WHAT THE LEGAL COMMUNITY NEEDS TO KNOW ABOUT THE SMALL CLAIMS COURT

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INTRODUCTION

At the third annual Lawyer Referral Workshop held October 27-28, 1972, Chesterfield Smith, ABA President-Elect, stated that many legal needs of people of moderate means were going unresolved. He emphasized that under our "traditional system of resolving legal disputes and providing legal advice, it simply does not make economic sense to take every small claims to court. (emphasis added)"

It does not require an extensive empirical study of the problem to recognize the validity of Mr. Smith's statement; any person engaged in the private practice of law is aware of this inadequacy in our legal system. Moreover, it is not only the person of moderate means, but also the middle or upper income individual who is frequently denied substantial justice because of the lack of an appropriate facility for resolution of small claims. This defect in our judicial system has been criticized by the members of the bar and the bench, as well as by legal scholars for over half a century.

As an example, the minimum fee schedule adopted by the Nebraska Bar Association (not too dissimilar from minimum fee schedules in other areas of the country), while generally approved as realistic and not unduly high, effectively prevents legal representation of claims for less than a certain minimum. This minimum fee would ordinarily require the attorney to charge a fee of $100 for filing a petition, plus at least $25-$35 per hour for his services. When the claim is for $500 or less, and there is no provision for recovery of attorney fees from the losing party, justice may well be denied even though a meritorious claim exists.

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4. NEBRASKA STATE BAR ASSOCIATION MINIMUM FEE ADVISORY SCHEDULE AND MANUAL ON ECONOMICS OF THE BAR (1970). The schedule is commonly found in the Nebraska Lawyer's Desk Book.
5. Id. at 1, 11.
Nebraska, like most other American jurisdictions, seldom allows recovery of attorney fees in addition to the actual damages shown. Even where a contract includes a clause providing for the award of attorney fees, the clause is unenforceable, although the contract remains valid. Thus, it is in the very exceptional case, such as certain types of actions against one's own insurer, that realistic attorney fees are allowed, even when the defendant is known to have been acting wrongfully and intentionally.

The bar of Nebraska recognized this deficiency in the judicial system and indicated support for a change. During a survey of the members of the Nebraska Bar Association, approximately 80 percent of those responding favored a strong small claims court, a concept which was finally approved by the legislature in LB 1032. It is suggested that this law is one of the strongest, if not the strongest, bill passed by any legislature dealing with the problem.

A strong law, however, cannot of itself completely alleviate the difficulties; still required is the active assistance of the bench, bar and public. The purposes, then, of this article are: first, to briefly explain the Nebraska version of the small claims court; second, to analyze the legal community's role under the current implementation; and finally, to enumerate problems encountered in other jurisdictions and explain how the Nebraska enactment attempts to avoid these pitfalls.

THE NEBRASKA LAW

The act provides that every county court shall have a small claims court, as must each municipal court. This section is mandatory, not discretionary, and should a particular county judge refuse to establish such a tribunal, it is suggested that at a minimum,

6. The questionnaire sent to active members of the Nebraska Bar Association was intentionally brief and even slanted in the extreme. The questions asked were:
   I strongly support LB 1032's Provisions regarding a strong Small Claims Court
   I strongly oppose the LB 1032 Small Claims procedure.
   It is this writer's opinion that attorneys are particularly reluctant to indicate that they “strongly disagree” or “strongly support” anything. The questions were not designed to obtain statistical support for a bill being considered in the legislature, although the information certainly was useful for that purpose, but to attempt to learn how the practicing bar felt about a small claims court that does not permit attorneys and has other somewhat radical characteristics. The results were surprising. In any event, the results should dispel any notions of prejudice against small claims courts by attorneys merely because it may cause a loss of income to some. In fact, some of the most enthusiastic support for the proposal was from attorneys.

   SMALL CLAIMS SURVEY
   NUMBER OF CARDS SENT | % RETURNED | % IN FAVOR | % OPPOSED | % UNDECIDED
   2400 | 33% | 75% | 22% | 3%

8. For a comparative study of other small claims court provisions, see Appendix A.
mandamus would lie to compel compliance with the statute. Although it has been customary in some areas during the past few years to have civil cases heard by the municipal judges rather than in the county courts, it would be better if the small claims courts would operate concurrently in county and municipal courts so as to provide as many forums as possible and thus lessen the judicial burden.

**Jurisdiction**

A general practice in the past has been to limit the power of courts not only monetarily but also with regard to particular types of cases. Usually this has meant that courts of limited jurisdiction possessed no equitable powers nor could they hear assault, battery, libel or slander cases. In addition, some states have provided that such courts would have jurisdiction in civil cases for money damages only and frequently only in cases arising in contract, not torts.

Nebraska did not adopt these theories, for our small claims court has extremely broad jurisdiction. The act provides simply that the court can hear cases in "all civil actions of any type," provided the amount of the complaint does not exceed five hundred dollars. This will permit, therefore, actions for breach of contract, both intentional and unintentional torts, and all other types of suits that are regarded as civil in nature. Obviously this does not mean that all actions for injuries or damages of less than five hundred dollars can automatically be filed in small claims. One exception, for example, would appear to be an action against the state, since there is a particular statutory reference to such a claim being filed in the district court."

It is also possible to bring an action in small claims, the basis of which arose prior to the establishment of the court, provided the appropriate statute of limitations has not expired. Establishment of such a court is merely a procedural change and therefore does not affect the substantive rights of the parties.

The court may also hear requests for equitable relief in certain instances. For example, it may make a determination that a contract is disaffirmed and the defendant is no longer liable thereunder, whether due to fraud, minority, breach of warranty or any other reason. The primary purpose for inclusion of this provision was to allow a person being harassed and threatened with a lawsuit involving less than five hundred dollars to seek affirmative relief.

11. Neb. Rev. Stat. § 24-319 (Cum. Supp. 1972). The statute does not indicate whether state agencies must be sued in district court; however § 24-523 does specify that parties in small claims may be "any other kind of organization or entity." It is arguable therefore that although an individual can sue the state only in district court, the state or its agency could sue in small claims.
Several public policy arguments could be given for the section, but it is sufficient to note that the rationale used for establishment of declaratory judgment procedures is here applicable, and experience shows that such relief is desirable. The section was further necessary because minors who have the legal right to disaffirm a contract have found that as a practical matter the right is only theoretical. Whenever they have attempted to regain the property or consideration parted with, they have been confronted with the phrase "sue me." Under this section, such a request by the adult defendant can be economically complied with by the innocent minor.

The enactment does include one jurisdictional limitation: the defendant or his agent must reside in or do business in the county before the court can proceed, even though the court would otherwise have jurisdiction. This is not a venue provision; the defendant must actually reside (present tense) or be doing business (present tense) before the court may proceed. Therefore, it is submitted that the mere fact that the defendant at some time in the past resided, or was doing business, is not sufficient to give the court jurisdiction. It is likely, however, that such an action could be commenced in the ordinary county or municipal court under some form of substituted service or long-arm provision. Unfortunately, this alternative is of little avail since the assumption of the small claims law is that such courts are economically unfeasible for the type of claims involved.

This is not to say that substituted service cannot be used as a device in the small claims court. If the defendant is doing business in Nebraska but does not maintain an office or resident agent in the county, then the appropriate method of service would be to serve the secretary of state as in any other case. Because of the lack of knowledge of such a device by most laymen, it is essential that the court personnel advise prospective litigants of this possibility.

To avoid questions regarding who may be parties in the small claims court, the legislature has provided specifically that any entity can be sued. This would include any city, county, school board, corporation (profit or non-profit), partnership or association. As indicated earlier, however, there may be additional statutory requirements or limitations, such as that regarding suits against the state.

Consistent with the general policy applicable in all states, jurisdiction over the subject matter in small claims cannot be waived. This is true even though both parties may consent. Therefore, the small claims judge would be well advised to question, even in default cases, the jurisdictional basis of the court. Also, the attorney contacted by a client sued in small claims may want to raise such problems.

13. Id.
an objection. It would be unnecessary to appear and contest the subject matter jurisdiction, though, since a collateral attack is always possible. However, from a practical point of view, it would be advisable to appear and point out, for example, that the defendant does not reside in or do business in the county. At that point the question of jurisdiction can be decided by the judge. While the statute does not define "doing business in the state," it is likely that through analogy to the long-arm cases the court will determine that if there are sufficient minimum contacts in a commercial transaction to justify the court's assertion of jurisdiction, such action would withstand due process objections.

Finally, it should be emphasized that jurisdiction of the small claims court is not exclusive, but concurrent with the applicable county, municipal or district court. Some statutes have provided the small claims court with exclusive jurisdiction.

**Procedures**

The most significant section of LB 1032 is as follows:

No formal pleadings other than the claim and notice, and the counter-claim or setoff and notice, if appropriate, shall be required in the Small Claims Court, and the hearing and disposition of all matters shall be informal so that the rules of evidence, except those relating to privileged communications, shall not apply, with the sole object of providing a prompt and just settlement of the issues. When a money judgment is entered, payment shall be made forthwith after time for appeal has run, or execution may issue as in other cases in the county or municipal court. When a judgment for the return of personal property is entered, return shall be made forthwith after time for appeal has run, or an order of delivery may issue as in other cases in the county or municipal court.\(^5\)

This section exemplifies the philosophy of the small claims court. The informality, preclusion of excess forms and pleadings, and dispensation with the rules of evidence indicate a legislative desire for speed and simplicity.

An action is commenced by an individual appearing in person before the clerk of the court, requesting a small claims complaint form, filling it in and signing it in the presence of the clerk.\(^6\) The plaintiff pays the filing fee of two dollars\(^7\) plus the one dollar retirement fund assessment. It might be noted that were this same action being filed in the ordinary court, the fee would be ten dollars plus the retirement assessment, if the action were for a sum greater than three hundred dollars.\(^8\) The claimant can have notice served

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16. A copy of the complaint has been included at Appendix B. All other forms mentioned are on file in the Creighton Law Review office and will be furnished upon request.
by registered mail or personally by the appropriate official.\textsuperscript{19} (In the latter case, the minimum fee charged is usually five dollars.) The plaintiff can also at this time request a waiver of all fees based upon inability to pay.\textsuperscript{20} The court, of course, will determine whether this should be granted.

The court will set a time for hearing of the claim when the plaintiff files his action and will cause notice to be served on the defendant.\textsuperscript{21} It should be noted that the defendant will receive not only a notice to appear, but the complaint as well, which will state the basis for the suit. No time limits are established by the statute other than to provide that the hearing cannot be held sooner than five days after notice.\textsuperscript{22} Present practice in the Omaha municipal courts is to set the hearing date twenty days after filing.

The Nebraska statute specifically requires the complaint to contain a concise explanation of how the small claims court operates and the appeal process.\textsuperscript{23} It further provides that the names of the parties and a concise statement of the nature, amount, time and place of the underlying facts be set forth. By requiring the items listed, the court can decide at once whether or not it may proceed to act, what law governs in a conflicts situation and whether or not the statute of limitations may have run.

The complaint form adopted by the Supreme Court of Nebraska contains all the essentials of the statute, including the statement regarding non-military status.\textsuperscript{24}

Because of the summary nature of small claims, and the preclusion of attorneys, the statute prohibits any prejudgment actions for attachment, garnishment, replevin or other provisional remedy.\textsuperscript{25} Should a plaintiff wish to use one of these remedies he is, of course, free to file his actions in the regular court.

After service of the notice, the defendant may wish to file a set-off or a counterclaim, which is specifically permitted in small claims.\textsuperscript{26} If the set-off or counterclaim is greater than $500, however, then it must of course be transferred to the regular docket.\textsuperscript{27} The defendant may be required to pay the general fee of eleven dollars required in civil matters for "any and all services rendered up to and including the judgment."\textsuperscript{28} This notice of set-off or counterclaim must be served upon the plaintiff at least two days prior to the time

\begin{footnotesize}
\begin{enumerate}
\item[20.] Id.
\item[22.] Id.
\item[23.] Id.
\item[24.] The complaint is reproduced at Appendix B.
\item[26.] Id.
\item[27.] Id.
\item[28.] NEB. REV. STAT. § 26-112 (Cum. Supp. 1972). While it is arguable that no fee should be charged a defendant asserting such a counterclaim, the enactment does not specifically cover the problem.
\end{enumerate}
\end{footnotesize}
set for trial. The statute does not provide for the method of serving the counterclaim: it merely states that a copy shall be delivered to the plaintiff. It is arguable, therefore, that it could be delivered in any manner that is reasonably calculated to give notice to the plaintiff.

Should the defendant find he cannot appear at the time stated on the notice, he may seek permission from the court to appear at some later time. Although this is not provided for specifically in the law establishing small claims, it would appear that the presiding judge would have an inherent power to grant a discretionary continuance, even though the prior statutory basis for an automatic seven-day continuance at the request of either party has been repealed. The only statutory basis for a continuance would now appear to be "for good cause shown." However, if a judge in small claims frequently grants continuances the success of the court might be seriously, perhaps fatally, affected, for the statute expressly provides that there should be a prompt and just settlement of the issue.

Sequentially, the next problem area involves the non-appearance of the defendant and the entry of a default judgment. If grounds are available to the defendant for vacating the judgment, appropriate forms are available for that purpose. Perhaps since a de novo appeal from small claims exists, talk of vacating a judgment seems superfluous. However, situations may arise when an appeal is either not timely filed or is economically unfeasible, leaving vacation as the only adequate remedy.

At the time designated for the hearing, it is expected that the proceeding will be informal, with the judge questioning the plaintiff and defendant in turn. He may ask each if they have questions of the other, receive and examine any matter the parties deem of importance, and question witnesses. Mandatory production of papers could be compelled by the appropriate writ, which should be explained to the parties by the clerk. If the judge wishes to obtain evidence outside the hearing it would not appear to be particularly objectionable, especially in areas where the judge needs expert assistance. The judgment can be given either in open court or mailed to the parties.

Appeal

Some states have felt that an appeal to a district court should be allowed, with that decision being final. Still others have adopted
the view that an appeal should be allowed to the defendant, but not to the plaintiff. The view adopted may well have depended on other factors, such as whether an attorney is allowed or whether a jury is available if desired. In Nebraska, the legislature opted to deny representation by counsel in small claims, but to allow a person to request a jury, and thereby remove the action from small claims. However, the law provides also that if the defendant does not request a jury, then he may still have an appeal de novo, with an attorney but no jury. Nothing is said regarding a further appeal. It is assumed by this writer that a further appeal to the Supreme Court of Nebraska would be permitted under the general statutes.

In this writer's opinion, it would be a mistake to treat such an appeal as if the trial had been conducted in an ordinary court. There are several reasons for this: first, the act specifically provides that no formal pleadings (other than claim and notice) shall be required in small claims; second, it is further provided that either party may appeal if he is dissatisfied with the judgment, apparently no allegation of error being required; third, the legislative adoption refers to the purpose of small claims as being to provide a prompt and just settlement of the dispute. It is submitted that there can be no prompt settlement of a dispute if the ordinary appellate procedures are to be strictly applied by the courts.

Therefore, this author believes that any rule relating to appeals which would not be conducive to a prompt settlement of the dispute should be considered inapplicable to small claims. If this proposition is accepted as a proper rule, and certainly there are some arguments for adopting a different posture, how would the appeal process function?

As pointed out earlier, there is no specific procedure outlined in the sections dealing with small claims regarding an appeal, other than a statement that such an appeal shall be allowed de novo if either party is dissatisfied. It is assumed, therefore, that the appeals procedure used in the county court will apply in small claims. One might question whether the provisions of the statute relating to appeals should be mandatory for small claims cases. If they are, then not only must there be a recodarion of the entire small claims hear-

36. Neb. Const. art. 1, § 24. "The right to be heard in all civil cases in the court of last resort, by appeal, error, or otherwise, shall not be denied." However, this provision was not deemed to invalidate the statute which provided that no appeals were allowed from justice courts where not more than $20 was involved. Hier v. Anheuser-Busch Brewing Ass'n, 52 Neb. 144, 71 N.W. 1005 (1897). For a general but informative discussion, see Fowks, Small Claims Courts: Simplified Pleadings and Procedures, 37 J. Kan. B. A. 167, 172 (1968).
ing, but the provision providing that the appeal from small claims was to be de novo [not de novo on the record, as is provided for in ordinary appeals from the county court] loses any meaning. It is suggested that the intent and a literal reading of all the sections would not require a technical adherence to all provisions regarding appeals. What the ultimate decision will be must await a judicial determination. It would be advisable, however, to resolve the problem legislatively by providing for a different method of appeal, with different time provisions and procedures as similar to the small claims hearing as possible.

It should be noted that the provision requiring the appealing party to pay for the transcript, if it is required, will act as a deterrent to appeals from small claims. For the individual who is in fact unable to pay, and thus eligible to apply for relief under the statute, this may not be true. But for the person of moderate income, who is technically financially able to pay, it may result in a denial of justice.

Once a judgment has been taken, it might be sufficient to merely state that there are no unusual provisions regarding execution, garnishment or other remedies in aid of collection. However, there is a possibility that since the statute provides that execution shall issue forthwith after time for appeal has run, a problem might arise. For example, should the judge decide to permit payments in installments, the judgment creditor could argue that there is no such discretion and insist upon immediate payment. This problem might be avoided by having the parties enter into a stipulation approved by the judge.

Finally, the Nebraska statute provides that prior to an appeal from small claims, it is necessary to supply a bond or pay the amount of the judgment, costs and expenses. This provision does raise certain constitutional questions which may well invalidate that part of the law.

41. The distinction between de novo and de novo on the record was, according to my personal interviews with the draftsman of L.B. 1032, intentional. The latter permits an appeal solely on the record if the judge decides that additional evidence shall not be allowed. In small claims appeals, the record below is irrelevant for purposes of disposition by the district court.


To most adequately offset the reluctance of the poor to make use of the legal process, the memorandum of judgment should probably have a tear sheet that reads something like: "If you desire to appeal — that is, to have your case heard by another judge, this time with a lawyer to assist you — sign here and return this portion to the clerk at (date). If you do not know a lawyer, see the enclosed information on 'Lawyers' Reference Service.' If you feel you cannot afford to pay for a lawyer, see the section on 'Free Legal Services.' You must act within 20 days or the judgment against you will become final."
In Brooks v. Small Claims Court for the Downey Judicial District of Los Angeles County, the Supreme Court of California held that where counsel is denied (as it is in small claims in California and in Nebraska), even though there is an appeal de novo where an attorney will be allowed, it is a deprivation of property without due process of law to require the posting of a bond. This decision was rendered in spite of strong arguments by the state, including the impact such decision would have on small claims courts. Therefore, any person can appeal in that state from small claims without being required to post any bond. The question of whether or not a fee could be required before the losing party could appeal was not answered, but it is suggested that under that decision, no fee can be charged to an appellant from small claims.

The impact of that decision has not been felt in California as of the date of this article. One of the small claims judges indicated his extreme dissatisfaction with it but felt it would not seriously cripple the small claims courts.

It becomes an immediate question of public policy; should parties be given the opportunity to have counsel if they desire in small claims, but restrict their activities by use of the simple, informal procedures, and then require the posting of a bond in order to appeal; or should an appeal de novo without any requirement or cost whatsoever be allowed, as apparently will be the case in California and in all other states adopting that constitutional rationale?

The California decision can to some extent be distinguished upon facts and the differences in the Nebraska statute. For example, if any party wishes to appeal but can't afford to pay for the bond, then he can request a waiver. However, the California court stated specifically that the mere fact that the small claims court could in its discretion waive the fee did not obviate the constitutional objection, since the court could refuse to agree that a person was indigent. The court indicated that ability or lack of ability to pay for the bond had nothing to do with the decision, but the mere existence of the requirement was objectionable.

The decision generally attempts to show its respect for the small claims court, but also points out what is a constitutional weakness. As a practical matter it is not likely to increase the number of appeals. I suggest, since the appellant must still be able to afford (or be willing to afford) an attorney. In Nebraska, if the appellate procedure is modified so that the hearing on appeal is so informal that a person could appear pro se, then the decision, assuming its rationale were adopted by the Nebraska supreme court, should not be injurious to a viable small claims court.

THE ATTORNEY'S ROLE

When Nebraska adopted its small claims court procedure, with the provision specifically excluding attorneys, there was a muted cry of discontent from certain elements of the community. Surprisingly this came not from the bar (which was most directly affected) but from individuals connected with collection agencies. This is not to say, however, that the bar was unanimous in indicating support for this provision. But of those responding to a questionnaire, approximately eighty per cent indicated support for this provision. Of those attorneys showing an unfavorable attitude to the legislation, several had reservations about the bill's constitutionality, but few commented regarding the advisability of the preclusion of attorneys. It is interesting to note that no news commentators or editorial writers criticized this part of the law. In any event, whether it was a wise decision from a public policy viewpoint is at this time academic. But the questions regarding the constitutionality of such a statute merit some discussion.

The only case decided in any jurisdiction specifically on this point is another California decision, Prudential Insurance Co. v. Small Claims Court. In that case, Prudential sought a writ of prohibition restraining the small claims court of San Francisco from proceeding because the judge denied a request that an attorney be allowed to appear and represent the company. The attorney was a member of a law firm that was on retainer for Prudential. The California law provided that "(n)o attorney at law or other person than the plaintiff and defendant shall take any part in the filing or the prosecution or defense of such litigation in the small claims court . . . ." Prudential argued specifically that the preclusion of counsel was a violation of due process. The court, however, rejected that contention, commenting that an arbitrary refusal of representation of counsel would be such a denial in a civil as well as criminal case. But the legislature can provide for an informal hearing without counsel so long as somewhere in the process a real right to counsel exists. The court based its decision upon such principles as the Supreme Court's ruling that it was permissible to deny a jury in a civil case at the first level of hearing so long as a common law jury could be had on appeal. The court went even further, citing the Magna Carta as providing that "justice would not be denied or delayed." And that if the informality (presumably the

46. CAL. CIV. PRO. CODE § 117g (West 1954).
47. 173 P.2d at 40.
48. Id. This case should be read in conjunction with an interesting comment, found in 11 Calif. L. Rev. 276 (1923).
preclusion of attorneys) were to be judicially denied effect, then justice would in fact be denied to the poor litigant. Also, the court noted that if one party is allowed to employ an attorney, then the other would, in most cases, be compelled to do the same. The court also stated that the policy of restricting attorneys had received support from the legislature and the almost universal approval of the public, the bar and the judiciary.

Prudential then argued that since the corporation could not appear as such, it could not be sued in small claims. This, the court countered, was an ingenious but unsound argument, since under several statutes a corporation was able to sue and be sued in any court. The fact that many decisions had concluded that a corporation could only appear in a court of law through an attorney was not denied insofar as courts of record are concerned, but the court pointed out that in none of those cases had there been a statutory provision such as the one in effect in that state. Therefore, a corporation, because of the statute, could appear in pro pria persona. The court recognized that the statute did not make clear who was to appear for the corporation, and suggested that legislative clarification was desirable.

While some jurisdictions bar lawyers absolutely, all actively discourage them. As a source of delay, technicality, and even distortion of the process, representation by counsel is unwelcome. Though possibly of value to handle a frightened party, counsel finds his major functions assumed by the judge who does fact-finding, questioning, and cross-examining himself. Counsel is regarded as a luxury which the potential recovery in dollar amounts does not warrant. Further, the particular talents of a lawyer are not needed in small claims courts since the emphasis is on summary procedure.49

The absence of lawyers certainly involves some sacrifice of accuracy and soundness of judgment. In some very simple cases, the sacrifice is minimal but in others, unless the judge is very capable, the loss may be substantial. Therefore, it is again very clear that the high quality of the court's judicial manpower is vital for effectiveness.50

A related problem arises when an attorney has placed himself on a retainer to provide all necessary legal assistance. It may be difficult for such an attorney to refuse to appear and remove a case from small claims by following the prescribed procedure since he is being paid to handle all of the client's legal needs. But inasmuch as the client will be entitled as of right to an appeal de novo, the attorney's fears would appear to be unfounded. However, where the client is afraid to appear, from nervousness for example, the attorney

50. Id. at 68.
may have no choice but to have the case removed.

Most attorneys who engage in private practice are frequently contacted regarding a justifiable claim, but involving such a small amount as to make assistance of counsel unfeasible from a practical and economic point of view. Prior to adoption of the small claims procedure, the attorney would seldom advise a person seeking his or her assistance to attempt to litigate the matter pro se. Such a decision could not be criticized inasmuch as attorneys are aware that judges, in the absence of case law, statute, or rule of court, cannot waive the technical rules of pleading and evidence, or ordinarily provide extensive assistance to either party. It would be likely, then, that the attorney would either agree to attempt some summary method of assistance, or advise the client that he might best allow the matter to rest. Even this activity is time consuming and cannot be done frequently unless the client is an otherwise profitable one. The effect has been, then, to provide assistance through legal aid where the claim was small, if the person's income was below the federal guidelines for that geographic area. If the person was of moderate means, however, he was effectively denied justice. Of course, it is true that the person who has a moderate income could theoretically pay an attorney $150 to attempt to collect $300, but to require the person to part with that much of a net recovery, which probably did not cover the total loss initially, is in effect, a denial of justice.

Because of the establishment of the small claims court, attorneys are now in an excellent position to provide a real service to such an individual. The client can be advised not only of the existence of the small claims court, but also that if further assistance is required, the attorney would provide a short conference for a minimum fee. It is not suggested that the attorney will attempt to make a "Philadelphia lawyer" out of his client, but merely assist him in preparing his case. It is expected that one of the most important items of information that the attorney can relay to the individual is that the appropriate person be named as defendant, especially where a corporate defendant is involved and that the proper person be served.

The attorney must also be familiar with the procedures and proceedings in small claims. He must, with reference to the preceding paragraph, be able to advise a client that if he wants to appeal, this is possible. He must be able to inform the person of the time limitations for an appeal and what actions must be taken.

It has been said in one jurisdiction that most professors and students did not even know that the small claims court existed.51 A greater fear is that the public at large may not be aware of its existence. Newspapers, television and radio announcements have been

generous in publicizing the court in the Omaha area, though it is not known how much publicity has been given in out-state areas. Attorneys in these areas are in a unique position to provide assistance to the public and improve the image of the bar by informing the public of the existence of these courts.

The attorney can also provide assistance to the individual claimants who may have appeared in small claims, obtained a judgment and wish to collect it. The statute does not prohibit assistance of counsel in this manner. Also, the problem of collection may be more difficult than in presenting the case in court.

One of the principal problems encountered in the Omaha small claims court proceedings has been the misconception that laymen have regarding the effect of a judgment. It has been assumed by many that once the judgment is given the defendant will in all cases simply pay the money into the court and the plaintiff can pick up the check. Of course, this is seldom the case. It will be necessary in many cases for the small claims judgment creditor to use the same devices that attorneys have used to collect the judgment. Also, the danger of a wrongful attachment or wrongful execution with the subsequent possibility of a civil suit for substantial damages, indicates a desirability that persons with an unpaid judgment seek at least a conference with attorneys who may, for a fee, seek collection. Much of the time that the attorney would have been required to expend in preparing a formal petition, appearance and other matters has been saved; therefore the cost to the client is much less. It is unlikely that legislation could be developed that would protect the litigant in small claims from his wrongful actions in attempting collection, and this writer suggests that it would be undesirable, since those persons who would harass a debtor would be the first to use “unusual methods” if they were judicially approved. To provide, as some have suggested in considering the problem, that the judgment creditor in small claims shall not be liable for wrongful execution, unless actual malice is shown, would make the small claims court an enemy of the poor and the ignorant. Therefore, it is essential that, even though instructions can be framed in very simple terms explaining procedures for collection, persons be made aware of the desirability of at least consulting an attorney regarding assistance in collection of a judgment.

Judges and Small Claims

The municipal and county judges, including associate county judges, will be able to hear small claims cases. With all due respect to those who have been appointed associate judges, and who are not attorneys, it would be inadvisable for them to hear small claims, unless there is an acute emergency. The principal reason is that there are no attorneys present to assist in determining the applicable
substantive law. The associate judges, however, can be extremely effective in rendering assistance in filing and in the ancillary action related to small claims.

It is suggested that the principal functions of the small claims judge and the areas which might be most easily criticized will be as follows:

First, the judge must appropriately supervise the personnel who are assisting claimants in filing their claims. The judge should personally observe the attitude of the clerks who have the initial contact with the claimant. Their attitude, especially towards the elderly, less educated or very frightened person, must be one of concern. Clerks, familiar with attorneys, might adopt the view that the lay person should be better prepared when coming into small claims. Should the clerk indicate a lack of sensitivity to the procedure, the judge should attempt to find a replacement immediately.

Second, the judge must be able to maintain the proper decorum in the small claims hearing. Since no lawyers will be present to restrain the parties in their enthusiasm, the possibility of contumacious conduct is greater. It would be advisable in all cases to have a bailiff present during small claims hearings.

Third, the judge must be especially careful to see that proper service was made, even in default cases. Inasmuch as the hearing becomes final within ten days, the judge must advise the person, even in a default, that he must prove his case. That has been the practice of the Omaha small claims court since it commenced hearing cases in January, 1973.

Fourth, the judge must be willing to listen to the litigant who is ignorant, inarticulate or boring. It certainly is not sufficient to merely ask, "why don't you pay the money?" or "do you owe this money or don't you?" In examining some of the criticism of small claims courts in different parts of the United States, it has been observed that this is one of the most frequent objections leveled. Certainly the judge will become physically fatigued, and the experience will, for many, be emotionally draining. The number of cases being heard in one day will present a problem in itself. The need for a speedy resolution is one of the reasons for establishing the court. But if speed, as an end in itself, is allowed to lead to injustice, then the courts have defeated their own purpose. By controlling the interrogation carefully, insisting that the parties not speak until spoken to, showing no tolerance for arguing in the courtroom, the judge can in most cases prevent the problem from becoming too great. It would appear to be the better practice to have the plaintiff tell the court why he is there, what relief he is seeking and why he feels he is entitled to it. The judge may then ask the defendant to respond. If there are questions remaining, the judge should commence his interrogation.
Fifth, the judge will occasionally have attorneys in small claims who are fulltime employees of the defendant. The judge will have to insist that the attorney refrain from "acting like a lawyer." This can be done by advising the attorney that the same rules apply to him as to the non-lawyer. Since the rules of evidence do not apply, and the judge will do the interrogating, there is little need for the attorney being there. Should the judge allow the attorney to interpose objections and dilatory tactics, others in the courtroom are likely to become frightened of the procedure, and the court can only suffer.

Sixth, the judge must advise both parties of all the law that is applicable. He should inform them of the right to remain silent if a case arises in which it is obvious that a statement may be incriminating in a later action. He should relate the appeals procedure. To advise the defendant, for example, that he would have a good defense if he would only present it properly, or to tell the plaintiff that he didn't allege certain facts necessary for recovery, is to misconstrue the role of the small claims judge.

Seventh, the judge must make clear to all parties that he is disinterested in the outcome of the case. If he happens to personally know one of the parties, he might indicate this and ask if they would prefer to have another judge hear the matter. It is suggested that all canons of judicial ethics apply as strongly in small claims as in the Nebraska supreme court.

Eighth, the judge should do nothing to demean the small claims concept in the presence of those persons appearing before him. To make comments such as, "why didn't you get a lawyer and handle this the right way?" or "this court shouldn't have to hear that kind of a case" indicates lack of judicial decorum.

Ninth, the judge should attempt to make the public aware of the existence of the small claims court, the value of such a court and his support for it.

PROBLEMS IN OTHER JURISDICTIONS AND NEBRASKA'S ANSWERS

In spite of the favorable articles, comments and speeches given regarding small claims, serious problems have arisen in certain jurisdictions. Many of these have already been discussed, however, and will not be repeated here.

COLLECTION AGENCY

Perhaps the most frequent criticism of small claims courts is that it has often become a forum for injudicious use by collection agencies. The small filing fee, the summary nature of the action, the

speed with which one may obtain a judgment, the execution remedies available and the inability of some persons to articulate clearly the reasons for their position are alleged to create a "super collection agency" that inflicts a great deal of harm. One of the most frequent complaints has been that finance companies and collection agencies would purchase commercial paper at a discount and immediately upon a default seek relief in small claims. In fact, it has been argued that disreputable merchants, aware of the ease of obtaining a judgment, would in fact encourage persons to overextend themselves, anticipating the use of the small claims court.55

In many of the jurisdictions examined, a numerical analysis of the cases filed will show that collection agencies, finance companies, utility companies and other entities generally considered unsympathetic to the poor make wide use of the small claims court procedures. This, of course, is possible because there is a substantial savings in attorney fees and court costs, there is little delay and a likelihood of default, because many feel the procedure is nothing more than an extension of the credit department of the person seeking payment. The mere fact that such a great number of these cases are being heard would have a negative effect upon the ordinary consumer.

A major problem has also arisen because of the application of the "holder in due course" shelter whenever the consumer is sued on a contract for the purchase of shoddy merchandise or services that were warranted as being of high quality. The original party to the transaction conveniently sells the contract to a finance company, and either the company is a holder in due course, or the contract contains a clause which provides that the buyer won't attempt to use any defenses he might have had against the seller. Inasmuch as lawyers would rarely be present to argue such concepts as conscionability, or inequality of bargaining position, the ignorant, poor litigant had little chance of being successful. Therefore, there was little reason for him to appear in small claims.

Nebraska has provided specifically that only parties to the original transaction can be parties in small claims.54 This forbids agencies from using the court to collect on accounts that have been purchased by assignment or by negotiation. This, as a practical matter, will effectively prevent the use of the "holder in due course" defense because the original parties will be the only parties to the action.

Nebraska has also provided that no person can use the court more than two times within one week nor more than ten times within one year.55 This will prevent a finance company which may be an orig-

53. Id. at 239.
55. Id.
inal party to the transaction from making daily trips to the court for collection purposes. This provision, however, does contain some ambiguities. For example, does it mean that a person can use the small claims court in Douglas County Court ten times a year and ten times in the Omaha Municipal Court and ten times in Sarpy County and in each county? It is suggested that this be clarified by legislation, but until such time the court would be on sound grounds in viewing the legislative intent to mean not more than ten times per year within the county (including county and municipal courts). This problem became so acute in one state, California, that some judges began to arbitrarily deny permission to file more than a given number of small claims at the same time, or within a certain time. The problem inherent in such a device is that an appropriate writ could require allowance of unlimited claims and also allow forum-shopping for a judge who will permit unlimited filings.

**Wrongful Execution and Amount in Question**

Most Nebraska law officers or court officials are also particularly careful to see that no wrongful executions are made. The officers are willing to execute orders of the court, even in small amounts, since their remuneration is not contingent upon satisfactory collection. The amount paid is established by statute. Therefore, the criticisms directed at small claims procedures in some jurisdictions relating to collection problems have no applicability to the Nebraska practice.

A major area of concern is the use of garnishment and attachment in small claims. It has been asserted that permitting garnishment of an employee's earnings frequently leads to his dismissal. With the adoption of state and federal legislation protecting debtors, this criticism is no more valid in small claims than in any other court. It should be noted, however, that such devices are not allowed in small claims until a judgment has been obtained.

Some critics have also insisted that by requiring a filing fee and payment of service fees in advance, the very poor claimant is excluded from small claims. If this is true, then the Nebraska law attempts to provide reasonable relief by permitting the party to sign a statement that he is unable to pay, and unless the judge finds otherwise, no fees need be paid.

The question of whether or not the maximum jurisdictional amount of $500 in a small claims action is appropriate has been discussed. While some states consider small claims those under twenty dollars and others as much as two thousand dollars, these are unusual exceptions. It has been found that $500 is a reasonable amount
considering the kinds of cases that can be effectively handled. 56

**SERVICE AND VENUE**

Charges that persons with meritorious defenses are frequently denied an opportunity to present them due to failure of service have led some to denounce the small claims courts. This criticism has been especially marked in New York and Washington, D.C. If such charges are true, and the evidence is not absolutely convincing, it does not follow that Nebraska should likewise be criticized. First, Nebraska allows service by mail. Also, officers required by law to serve process are paid a statutory amount in mileage, hence there is no reason for them to wish to refuse to make service in small claims cases.

In some areas of the country, it is not uncommon to include in a contract a clause that performance is to be accomplished at the seller's place of business. This provision is popular because the small claims act provides that the action is to be brought where the contract is performed. If the defendant buyer lives in a distant county, default judgments are spawned. This has been avoided in Nebraska by providing, as mentioned earlier, that the action may be brought only if the defendant resides or does business in the city or county where the action is brought. 57

**CONCLUSION**

R. H. Smith, in his oft-quoted book *Justice and the Poor,* stated:

The essential features of a small claims court are extremely low costs or none at all, no formal pleadings, no lawyers, and the direct examination of parties and witnesses without formality by a trained judge who knows and applies the substantive law. 59

It is my belief that the Nebraska small claims court provides exactly these features, and the success of our court will be assured, provided the bench and the bar fulfill their functions appropriately.

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56. No evidence is available to prove that cases involving $100 are less complex than those involving $10,000. It would appear to be reasonable, however, to consider the type of cases that are likely to arise which usually involve less than $500. In other words, it is improbable that a patent infringement action would involve $500 or less, but it is quite likely that an action to recover a deposit for an apartment rental would be within the dollar limitation. My examination of viable small claims courts in different parts of the United States reveals that the type of cases involving $300 to $500 are similar enough, in my opinion, to justify that amount.


59. Id. at 56.
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Idaho Code § 1-2301 et seq. (1948).
Utah Code Ann. §§ 78-6-1 et seq. (1953).

2. A — All claims if no important or unusual points of law are involved.
B — Same as civil actions for the recovery of money in other lower courts with minor restrictions, such as libel and slander.
C — Same as civil actions for the recovery of money in other lower courts.
D — Money actions and equitable relief.
E — Contract, motor vehicle damage and landlord-tenant relations.
3. A — Not mentioned in statute.
   B — Same as civil actions in other lower courts.
   C — Where defendant resides or does business.
   D — Where claim arose or contract performed.
   B — Assignees excluded.
   C — Allows only plaintiffs who cannot financially resort to other lower courts.
   D — Number of claims that may be filed.
   E — Corporations excluded.
5. A — Not mentioned in statute.
   B — No formal pleadings other than complaint required.
   C — Unnecessary for court to apply formal rules of evidence.
   D — Follows normal civil procedure.
6. A — Not mentioned in statute.
   B — Defendant only.
   C — No appeal allowed.
   D — Defendant and plaintiff.
7. A — No restrictions.
   B — Not allowed.
   C — Allowed, but with no fees.
8. No statute was located in the Creighton University Law Library for that jurisdiction.
In the small claims court of the municipal court of the city of Omaha, Douglas County, Nebraska

Plaintiff

v.

Defendant

Plaintiff states that defendant(s) owe and should be ordered to pay to me the sum of , because on (date)

at , the defendant(s) (place)

Plaintiff declares that the defendant or defendants are not a "person in military service" or "person in the military service of the United States" as defined in Sec. 101 of the Soldier's and Sailor's Relief Act, 1940.

I have filed small claims within the past calendar week.

I have filed small claims within the past calendar year.

To the best of my knowledge and belief, the defendant named above resides at the following address, or the following is the business address:

My printed name and printed address are as follows:

I elect to have the notice served upon the defendant personally by mail.

Signed in my presence Signature: 

Clerk or Deputy Today's date: 

1973] SMALL CLAIMS COURT

APPENDIX B

Official Form No. 1a
NOTICE TO DEFENDANT

This claim has been filed against you. You must appear before this court on _________ at _________ at _________
(date) (time) (location)

If you do not appear, a judgment may be entered against you. Costs of the action also may be charged against you. You should read the information on the back of this claim and notice. If you have any questions about the procedure, you may contact the Clerk of the Court in person at __________________________
(location of court)

or by telephone at __________________________.

(number)

______________________________
Clerk of the Court

By: ____________________________
The Small Claims Court provides a method of settling legal disputes involving $500 or less. Court procedure is informal, and lawyers are not used. The judge attempts to help both parties in presenting their side of the case.

The person making the claim is known as the plaintiff. The other party is known as the defendant. The plaintiff fills out the claim form and signs it in the presence of the court clerk. The clerk sets a date for trial, and arranges for notice to the defendant. The notice may be served on the defendant in person, or by registered or certified mail. The plaintiff decides how the notice will be served. The notice is ineffective unless the defendant actually signs the mail receipt himself. The plaintiff pays a filing fee totalling $3.00, and the cost of serving the notice on the defendant. If the plaintiff is successful in his claim, these costs are added to the judgment which the defendant must pay.

The defendant must appear in the court at the time shown on the notice served on him. If the defendant does not appear, a judgment can be entered against him. If the defendant is not able to appear at the time set for trial, he should contact the court clerk before that time and explain why he cannot appear. The court may continue the trial to a later date if it is satisfied that it is impossible for the defendant to be present on the original date. Mere inconvenience is never considered sufficient. The defendant has the right to file a counterclaim or setoff. In a counterclaim, the defendant says that the plaintiff is at fault rather than the defendant. In a setoff, the defendant says he may owe something, but that the plaintiff also owes something to him. The defendant may ask for a jury trial. If he does, the case will be transferred out of Small Claims Court, and the parties may have lawyers.

At the trial, both the plaintiff and the defendant may have witnesses to support their positions. They can have other evidence produced in court, by a court order, if the other party refuses to bring it to court. Both may also present other evidence, such as contracts or cancelled checks.

If either party is not satisfied with the judge’s decision, he may appeal to the District Court. On appeal, the case will be tried again. The formal rules of evidence and procedure will be used, and the parties may have lawyers. Notice of appeal must be given within ten days after the judge’s decision, and an appeal bond posted. The clerk has forms for the appeal. Other information about appeals will be given by the court clerk.

If there is no appeal, the parties must follow the orders of the judge as to payment of money, delivery of property, etc. The judge may make additional orders, such as garnishment, if necessary.

Additional information about Small Claims Court will be given by the court clerk, upon request.