firmly it reduces attendances in most cases. And personal confrontation frequently helps settlement. By acting as a catalyst the Registrar can often bring the parties together. Conciliation should be a function of any civil court. Many Registrars do try to bring parties together. In practice, many consumer claims can be decided at the Pre-trial Review stage, especially small disputes over, e.g. boots or shoes. At present the rules do not oblige the Registrar to help parties or to conciliate. The rules should ensure that the Registrar endeavours to seek a settlement. It is, however, difficult to get some Registrars away from the "umpire" approach to small claims disputes.

3. ISSUES

An adversary system is only effective if the issues are defined and the parties come to court fully
armed with all the evidence. Where parties are legally represented the court can usually rely on their representatives to present the evidence and the relevant law. The judge, therefore, remains passive. With litigants in person the issues are seldom defined. The cause of the action may even be the wrong one and parties don't know what evidence is required to prove the issues. The judge must therefore play an active role, otherwise there is a risk that justice will not be done. Although nothing is laid down, the conduct of the hearing should vary according to the parties. Although in theory the rules of evidence are disregarded in practice it is not quite so.

4. INFORMAL HEARING

Reference to arbitration is on such terms as the Registrar thinks just, e.g. exclusion of legal representatives or a decision being made on the documents alone. This is not satisfactory - there should be reasonable consistency prescribed by the rules. On the conduct of the arbitration, Mr. Birks said that his practice was to question each party in turn and then call their witnesses and question them. In commercial matters, it is often possible to act as "Chairman of the Board" and allow discussion to develop. This approach can work where there is no dispute as to the facts. The parties sit at the table in front of his desk and give their evidence. It is almost invariably in private. Giving a reasoned judgement is important. The loser is entitled to know why he lost. It is not mandatory at present to give reasons and this is unsatisfactory. Professional judges are necessary since they must evaluate the evidence and ascertain the law applicable.

...
The general views of the Workshop were as follows:
That any small claims court should fit in with the court structure.
That it is not a good idea to put debt collection in a separate court.
That the small claims court should not be restricted to small consumer claims.
The sheriffs in the Workshop thought that they could adapt to the necessary inquisitorial role; others had doubts.
Doubts were also expressed on the use of experts as adjudicators; it was thought more appropriate merely to have the adjudicator assisted by the expert.
It was felt that Pre-trial Review procedure would be very valuable in any small claims scheme.

Although there should be no appeal some mechanism could perhaps be provided whereby the adjudicator could certify a case for appeal (on a point of law) if either party wishes to take it further.

Points expressed at plenary session:

Unless the scheme is compulsory defenders could keep out of it.

It should be restricted to consumer claims initially; do not want too complicated a scheme at first.
Small traders should be able to use the system.

The difficulty of the type of claim allowed could be resolved by letting all types of small claim into the system but giving the adjudicator power to remit to the summary cause procedure.

It is doubtful if sheriffs in places such as Glasgow have the time to take on the extra duties involved in adjudicating small claims.

Allowing the adjudicator to certify a case for appeal would answer the problem on the development of substantive law.

There should be no appeal because it would be impossible at the outset to advise a claimant on the limit of his financial liability.

Could have a hypothetical appeal by letting the adjudicator's decision stand but appealing the judgement to a higher court. Provision could be made for payment out of public funds.

It is understood that one of the Australian States has this hypothetical appeal mechanism.
WORKSHOP 2 "A SIMPLE PROCEDURE: WHAT DO WE MEAN BY THIS?"

CHAIRMAN: MRS. ESME WALKER, SOLICITOR,
MEMBER OF SMALL CLAIMS WORKING PARTY

The general views of this Workshop were as follows:

It would be almost impossible for a lay person without help to use any small claims scheme. There would therefore be an important role for the "helping agencies".

An ombudsman for small claims was suggested by someone in the Workshop.

On balance, it was thought that legal representation should be allowed since it would encourage some who would not otherwise use the scheme.

An inquisitorial system should be the appropriate one.

Not in favour of cases being decided on paper submissions only.

The question of enforcement was complicated.

Points expressed at plenary session:

When small debt procedure first introduced lawyers were excluded so lawyer got debts assigned to him so could appear in small debt court. Later the law was amended to allow representation. If an informal scheme is set up it is essential to keep the legal profession out.

The question was raised as to whether Consumer Protection Departments could have a conciliatory role to play and in reply an official of Strathclyde Consumer Protection Department said that this happens in practice to some
Why should not the adjudicator be able to decide a case on the basis of paper submissions?

The question of legal representation was very important. A voluntary scheme should not start by excluding legal representation as it might discourage some defenders.
WORKSHOP 3 "A CHEAP PROCEDURE: WHAT DO WE MEAN BY THIS?"


The general views of the Workshop were as follows:

Any small claims scheme should be open to all claims up to £500.

The scheme should accept any type of claim within this financial limit.

One of the reasons for the £500 limit was that initially the scheme would be an experiment to compare it with the summary cause procedure.

There should be free advice and assistance from the offices of the scheme. This would have implications for the training of sheriff court staff.

Fees payable by parties should be the same as for the summary cause procedure. They should be paid at the outset.

No representation of any kind should be allowed but if it was, then lawyers who represent parties should not be able to recover costs.

No costs or expenses should be awarded at all but perhaps the court fee should be recoverable.

Points expressed at plenary session:

If no lawyers are allowed how can the problem of commercial organisations using senior (perhaps legally trained) staff to present their case be overcome? This
could lead to an imbalance.

The fluency of one side in presenting their case should not matter if the adjudicator is doing his job properly.

What is to happen if one of the parties, say through infirmity, cannot come to court? What is to happen to an illiterate party?

If a party wanted to employ an expert witness he should be able to do so but the scheme itself should also be able to call on expert witnesses.

If no expenses awarded it could prevent a lot of claims being made.

Should any costs incurred not be met by scheme?

If anyone can now sue in the small claims system proposed will solicitors - and even sheriff officers - become redundant?

Why not abandon thoughts of special court and just adopt Pre-trial Review before final proof. This would dispose of 75% of the cases.

Pre-trial Review and an option by the sheriff to send to arbitration rather than a root and branch change in procedure might be all that is necessary.

The suggestion (immediately above) is like the English county court system but people still use the Manchester Small Claims Scheme. In Scotland there is the chance to go a step further and establish a different system altogether.

One of the reasons for the proposed new procedure is that/...
there is a suspicion that a large number of people would use the scheme who would not use the summary cause procedure. There is an "unmet need" which is difficult to quantify. It is not enough to tinker with the system here and there. Slight procedural modification to existing system will not affect things one little bit.

On lay representation, the court system is so intimating that a "friend" should be allowed. The "friend" can always be "controlled" by the adjudicator.

All the arguments on quickness, simplicity and cheapness could be met by tinkering with the current system.

The vast majority of complainers coming into Consumer Protection Departments do not want to go to court. Agree that tinkering with the present procedure is not enough.

The crux of the matter is the change from the "referee" role to that of inquisitor.

If people see that the court is working properly, they will become less reticent about using it.

It is important to consider holding the hearings outside ordinary court hours.
WORKSHOP 4 "ADVICE AND ASSISTANCE TO CLAIMANTS AND DEFENDERS"

CHAIRMAN: FRANCES ALLEN, SCOTTISH ASSOCIATION OF CITIZENS' ADVICE BUREAUX.

The general views of the Workshop were as follows:
The Workshop started by defining small claims as the settling of disputes rather than the settling of debts.

In giving advice and assistance, it was felt that some decisions were not appropriate for court officials to advise on. Perhaps court officials should be restricted to giving information only. The inadequate network of advice agencies in Scotland gave concern.

There was an important conciliatory role to be played by any small claims scheme. Many go to Consumer Protection Departments because they do not want to go to court.

The conciliation powers of the Citizens' Advice Bureaux are more limited than those of Consumer Protection Departments.

The Citizens' Advice Bureaux role is different from that of the Consumer Protection Departments since they help only one party.

Solicitors could have a role using the Legal Advice and Assistance Act.

A Citizens' Advice Bureau type worker in court might be useful. The court officials are well placed to give information but it was perhaps better if advice came from someone such as a Citizens' Advice Bureau worker.

/...
There might be a problem in finding enough workers to fulfil this role. As an alternative a new kind of "legal animal" was suggested.

There might be a problem of increasing the costs of any scheme by providing these services to litigants.

There is a problem as to how advice and assistance can be given during the course of hearings. There might be a "hand-holding" role for helpers.

There was a strong feeling that litigants need support of some kind.

A pre-requisite for any scheme would be the availability of clear pamphlets.

Most were in favour of a compulsory rather than a voluntary scheme.

On enforcement court officials could give information.

On the advertising of the scheme the Office of Fair Trading was seen to have a role.

Points expressed at the plenary session:
It is not impossible to advise both claimant and defender and be impartial.

This is done in Manchester without much difficulty and also in the New York small claims court. In practice, it is not an obstacle.

On being asked the question, a Sheriff did not think there would be much difficulty in adapting to an inquisitorial role.
CLOSING REMARKS BY THE HON. LORD HUNTER V.R.D.

Lord Hunter said that although it was difficult to summarise the three talks and all the points made at the Workshops and the plenary sessions, there seemed little doubt that the Seminar fairly unanimously favoured the view that there should be introduced into Scotland a procedure for the settlement of small claims.

The following points were also referred to by Lord Hunter in his summing-up of opinions expressed during the Seminar:

The summary cause procedure tends neither to be cheap, nor to look simple, and the feeling that the courts are awesome does apparently exist.

It should be borne in mind that consumer legislation is often complicated and voluminous, difficult to devise and difficult to interpret and understand. Much of this legislation was pressed for by consumer organisations. Only in a small proportion of consumer disputes, however, is a question of law likely to arise.

Regarding the adjudicator, different opinions had been expressed as to who should fill this role, but the balance of opinion expressed at the Seminar appeared to be in favour of sheriffs acting as adjudicators of small claims under relatively informal procedures.

Those who advocate a new tribunal - with its separate buildings, adjudicators and staff - should bear in mind that on grounds of simplicity and economy, there is much to be said for making use, where possible, of existing institutions, particularly in a small jurisdiction like Scotland.
Experts are often not very good decision-makers.

On the question of expense it is natural for consumer organisations to look to the State rather than to litigants to meet many of the outgoings.

On the great question as to whether any scheme should be voluntary or compulsory, the general view of those attending the Seminar appears to be that any long-term scheme should be mandatory.

On the details of the scheme, Lord Hunter observed that forms are very important especially when they have to be filled in by people who may be illiterate or inarticulate. The forms drafted by Mr. Birks, though on the face of them very simple, are the work of a very ingenious and skilled mind.

On evidence and procedure, the Pre-trial Review is absolutely essential in order to weed out vexatious and hopeless cases.

Written evidence may often be cheaper, but people frequently fail to incorporate in written statements all the information that is required.

In order to save expense it would probably be necessary to have a totally inquisitorial procedure, and for the same reason representation of the parties at the hearing might have to be dispensed with.

The question of expenses creates great difficulties. It is difficult to say that there should be no expenses awarded at all. If the procedure is mandatory, this may be very unfair.

Finally, Lord Hunter remarked that little has been said about the very difficult area of citation and enforcement.
Lord Hunter concluded by asking Mr. Clarke to read out the final resolution passed by the Seminar.

FINAL RESOLUTION PASSED BY SEMINAR

This seminar considers that there is a need in Scotland for the provision of simple inexpensive and informal procedures for the settlement of small claims.

While welcoming the initiative of the Lord Advocate in planning to mount an experimental and voluntary scheme within a Sheriff Court District in Scotland, the seminar urges the Lord Advocate to give serious consideration to the establishment in early course of a small claims procedure throughout Scotland, which might in appropriate circumstances be mandatory, and so resolves.
APPENDIX 1

WORKSHOP PAPER 1

WORKSHOP:— THE ADJUDICATOR AND THE FORUM

CHAIRMAN: SHERIFF J.J. MAGUIRE
MEMBER OF SMALL CLAIMS WORKING PARTY

1. INTRODUCTION

It is necessary to consider, first, whether a voluntary arbitration scheme outside the courts would adequately meet the objectives of a simple and effective small claims scheme. If a scheme within the courts is proposed, it is essential to know exactly what type of case is envisaged for the procedure. Some countries put debt collection actions to a separate court. Is there merit in this? Are we concerned for small consumer claims only—actions regarding the supply of goods and services—or is there a case for a wider remit?

2. THE ADJUDICATOR


(2) The inquisitorial role of the adjudicator. How will this conform to existing court procedures?

(3) Would any special training or instruction be necessary for the adjudicator?

/...
3. THE FORUM

(1) Is a voluntary arbitration scheme outside the court system to be preferred on any count? Cheap? Simple? Enforceable? Authoritative?

(2) The Pre-trial Review in the English and other courts leads, in effect, to settlement of most cases. Are there Scottish equivalents? In any new Small Claims Procedure how could the Scottish courts provide such a hearing?

(3) Should the hearings be in public or private or at the discretion of the adjudicator?

(4) Does the Sheriff-Clerk have a role to play in small claims settlement, e.g. Pre-trial Review?

(5) What appeal, if any, should there be from the adjudicator's decision?
APPENDIX 1 (CONT.)

WORKSHOP PAPER 2

WORKSHOP: - A SIMPLE PROCEDURE: WHAT DO WE MEAN BY THIS?

CHAIRMAN: MRS. ESME WALKER, MEMBER OF SMALL CLAIMS WORKING PARTY

INTRODUCTION

It is commonplace that individual citizens are frightened by the elaborate procedures of our legal system and that this deters them from taking legal action except in a last resort. How far can simplicity be introduced to the courts without loss of quality or justice? Is it "palm-tree" justice we want? How far will litigants accept "rough" justice if it is cheap and quick? Does simplicity of procedure necessarily entail "rough" justice?

(1) Simple for whom? The parties, the adjudicators, the court officials?

(2) In what way is the present Summary Cause Procedure complicated?

(3) In what parts of a procedure is simplicity most required?
   Access to the law?
   The paper work?
   Advice easily available at court?
   Rules of evidence simplified?
   Facilities for self-representation?

(4) How can the defender's interests be protected within a simple procedure?
   Should counterclaims be allowed?

/...
APPENDIX 1 (CONT.)

WORKSHOP PAPER 2

(5) Should legal representation be allowed? Should costs be allowed? Should representation by a "friend" be allowed? (Also being discussed in Workshop 3).

(6) Evidence: What evidence should be accepted? Should corroboration be necessary? What documents should be needed in support of a claim or defence?

(7) Should the adjudicator be able to reach a decision on paper submissions only?

(8) Should the hearing itself have any formal procedure? How important is the appearance of the court?

(9) Is any simplification of enforcement of the adjudicator's decision either desirable or possible?
APPENDIX 1 (CONT.)

WORKSHOP PAPER 3

WORKSHOP:- A CHEAP PROCEDURE: WHAT DO WE MEAN BY THIS?

CHAIRMAN: MR. D.I.K. MACLEOD, MEMBER OF SMALL CLAIMS WORKING PARTY

INTRODUCTION

We are talking of small claims and it is self evident that most sensible people do not want to spend £20 to retrieve £4 - let alone risk losing much more if they lose the case and have to pay heavy expenses.

How can the costs be pared down? Solicitors' charges are the heaviest item the litigant is likely to face. Is justice likely to be substantially denied if litigants are enabled to present their own cases? Is there a case for denying all litigants legal representation (although they will be able to take legal advice before starting an action)?

1. What is a small claim? How large can it be?
2. Should parties receive free advice and assistance from the officials of the scheme itself?
3. What fees should be payable and at what stage in the progress of any claim?
4. Should legal representation be allowed in the small claims system or only for claims above a certain level, e.g. above £100?
5. What costs or expenses should be recoverable by the successful party?
6. Should costs be related to the value of the goods in dispute?
APPENDIX 1 (CONT.)

WORKSHOP PAPER 4

WORKSHOP:- ADVICE AND ASSISTANCE TO CLAIMANTS AND DEFENDERS

CHAIRMAN: MRS. FRANCES ALLEN,
SCOTTISH ASSOCIATION OF CITIZENS' ADVICE BUREAUX

INTRODUCTION

It is vital that a small claims scheme has a back-up of advice and assistance in order that potential claimants may first of all be advised whether they have a case or not. If they do, it may often be necessary to give further assistance in completing the form initiating the action. Thereafter, it may be that many claimants require someone on hand to give advice and assistance during the course of the claim. Defenders, say a small trader, may also require this advice and assistance. One point that immediately arises is, should this help come from inside or outside the scheme?

1. What advice and assistance should the parties receive from the officials of the scheme or court officials?

2. What should be the role of Citizens' Advice Bureaux, Consumer Advice Centres and other advice giving agencies?

3. In areas where no appropriate advice agencies exist where should the advice and assistance be obtained?

4. Does the legal profession have a role to play? (Bearing in mind that legal representation may not be allowed in a small claims scheme below a certain level of claim).
5. Should representation by a "friend" be allowed at the hearing itself? Or should this be restricted to merely assisting the claimant to present the case.

6. What advice and assistance would be necessary at the enforcement stage? What role would the scheme officials/others play in advising the claimant of how to go about enforcement?

7. How should the service be advertised? Who should be responsible for leaflets explaining use of the scheme?
APPENDIX 2

DELEGATES:

The Rt. Hon. R. King Murray, Q.C., M.P., Lord Advocate

Chairman for the Day: The Hon. Lord Hunter, V.R.D., Chairman of the Scottish Law Commission

Chairman for the Plenary Session: Mr. J.P.H. Mackay, Q.C., Dean of the Faculty of Advocates.

SPEAKERS:

Mr. M.G. Clarke, Advocate, Chairman S.C.C. Small Claims Working Party
Sheriff I.D. Macphail
Mr. M. Birks, Registrar, West London County Court.

CHAIRMAN OF WORKSHOPS:

Sheriff J.J. Maguire
Mrs. E. Walker, Solicitor, Member of Small Claims Working Party
Mr. D.I.K. MacLeod, Solicitor, Member of Small Claims Working Party
Mrs. F. Allen, Scottish Association of Citizens' Advice Bureaux

DELEGATES:

Mr. E. Abrahams, Working Party of Scottish Directors of Consumer Protection
Mr. C. Adamson, O.F.T., London
Mr. M. Adler, Edinburgh University
Mr. K.F. Barclay, Secretariat, Royal Commission on Legal Services in Scotland
Mr. J. Barnard, Society of Messengers-at-Arms and Sheriff Officers
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Mrs. B. Doig, Scottish Central Research Unit
Mr. J.G. Doig, Scottish Courts Administration
Ms V. Ellison, Manchester Small Claims Court
Mr. G.M. Fair, Secretariat of Royal Commission on Legal Services in Scotland
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Mr. L. Freedman, Maclay Murray & Spens
Delegates:

Mr. S. Freedman, Commission of the European Communities.
Mr. A. Gamble, Glasgow University
Mr. J. Girdwood, Strathclyde Region Consumer Protection Department
Mr. I. Greer, Northern Ireland Office
MRS. M. Hammersley, S.A.C.A.B.
Mr. D. Harcus, Scottish Liberal Party
Mrs. Harper, S.A.C.A.B.
Miss E.M. Houston, Royal Commission on Legal Services in Scotland.
The Rt. Hon. Lord Hughes, Chairman, Royal Commission on Legal Services in Scotland.
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Mr. L.M. Lewis, Society of Messengers-at-Arms and Sheriff Officers.
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Mr. J. Maclean, Society of Public and Civil Servants (Sheriff-Clerk's Branch)
Mr. H. MacDonald, Scottish Law Commission
Mrs. A. Malcolm, Grampian Consumer Advice Centre.
The Hon. Lord Maxwell, Royal Commission on Legal Services in Scotland.
Mrs. F. Miskimmin, Northern Ireland Consumer Council.
Mr. G.K. Moore, Hamilton Burns & Moore, Solicitors, Glasgow
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Miss J. Potter, National Consumer Council
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Mr. P.M. Russell, Secretariat, Royal Commission on Legal Services in Scotland
Mr. R. Rennie, Society of Public and Civil Servants, (Sheriff-Clerk's Branch)
Mrs. M. Robertson, Scottish Television
Mr. R.R. Shaw, Scots Law Times
Mr. M. Sherwin, London Small Claims Court
Mr. K. Simpson, Society of Messengers-at-Arms and Sheriff Officers.
Ms. B. Stow, National Association of Citizens' Advice Bureaux
Mr. H. Terrell, Dundee and Tayside Chamber of Commerce
APPENDIX 2 (CONT.)

Delegates:
Mr. G. Turnbull, Working Party of Scottish Directors of Consumer Protection.
Mr. A. Walker, Society of Messengers-at-Arms and Sheriff Officers
Professor I.D. Willock, Editor, SCOLAG Bulletin
Mrs. E. Willock, Dundee Legal Advice Association
Professor W. Wilson, Edinburgh University
Mr. E. Wozniak, Edinburgh University
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Mr. P. Gibson
Mr. D. Purdom
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APPENDIX 3

MEMBERS OF SCOTTISH CONSUMER COUNCIL SMALL CLAIMS WORKING PARTY

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Mr. D.I.K. MacLeod, Solicitor
Mr. R. McCreadie, Scottish Consumer Council
Mr. M. Neil, Secretary, Glasgow Chamber of Commerce
Mr. D. Reid, former Director of Consumer Protection, Fife Region
Mr. J. Short, Director of Consumer Protection, Lothian Region
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