INTRODUCTION

In 1973, the Creighton Law Review published an article entitled "What the Legal Community Needs to Know About the Small Claims Court." That article analyzed the development of the Nebraska Small Claims Court and the ideal role that the legal community should play in implementation of the system. In that regard, a survey of all members of the Nebraska bar was conducted to ascertain attitudes toward the small claims system. In addition, the article addressed problems that had been encountered in other jurisdictions and how Nebraska law attempted to avoid them.

Because more than ten years have passed since the original article was published, this article reconsiders the Nebraska small claims system. To do this, an extensive survey was conducted, during the latter part of 1984, of all Nebraska district, county, and municipal judges as well as a representative sample of all active attorneys in the state. The purpose of the survey was to ascertain the present attitudes of the respondents regarding strengths, weaknesses, and problems of the small claims system.

A detailed analysis of all small claims cases filed in the Omaha Municipal Court since its creation in 1973 was made, based on the assumption that cases filed and actions taken subsequent to filing in the Municipal Court of Omaha are fairly representative of those filed

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2. Of the 48 questionnaires mailed to district judges, 36 answered for a response rate of 75%. Municipal/county judges returned 39 of 57 questionnaires, showing a response rate of 68%. Attorneys returned 202 of 409 questionnaires, giving a rate of response of 47%. A total of 534 questionnaires were thus mailed; 277 responded for a response rate of 52%. The responses were returned from all geographical areas, and no one area within the state was disproportionately represented. The original materials, including all responses, are in the office of the writer and available for examination.
throughout Nebraska. The results of that study are included in tabular form and are discussed in this article. One additional study was made by a personal examination of the files of all cases in the Omaha Municipal Court of Small Claims which were later removed to the regular docket. The study reveals the effect of such removal upon the cases. Some alternatives, ancillary or additional mechanisms, in addition to the present small claims court practices, are discussed, including specific suggestions for improvement.

Much of the original Nebraska study was based upon a close examination of the small claims courts of other jurisdictions. Each state statute or court rule, where applicable, was analyzed. From the materials gathered, a table was prepared which compares the small claims court procedures of the fifty states and the District of Columbia.

Because many changes have been made in those states since Nebraska adopted its small claims court procedures, a new table, using statutory materials through 1985, was prepared and is included in this study. This table is useful in making comparisons between Nebraska small claims procedures and those of other states. It is the writer's opinion that this table is the most complete, comprehensive, and accurate analysis of the present status of small claims courts in the United States published to date.

SMALL CLAIMS PROCEDURES

The small claims procedures adopted in 1973 have remained essentially the same, with some threshold changes. The filing fee has been increased from $2.00 to $5.00, and the jurisdictional amount has been increased from $1,000 to $1,500. Unlike provisions under the original bill which required either requesting a jury or filing a coun-

3. One "improvement" not discussed in this article, but one which would likely be a wise decision, is the placement of L.B. 125 on General File; it is expected to pass either in the present session or in the next session. In summary, it will allow a plaintiff to prepare and file a small claims complaint without having to appear personally before the clerk. This allows the nonresident to sue by signing before a notary public and mailing in the complaint. This procedure would be supported by the basic policies discussed in this article.

4. Table 1 allows the attorney or researcher concerned with the small claims court in a particular state to determine any of the following: whether representation by an attorney is permitted; whether a court has subject matter jurisdiction; whether trial by jury is available; whether there are limits on the number of times a person may gain access to the court; whether standing to sue is limited to original parties; whether appeals are allowed; whether specific provisions require judges to follow substantive law when deciding cases; and other items.

5. It may be useful for the researcher to compare the 1985 table with the original table published in 1973. Forbes, supra note 1, at 336.

6. Substance rather than form was the criterion in categorizing or classifying small claims wherever the statutes or rules of court provided sufficient information.
terclaim in excess of the jurisdictional amount to obtain removal, the parties may now remove an action from small claims simply by the appropriate request. The statutes have also made clear that unless a specific statutory provision relating to appeals provides differently, appeals from small claims are governed by the same rules as any other appeal from the county or municipal court.

The Nebraska Supreme Court has been extremely supportive of the small claims procedures in those cases in which appeals were filed. For example, in one of the more favorable opinions the supreme court ruled that in appeals from small claims to the district court (a fortiori to the supreme court of the state), the decision would be upheld for the plaintiff if the facts show that recovery could have been justified by any possible theory because the law does not require that a "cause of action" be stated in the small claims plaintiff's complaint. In addition, the supreme court showed its enthusiasm for the small claims concept in Simon v. Lieberman when the court stated: "The creating of small claims courts is clearly in accord with sound public policy. To provide a forum in which small claims may be prosecuted without the delay, expense, or procedural difficulties . . . is a commendable accomplishment for the public benefit."

**Appeals From the Small Claims Court in Nebraska**

Analysis of both the responses to the questionnaires and the tabular information from the small claims court in Omaha, Nebraska, shows that several issues relating to appeal merit discussion. These include: 1) methods of dealing with appeals from small claims courts to district courts; 2) attitudes of judges and attorneys about appeals from small claims, i.e., whether they should be treated more informally than ordinary appeals; 3) judicial opinions as to the practicality of individuals appealing pro se from small claims; and 4) attitudes about a change in the law to simplify the appeals procedure from small claims.

The records of the Omaha Municipal Court show that appeals

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10. Id. at 788, 290 N.W.2d at 451.
12. Id. at 324, 226 N.W.2d at 782.
13. The problems within the small claims process are discussed essentially in the same order in which the questions were presented in the questionnaire.
from the decisions of the Small Claims Court have varied from 1.1 percent of all cases decided in 1978 to a high of 9.1 percent of all cases decided in 1981. On the average, 4.6 percent of all cases tried in the small claims court have been appealed to the district court.

District Court Judges

District court judges, by a slight majority, indicated that when hearing appeals from small claims, they tend to treat the appeals less formally than the usual appeal. One respondent indicated that he "tried to not treat them any differently, but [he felt] obliged to do so where the party or parties were appearing without counsel." Interestingly, the district judges who had previously served as county or municipal judges and had heard small claims in that capacity agreed that they attempted to treat the appeals more informally while those without any previous judicial experience were divided almost evenly.

In the original article in 1973, it was suggested 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." It was also considered advisable "to resolve the problem legislatively by providing for a different method of appeal, with different time provisions and procedures ... similar to the small claims hearings." No legislative changes relating to such appeals were, or are, forthcoming.

When asked whether they believed that appeals from small claims without using an attorney were "practical," i.e., that an attorney is not essential, a surprisingly large seventy-seven percent of the respondents indicated that they thought this was possible. Comments included in the responses varied from "these appeals usually occupy one half of a day and, therefore, should be limited in some manner," to "the appeals are not really a problem unless one of the parties has a lawyer and the other does not." This last comment was made by several district court judges, even where they believed it practical to appeal without an attorney. There was no significant difference in response to this question from those judges who were previously county or municipal judges.

14. 54.7% indicated a tendency to treat appeals less formally while 45.5% indicated that they treated small claims appeals the same as any other appeal.
15. All respondents to the survey were anonymous.
16. This group constituted 15.2% of all district judges who responded.
17. Of the 28 respondents, 13, or 46.4%, tended to treat the appeals more informally while 15, or 53.6%, treated the appeals no differently from other appeals.
18. Forbes, supra note 1, at 324.
19. Id. at 325.
Other comments from the district court judges showed that they commonly advised litigants that they might be at a disadvantage by not having an attorney although they were free to appear pro se if they wished. One judge stated that he tried to “bluff the non-represented party into obtaining a lawyer.” The inequity that resulted when one was represented on appeal and one was not was troublesome to several of the judges. As one judge commented, “I hate pro se appeals from small claims because they almost always result in an appealable record.”

Another judge holds a pre-trial conference as a matter of course when one party is not represented by an attorney. In this hearing, the judge “attempts to urge the unrepresented party to obtain counsel by alerting him to evidentiary problems that will be encountered.” In addition, more than one district court judge stated that he felt uneasy where one appeared without counsel and the other appeared with counsel because “it put the judge in the position of having to choose between two undesirable alternatives: (1) turn down every case where proof is technically insufficiently presented thus allowing the defendant to prevail because of technicalities, not on the merits; or (2) act as an attorney for the pro se party and hope there is no appeal.” Thus, in spite of the statistical result obtained in the survey showing that the district judges believed pro se appeals were practical, the comments clearly showed a different view.

In view of this contradiction between statistical results and individual comments, would these judges modify the law so as to make the appeals process less technical? If the judges were truly confident that pro se appeals were practical, then one would expect that most would have opposed any simplification of the appeals process from small claims, but this was not the case. Over half of all the district court judges would change the procedures relating to small claims, thus making such appeals as “simple and informal as in the initial small claims proceeding.” A total of thirty one of the district court judges answered this question; twelve, or forty four percent, of those who were not previously judges felt that the appeals procedure should be changed, while the remaining fifteen, or fifty five percent, did not support any change. The four judges who were previously municipal or county judges all believed that the appeals procedure should be modified. One judge wrote that his major reason for urging simplification was that “any losing party obtains an upset victory simply by hiring a lawyer and filing the appeal, and the party who should have won, usually the plaintiff, will lose by default.”

Those judges who opposed a simplification of the appeals process from small claims also provided justification for their reasons. One
said that he would "relax the procedures on appeal if necessary under the present rules, so that no change is needed." Another strongly opposed any simplification, saying that the "parties have had one bite of the apple and why should they have two?"

Particular comments included with the responses to the question above indicate that most of the district court judges are concerned with those situations where one party uses an attorney but the other does not. In order to make this process more fair, one judge would, by statute, make the district court decision non-appealable as to the party who chose to use small claims. Another also would deny appeal to the defendant, especially where the defendant has been given the right to remove to the regular docket but chose not to do so. Some feared that a constitutional amendment would be necessary in order to deny a full appeal. Excluding attorneys from the appeals process was suggested by others, provided that this was constitutionally possible. No district court judge recommended that attorneys on an appeal be provided at public expense if either party could not afford one although some researchers and social scientists have made this recommendation in other states.21

County and Municipal Court Judges

Fifty-eight percent of all sitting municipal and county judges responded to the questionnaire. Of this number, ninety-one percent generally believe that overall the present small claims procedures are adequate although improvements can certainly be made.

This same group of judges indicated no desire to change to a simplified procedure where an action is transferred from the small claims court to the regular docket. Seventy-five percent favored retention of the present system providing for a dual system of rules, as long as removal is allowed. Surprisingly, this same group of lower court judges, those who regularly hear small claims initially, would recommend a change in Nebraska law to provide for a "simplified procedure that would encourage individuals to perform their own appeals to the district court while still permitting attorneys to represent parties on appeal if desired."23

Comments from these respondents indicate agreement with the district court judges relative to the problems within the small claims practice. Several judges indicated, again, that an obvious inequity re-

20. See Table A infra for jurisdictions with such statutes.
22. Municipal and county judges are to be collectively referred to as county judges after 1985 due to the merger bill.
23. 65.4% favor procedural simplification.
sults where a party moves the action from small claims to the regular docket and one of the parties has an attorney but the other does not.24

The judges were almost evenly divided when asked if they would favor a change in the law that would absolutely prohibit removal from small claims to the regular docket.25 While a slight majority of these judges favored a provision barring removal, several recognized major problems that might result from this change. For example, where would a jury trial be allowed, assuming that one is required, which most judges apparently assumed? Others questioned the fairness of the proceeding if the party was forced to appear pro se, especially where the plaintiff or defendant might be illiterate, apprehensive, inexperienced, or suffering some language difficulty or other natural disadvantage.

Some judges qualified their responses by saying they would prohibit removal only in smaller cases, e.g., $250.00, or $750.00, or “under $500.00”; thus, in truly small matters, the parties should be forced to remain in small claims court regardless of possible arguments against such a procedure. Others suggested that the present appeals procedures are adequate to provide all the protections necessary to both parties and no removal should be allowed to the regular docket. As indicated above, the lower court judges do not generally favor a procedural change simplifying the proceedings in small claim matters after the matter is removed to the regular docket. Still, these comments often revealed uncertainty as to the fairness of the system.26

Another problem revealed by the survey indicates that basic complaint forms often fail to state a cause of action.27 The public pol-

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24. Several stated that this forced the judge to “take on a partisan role,” that “it is unfair to pressure a party to hire a lawyer since a person has a right to represent himself pro se.”

25. 51.6% of those judges responding indicated that they would support an absolute prohibition of removal of cases from small claims to the regular docket.

26. One judge indicated: “I believe there is sufficient discretion after removal for me to provide the necessary informality that exists now in small claims,” while another said that “after removal, they should be somewhat more complex but not at the level usually required at present in terms of technicalities.” Other comments included: “A pre-trial should always be held to iron out issues when there is a removal to get to the issues”; “The plaintiff needs to understand the need for an attorney after removal”; “There is no need to create a substitute for an appeal by allowing removal in all cases”; “The proceedings upon transfer should be precisely the same as in the regular court after transfer because that is what the law essentially requires”; “The procedures are not really too complicated as they are now after removal”; “The procedure is and should be simple after removal”; “The trend should be towards simple notice pleading and this would be in that direction.”

27. As one respondent stated: “Claims are so poorly alleged in most cases that an amended petition is almost necessary after removal.”
icy of Nebraska currently does not require such specificity in small claims pleadings. In fact, in most states where small claims procedures exist, this is true even after the case is transferred. This viewpoint is supported by the Nebraska statutory revision providing that after removal no further pleadings, motions, and so forth shall be permitted, except with the court's approval upon good cause shown. At minimum, that probably means that there would not be a technical reading of the complaint requiring a motion for a more specific statement of the claim, a restatement of the claim, and further motions.

Close to two-thirds of the judges responding favored simplifying procedures upon appeals to the district court so that non-lawyers could represent themselves. Comments included with these responses show that several judges feared such a change would be too impractical. As one judge stated, for example, "if appeals were de novo on the record, then it wouldn't matter that much if a person were an attorney or not, but where it is a full re-hearing de novo, it makes a difference what kind of rules you have." Likewise, another judge contended that "if it's worth appealing, then it should be with all the normal formalities."

Atorneys

A majority of the attorneys surveyed favor the present system permitting removal by the defendant from small claims to the regular docket. This same group, however, would also support a change in the law simplifying appeal procedure, thus allowing persons to effectively appeal pro se. Again, this indicates ambiguity and uncertainty rather than a lack of concern as to what should be done. This uncertainty is reflected in numerous comments of the responding attorneys.

29. 55.1% of the respondents favored the present system permitting removal.
30. The responses included: "Many claimants are unable to use small claims because of this ability to transfer cases"; "I would support a restriction on transfer if the jurisdictional amount were somewhat reduced"; "This is the one area that produces most problems and complaints from citizens and clients that I talk with"; "This would prevent insurance companies from removing small claim cases, forcing plaintiffs to hire an attorney, an unfair situation under the present system"; "This is an unnecessary loophole"; "This is a ploy, unscrupulous landlords know how to use this to their advantage to avoid justice"; "Removal should be allowed where insurance is involved because the car owner paid a premium to have an attorney represent [him] and rates are affected by what happens in the case"; "Many defendants use removal procedures as an economic means of defeating meritorious causes of action because plaintiff is unable to retain counsel." One response also suggested that removal should be permitted only upon a showing of good cause to the court, such as complexity of issues, inability to argue a point, or other court-determined good cause.
Several respondents were opposed to any change in the current law. Comments included: “This procedure allowing removals discourages frivolous filing and hearings”; “Not allowing transfer would unduly harm some defendants by more knowledgeable defendants using small claims”; and “People have a right to recognize their need for professional representation and to use it if they desire.”31 Lawyers contacted in this survey were also asked whether they preferred a system mandating a simplified non-technical procedure on appeal from small claims. Over fifty six percent of the respondents favored this change. Comments generally favorable to the change included: “The simpler the better”; “[I] would favor it if attorneys are kept out of the appeal”; “[I] would favor it if both parties agree”; and “It would increase an individual’s access to the courts.”32

Comments from the critics included: “It would increase an already overcrowded docket”; “[It] would take much too time”; “Everyone would appeal”; “Technical procedures are needed to weed out irrelevant facts and issues”; and “District judges don’t have time or patience for this.”33

Overall, these responses were well thought out and showed an excellent awareness of the problem. More importantly, they indicated a need for some practical alternative to the problem, provided that appropriate safeguards are established.

**JURISDICTIONAL ISSUES**

When L.B. 103234 was adopted creating the Nebraska Small Claims Court, most proponents were surprised that a jurisdictional

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31. Other comments included: “Dual access to attorneys serves no useful purpose”; “Some courts need an attorney assisted preparation for precedent purposes even if the amount is small in dollars”; “Some people are totally incapable of representing themselves”; “Corporations need to be able to remove”; “Most county judges are not that bright, so lawyers are needed to advise them of what the law is”; “Removal encourages the plaintiff to dismiss cases that represent anything except sure-thing winners”; “Especially frivolous cases”; and, “It helps appeals from small claims.”

32. Additional comments stated: “Would favor it for matters of less than $1000”; “Would favor it if it does not unsettle the dockets of the district courts”; “Favor it unless very technical cases are involved, then I would not”; “Favor it because judges are usually lenient with both parties who represent themselves on appeal”; “Would be no worse than at present which are hopelessly confused anyway”; “If a person can adequately speak they should be able to act pro se on appeals from small claims.”

33. Other opinions included: “Would approve if it means lawyers are barred”; “Simplifying procedures would not simplify issues”; “Present system is simple as it is”; “Appeals from small claims are usually made because the judges’ decisions were based upon a sense of fairness rather than law, thus resort to strict rules is essential”; “Would oppose this if procedures barring removal are adopted; the people should be allowed to have an attorney at some point”; and, “Would only further additional litigation at the appellate level if this is done.”

amount of $500.00 was approved since only fourteen states at that time allowed small claims courts to resolve amounts that large.\textsuperscript{35}

In 1985, a detailed examination of the statutes and court rules of all fifty states and the District of Columbia shows that only six states limit small claims to actions involving $500 or less.\textsuperscript{36} Nebraska increased its jurisdictional amount to $1,000, on August 22, 1979, and to $1500 as of April 2, 1985.\textsuperscript{37} As of March, 1985, thirty two states had established $1,000 or more as the jurisdictional limit for small claims.\textsuperscript{38} In fact, sixteen states allow actions for small claims where the amount is for more than $1,000.\textsuperscript{39}

Under the original bill in Nebraska, the small claims court's equitable jurisdiction was limited.\textsuperscript{40} At that time it had been traditionally assumed that the courts of limited jurisdiction did not have equitable powers. For that reason, the provision permitting rescission, disaffirmance, and avoidance because of fraud or incapacity such as minority within the small claims court was included. Many states have included a similar provision.\textsuperscript{41}

\textsuperscript{35} Forbes, \textit{supra} note 1, at 336.
\textsuperscript{36} Table A \textit{infra}.
\textsuperscript{37} In 1979, L.B. 117, \S\ 51, 1979 Neb. Laws raised the jurisdictional amount to $1,000. In April, 1985, Governor Robert Kerrey signed L.B. 373E which increased the jurisdictional amount to its current $1500.

The new law increasing small claims jurisdiction requirements requires the Nebraska Supreme Court to adjust the jurisdictional amount in accordance with the average percentage change in the unadjusted Consumer Price Index for all urban consumers for the five year period preceding the adjustment date. Additionally, the jurisdiction of such court is confined to cases for recovery of money or the cancellation of any agreement involving material fraud, deception, misrepresentation, or false promise.

\textsuperscript{38} See Table A \textit{infra}.
\textsuperscript{39} In fact, sixteen states allow actions for small claims where the amount is more than $1,000. See, e.g., Neb. Rev. Stat. \S\ 73.060 (1973) ("general provisions of law applicable to the proceedings in justices' courts not in conflict with this chapter . . . shall apply to make the procedure in this chapter complete and effective." Wis. Stat. Ann. \S\ 799.04(1) (1981) (general rules of practice and procedure apply in small claims proceedings). Table A should be examined carefully in order to determine if the characteristics of a particular jurisdiction qualify that state to be classified as a "true" small claims court in a practical sense. Iowa, for example, allows small claims to be filed for civil actions up to $2,000. Iowa Code \S\ 63.1 (1983). Thus, all claims for less than $2,000 are governed by the small claims procedures and no jury is permitted. This preclusion of a jury trial, either originally or on appeal, was constitutionally upheld in Iowa Nat'l Mut. Ins. Co. v. Mitchell, 365 N.W.2d 724, 729 (Iowa 1981).

\textsuperscript{40} L.B. 1032, \S\ 22(2), 1972 Neb. Laws (codified at Neb. Rev. Stat. \S\S\ 24-521 to -527 (Reissue 1979)).

\textsuperscript{41} La. Rev. Stat. Ann. \S\ 13-5202(B) (West Supp. 1985) ("A small claims division shall have authority to grant any appropriate relief, including money damages and equitable relief; except that injunctions and restraining orders shall not issue from a small claims division."). Me. Rev. Stat. Ann. tit. 14, \S\ 7481 (West Supp. 1984) (district court shall have power to grant monetary and equitable relief in these actions; equitable relief is limited to orders to return, reform, refund, repair, or rescind). N.D. Cent. Code \S\ 27-08-1-01 (Supp. 1983) ("The jurisdiction of such court shall be confined to
SMALL CLAIMS

There are still some states, however, which do not vest their small claims courts with equitable powers. As the 1984 survey responses indicate, the Nebraska jurisdictional provisions have not created any unusual problems. One provision included in L.B. 1032 was a provision preventing a plaintiff from suing a defendant in a geographically distant area which could have the practical effect of allowing the plaintiff to win a judgment by default. This subject matter jurisdictional requirement that the defendant reside or be doing business in the area rather than making this a mere venue requirement has proven very successful. This provision has been adhered to in many other states' small claims courts since 1973 although it is not always clear whether this requirement is one of venue or jurisdiction.

Jurisdictional Amount: Is a Change Necessary?

This question was submitted to all three groups surveyed. The responses were not consistent among the three groups. Only twenty-four percent of the district judges favored increasing the $1,000 jurisdictional limit, whereas twenty-seven percent of the county-municipal judges favored such an increase, and fifty-five percent of the attorneys favored an increase from $1,000 to a range of $1500 to $10,000. At the same time, six percent of the county-municipal judges would decrease the jurisdictional limits to less than $500, as would five percent of the attorneys. Table A indicates that there is also a lack of agreement among states as to what constitutes an appropriate jurisdictional limitation for small claims. Obviously, the amount chosen will depend upon many factors, for example, whether attorneys are allowed or whether judges hearing small claims must also act as attorneys. In evaluating the monetary limitations in Table A, all of the characteristics of a particular state’s small claims court should be examined prior to drawing any conclusions.

One suggestion made for cases involving more than $1,000 was that the case be removable to the regular docket, while allowing simplified procedures and representations by attorneys. Another suggestion was that the amount be changed immediately to $2,000 since it is cases for recovery of money, or the cancellation of any agreement involving material fraud, deception, misrepresentation, or false promise, where the value of the agreement or the amount claimed by the plaintiff or the defendant does not exceed one thousand five hundred dollars.

42. See Table A infra.
difficult for an attorney to handle a case for less than this and charge a fair fee. One lawyer stated that "$1,000 is enough [and] if a plaintiff feels [he is] entitled to more, [he] should be required to follow reasonable procedures and technical rules and use a lawyer." Another attorney agreed that $1,000 was enough for now but suggested that the limitation be automatically reviewed every several years to ensure that the jurisdictional amount keeps pace with inflation. In summary, there was general agreement regarding jurisdictional amount although a few attorneys strongly encouraged an increase.

Jurisdictional Limitations Upon Number of Claims That May Be Filed

As indicated above, Nebraska for some time was one of only two states to provide specifically by statute that no plaintiff may file more than a certain number of cases in small claims court during a given period.\textsuperscript{45} Several other states now have added such a restriction.\textsuperscript{46} The original reason for this limitation was to foster the notion that the small claims court was not for any particular group, e.g., collection agencies, utility companies, larger retailers, landlords with large numbers of tenants, or even for the "troublemaking neighbor" who wishes to sue everyone as a recreational device.\textsuperscript{47} It was also an attempt to prevent a business from having a person become a "store front lawyer" and place others at an unfair disadvantage.

There are presently no exceptions to the Nebraska law. Although a bill introduced in the Judiciary Committee in 1983 would have repealed this limitation, it did not come to the floor of the Nebraska Unicameral.\textsuperscript{48} Presently, there is a bill before the legislature which would allow libraries to use the small claims court an unlimited number of times to sue for damages to library materials.\textsuperscript{49} The

\textsuperscript{45} NEB. REV. STAT. § 24-523(6) (1979).
\textsuperscript{46} See Table A infra.
\textsuperscript{47} The Nebraska provision is viewed as "desirable" in a model small claims procedure, as one commentator has suggested: "Another alternative, which has been adopted by Nebraska . . . is the best means of accommodating the conflicting policies of free access to the small claims court and prevention of the misuse." Special Project, Judicial Reform at the Lowest Level: A Model Statute For Small Claims Courts, 28 VAND. L. REV. 713, 768 (1975) [hereinafter cited as Special Project].
\textsuperscript{49} In addition to specifically naming a library as an "entity," it would allow them to use small claims an unlimited number of times. It would also provide that they would not be required to pay a filing fee. While there is some merit to providing a workable system to public libraries as well as to some other plaintiffs who have a practical problem in collecting small amounts, this approach does not seem consistent with the original or present goals of the small claims court. Certainly the number of cases filed in small claims by libraries could become extremely large; persons would view the court as a collection agency for libraries. Moreover, the expertise developed by library employees might put the other party at a disadvantage. It is suggested that an
results of the survey completed in 1984 indicate that eighty seven percent of county-municipal court judges favor the present limitations on filing. Of the attorneys surveyed, sixty-eight percent also preferred the present limitations, while twenty-four percent would make some changes and eight percent would have no limitations whatsoever.\footnote{Comments from the judges were mostly positive: "This is an excellent provision"; "This should not be changed, otherwise we would be flooded with collection suits." Lawyers commented: "Courts are paid to administer justice; how can a limit be placed on that?"; "There are adequate remedies for individuals who overuse the court or file frivolous suits; thus this is unnecessary"; "This keeps frivolous claims from being filed." One lawyer suggested that "the present limitations are not in fact enforced; therefore it made no difference." Others said: "It should be an occasional use for personal disputes, not for large companies"; "Sometimes sophisticated individuals already dominate and manipulate small claims; this is one way to limit that"; "It must be prevented from becoming a collection agency in the eyes of the public"; "Firms would become lazy in collecting efforts and hundreds of filings would take place"; "I have had no clients who were harmed by the limitations; leave it as it is." Only one comment strongly advocated a change, although as the survey shows, there were some who believed that the limitation should be reexamined and possibly changed.} It is strongly recommended that the limitations be retained and that changes such as those suggested by L.B. 1072 giving libraries this unusual benefit be discouraged. If the law is changed so that libraries may use the small claims courts without limitations, then public utilities, private utilities, and local government bodies will soon advocate a similar privilege. Such usage was not and is not the purpose of small claims courts, either from an historical or jurisprudential perspective.

**MAJOR PROBLEMS OF THE SMALL CLAIMS COURT IN NEBRASKA**

Each person to whom a questionnaire was sent was asked to indicate the greatest problem in the small claims practice and procedures and to suggest possible solutions. Although it was initially anticipated that the various responses to this question would be difficult, if not impossible, to correlate, there is much similarity among the issues raised by the responses of all three groups.

*District Court Judges*

Among district court judges, the two most common problems cited related to appeals from small claims.\footnote{This is understandable since district judges' exposure to small claims is primarily limited to appeals.} Some unequivocally believed that all appeals from small claims should be de novo on the record. Many also indicated the difficulty when one party has access
to a lawyer but the other party does not. Some would go so far as abolishing all appeals to the district court if this were constitutionally possible.

Municipal and County Judges

The county and municipal judges raised two major problems: the collection on judgments and the need for repeal or revision of the rule permitting removal to the regular docket. Other less frequently raised issues included “plaintiffs don’t know who the real defendants are and who to name and how to serve them” and “a simple form system like the Probate Code System needs to be available to everyone using small claims, and they could buy it as a guide.”

Attorneys

Attorneys were also asked to list their conclusions regarding the most serious problems. Ninety percent of those responding indicated that collection of judgments was the greatest problem. The second issue most commonly raised was the removal provision from small claims to the regular docket. No other issues were as prevalent.

52. Other respondents suggested: “The law should state that mailing a summons first class followed by an affidavit to this effect is sufficient to give the court personal jurisdiction”; "A special small claims garnishment and execution procedure needs to be enacted”; "Lay people can't present cases clearly and properly"; "Docket control is impossible, because we can't know how long a case will take"; "Parties don't bring the required evidence"; "I have no complaints—the current procedures are the best around"; “People complain about not being able to collect”; and, “More people collect in small claims, percentage wise, than in the regular docket cases so this problem is often exaggerated.”

53. Other relevant critical comments were given: “Court is burdened with excessive irrelevant materials”; “Parties don’t know what to bring as evidence”; “Routine removal from small claims defeats purpose of small claims”; “Limitations on use of small claims presents a problem”; “Judges do not apply the law, they use rules of fairness and this is wrong"; “Judges are not knowledgeable of the substantive law enough to decide cases without a lawyer"; “Parties don’t know how to present a case even if they have the evidence”; “A small claims explanatory manual is needed badly, should be mandatory that they read it before using small claims”; “Service of summons should be made much simpler and cheaper”; “Judges are too impatient, they make people scared of the proceedings and of them”; “Judges should have people sit at a table with the judge and treat it much more informally”; “Judges should give their decision when they hear the evidence and not make people wait”; “Judges don’t decide the cases for a long time and people cannot understand that kind of delay and they don’t know whether to have a car fixed or not”; “Some discovery is necessary”; “People don’t know the court exists”; “Judges forget that even small claims is still a true court and should act like it”; “Judges are biased towards creditors and show it”; “Judges are insensitive and not responsive to laymen’s needs”; “Judges are afraid to raise defenses that are obvious, for fear of being accused of practicing law or being an advocate for one person”; “Lawyers should be allowed as a check”; “Judges are often incompetent”; “The appeals procedures are ambiguous”; “The forms need to be redone and made to be and to look simple”; “Plaintiffs should be made to understand that judgments don’t mean you will get paid”; “Rules regarding procedure in small claims should be adopted
When attorneys were asked if, as a general practice, they advised individuals to use the small claims court, ninety-five percent responded affirmatively. In addition, seventy percent indicated that their clients were generally satisfied with the results of the small claims process. This latter figure includes primarily plaintiffs.54

The Omaha Experience: An Empirical Study

The table presented on the next page shows an historical record of small claims court's activities in Omaha from the time of its inception through December 31, 1984. Conversations with attorneys and county judges in rural areas and an examination of the answers to the questionnaire distributed throughout the state indicate that the Omaha experience is representative of what has been occurring throughout the state.

These statistics show that what many people feared might happen in Nebraska did not in fact happen, namely that the court might become "a plaintiff's court."55 In fact, persons who appear before the court as defendants frequently prevail. This table also presents five major considerations. First, approximately thirty percent of the cases filed in small claims court are dismissed.56 Second, the average amount of judgments for all cases filed since the court was created is two hundred fifty four dollars. Third, settlements prior to trial occur in excess of twenty percent of the cases. Interestingly, almost

54. At the same time, 16% of the lawyers indicated that whether their clients were satisfied depended upon the results of the proceeding.

55. While it is true that more plaintiffs have prevailed in each year reported than did defendants, from a low of 61% in 1975 to 74% in the first year of the court's existence, the figures are not surprising. The average in favor of the plaintiff since the court was created is less than 70% of the cases. Whatever may have been the experience in some other jurisdiction where this is alleged to have occurred, it has not been true in Nebraska.

56. Common bases for dismissal have been improper service of process, improper party named (as where a tenant names the manager rather than the owner of the building), plaintiff filed and failed to appear, or court determined that for some reason it did not have jurisdiction of the subject matter or over the person. It is also reasonable to assume that many of these are dismissed because the plaintiff and defendant settle the dispute but the plaintiff did not formally dismiss the action or advise the judge before the hearing date.
### SMALL CLAIMS

<table>
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<tr>
<td>Total Tried</td>
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<td>908</td>
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<td>775</td>
<td>790</td>
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<td>1,065</td>
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<td>522</td>
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<td>(Percentage)</td>
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<td>71.7%</td>
<td>69.7%</td>
<td>69.5%</td>
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<td>4.6%</td>
<td>4.6%</td>
<td>1.1%</td>
<td>1.9%</td>
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<td>Request for Jury or Removal</td>
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<tr>
<td>Average Per Day Tried</td>
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<td>3.6</td>
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<td>3.9</td>
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<tr>
<td>Percent of Filings Tried</td>
<td>43.9%</td>
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<td>36.4%</td>
<td>36.9%</td>
<td>41.4%</td>
<td>34.8%</td>
<td>33.5%</td>
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<tr>
<td>Percent of Filings Settled Prior to Trial</td>
<td>19.3%</td>
<td>17.5%</td>
<td>17.5%</td>
<td>20.5%</td>
<td>21.5%</td>
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<td>22.5%</td>
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<td>23.7%</td>
<td>20.4%</td>
<td>21.0%</td>
<td>26.3%</td>
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</table>

*Jurisdictional limit increased to $1,000.00 on August 22, 1979. This amount was raised to $1,500 in April, 1985.


***Removal Re-enacted August 29, 1981.
thirty percent of the cases in 1984, as compared to twenty-one percent in 1983, were settled.\textsuperscript{57} Fourth, the number of cases tried in 1984 was less than the number tried in any prior year. This may be one of the most discouraging statistics within the table since it may be the result of the large number of cases that were removed to the regular docket in 1984.\textsuperscript{58} Fifth, after subtracting the number of dismissals and settlements, the number of removals is significantly high. Many parties, especially corporate defendants in consumer-type lawsuits, are learning that removal to the regular docket is an effective, inexpensive device, often resulting in a favorable decision.\textsuperscript{59}

\textbf{CONCLUSIONS AND RECOMMENDATIONS}

Discussed below are several suggestions that the state legislature may wish to consider when drafting remedial legislation. These suggestions are based on the assumption that three major problems exist within the Nebraska Small Claims Court System: (1) the process permitting an appeal de novo even though a full hearing on the merits may have been had below; (2) the ease of removal by a defendant of an action from small claims court to the regular docket; and (3) the real or perceived difficulty of collecting or enforcing small claims judgments. The identified specific problems have been studied from a public policy standpoint and have been comparatively analyzed.\textsuperscript{60} A miscellaneous section relating to other possible suggestions for improvement and based upon the criticisms raised in the summary is also included.

\textit{Appeals De Novo}

Nebraska law currently provides that all appeals from small claims court be tried de novo without a jury.\textsuperscript{61} Nebraska Revised Statute section 24-541.07 provides:

\begin{quote}
In all cases of appeals from the Small Claims Court the district court shall try the case de novo without a jury. The judgment of the district court shall vacate the judgment in
\end{quote}

\textsuperscript{57} One possible explanation for this might be the reenactment in 1981 of the "removal to the regular court provisions." Certainly such a procedure would make it easier for a defendant to force a settlement by threatening to remove the case to the regular docket at which time the plaintiff would probably have to obtain an attorney or settle.

\textsuperscript{58} For example, 187 cases were removed to the regular docket. This number becomes significant when it is noted that of 2,591 cases filed in small claims, 963 cases were dismissed. Of the remaining 1,600 or so cases, 187 were removed to the regular docket.

\textsuperscript{59} For further discussion, see notes 89-93 and accompanying text infra.

\textsuperscript{60} The statutes of every state having a small claims procedure were examined.

\textsuperscript{61} \textsc{Nebraska Revised Statute} § 24-541.07 (Cum. Supp. 1984).
the county court or the judgment, if entered prior to July 1, 1985, in the municipal court. The taxation of costs in the district court shall include the costs in the county court. The appeal may be based simply on the appellant’s assertion that the lower court’s judge's decision was incorrect. It should be noted that the decision of the small claims judge would encompass all factual determinations because no jury is used unless the matter is transferred to the regular docket.

Under current law, the defendant may remove the action from small claims court, and thus obtain a jury trial, by giving notice within two days of the small claims hearing. Nebraska Revised Statute section 24-52562 provides:

All matters in the Small Claims Court shall be tried to the court without a jury. Any defendant in an action may transfer the case to the regular docket of the county court by giving notice to the court at least two days prior to the time set for the hearing; upon such notice the case shall be transferred to the regular docket of the county court. The party causing the transfer of the case from the Small Claims Court to the regular docket shall pay as a fee the difference between the fee for filing a claim in Small Claims Court and the fee for filing a claim on the regular docket. In any action transferred to the regular docket there shall be no further pleadings, demurrers, motions challenging pleadings, or discovery unless ordered by the court upon a showing that any such procedure is necessary to the prompt and just determination of the action.

Except for this provision, appeals from small claims are governed by the ordinary provisions regarding appeals from county or municipal court to the district court.63

It should be noted that the appellant from small claims must deposit a cash bond or undertaking with the clerk of the county or municipal court and have at least one surety approved by the court.64 Furthermore, the appellant must also satisfy any judgment and costs adjudged against him. In addition, the appellant must serve notice of the appeal upon all parties who have appeared at claims court or upon their attorney of record.65 While these requirements may seem fairly simple to the attorney, it is doubtful that the non-lawyers would think so.

63. NEB. REV. STAT. § 24-527 (Cum. Supp. 1984) provides: “Any party may appeal to the district court as provided in sections 24-541.01 to 24-541.10 and 24-551. Parties may be represented by attorneys on appeal.”
It is important to keep in mind that appeals from the county or municipal court in all cases other than small claims are appeals de novo on the record. The relevant statute provides:

In all cases other than appeals from the Small Claims court, the district court shall review the case for error appearing on the record made in the county court. The district court shall render a judgment which may affirm, affirm but modify, or reverse the judgment or final order of the county court. If the district court reverses, it may enter judgment in accordance with its findings or remand the case to the county court for further proceedings consistent with the judgment of the district court.

Since the Nebraska legislature has made a policy decision to exclude attorneys from small claims court proceedings (an action supported overwhelmingly by both the bar and the judiciary), it is probable that such an appeal de novo is constitutionally required. An appeal de novo on the record where no attorney is permitted in the initial small claims hearing might well encounter due process objections. The reason for this is that counsel might have added to or deleted from the record certain crucial material or evidence. There is, however, no constitutional impediment to discouraging appeals by otherwise appropriate means. For instance, one method often used is the imposition of an attorney's fee award. This has been done in some small claims procedures in other states.

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67. Id.
68. See Forbes, supra note 1, at 327.
69. States allowing attorney fees where there has been a removal to the regular court docket from small claims court or where there has been an appeal from small claims, or otherwise limiting removals or appeals include: Arizona: ARIZ. REV. STAT. ANN. § 22-517(c) (Cum. Supp. 1985) (attorney fees allowed if defendant files counterclaim to get around the jurisdictional limits of the small claims court); California: CAL. CIV. PROC. CODE § 116.8 (West 1982) (transfer to regular court only if judge allows; court can award attorney fees if transferred). CAL. CIV. PROC. CODE § 117.12 (West Cum. Supp. 1985) (provides that “if the judge finds that the appeal was without substantial merit and not based on good faith, but intended to harass, delay, or encourage plaintiff to abandon his or her claim, the judge may award attorney’s fees of up to . . . $250.00.”); Colorado: COLO. REV. STAT. § 13-6-408 (Cum. Supp. 1984) (if court finds that defendant filed counterclaims for delay, court can award attorney fees); Connecticut: CONN. GEN. STAT. ANN. § 52-2519 (West Cum. Supp. 1984) (if defendant transfers and plaintiff wins, then court can allow attorney fees). For a recent case discussing this practice, see Moffitt v. Horrigan, 37 Conn. Supp. 873, 441 A.2d 207 (1982); Idaho: Frizzell v. Swofford, 663 P.2d 1125, 1129-30 (Idaho 1983) (ruling appeal bond unconstitutional); Indiana: IND. CODE ANN. § 33-4-3-10(B) (Burns 1985) (defendant can demand jury and remove); Kansas: KAN. STAT. ANN. § 61-2709 (1983) (no bond is necessary for appeal; if appellant is successful on appeal, court can award reasonable attorney fees); Kentucky: KY. REV. STAT. ANN. § 24A.320(2) (Baldwin 1984) (removal only if a jury is requested); Massachusetts: MASS. GEN. LAw. ANN. ch. 218, § 23 (West Cum. Supp. 1985) (reasonable attorney fees if an insurance company removes to the regular
Imposing costs and/or attorney's fees is an effective deterrent to frivolous appeals and to appeals taken solely to induce the plaintiff to abandon the matter. It is not illogical, then, to assume that most small claims cases have been decided and decided correctly based upon the appropriate substantive law.\textsuperscript{70}

Still, errors occur in every system, and an appeal of some sort needs to be provided as a matter of public fairness, even if it were not constitutionally required. It is difficult, however, to oppose the imposition of some \textit{reasonable} constraints upon an appealing party who has been unsuccessful in small claims given that the appeals procedure may be misused. In the Nebraska survey, a majority of the Nebraska district court judges indicated that they believed that individuals could appeal successfully \textit{pro se} if both appellant and appellee appeared \textit{pro se}. At the same time, these respondents and others within the survey strongly believed that appeals in which only one party is represented by counsel presented a major problem and created an inequitable situation.

One solution to this problem would be to provide that the appellee be entitled to recover a reasonable attorney's fee upon success in district court. The Nebraska Supreme Court has specifically stated

docket; if the party losing wishes to appeal, a bond must be posted to cover attorney fees). In addition, Massachusetts law in landlord tenant cases allows or requires the landlord defendant to post a bond for treble damages in order to appeal. Hampshire Village Assocs. v. District Court, 381 Mass. 138, 408 N.E.2d 830, 839-840, cert. denied, 449 U.S. 1062 (1980); Michigan: Mich. Comp. Laws Ann. § 600.8408(2) (West 1985) (if no removal asked for, then no appeal allowed); Montana: Mont. Code Ann. § 25-35-806 (1983) (if parties are represented by counsel on appeal, court may grant prevailing party his reasonable attorney’s fees in addition to costs; if a defendant removes . . . but does not prevail in justice’s court, court may grant plaintiff his reasonable attorney’s fees, if any); Nevada: Nev. Rev. Stat. § 73-050 (1973) (attorney fees allowed if appealed from small claims); New York: N.Y. Jud. Law § 1812 (McKinney Cum. Supp. 1985) (possible treble damages and payment of reasonable attorney fees if defendant delays in payment of judgment); North Dakota: Although the plaintiff cannot appeal from small claims, the defendant may if removed. Kostelecky v. Engeltar, 278 N.W.2d 776, 779-80 (N.D. 1979); Oklahoma: Okla. Stat. Ann. tit. 12, § 1757 (West 1980) (“If the plaintiff ultimately prevails in the action so transferred by the defendant, a reasonable attorney’s fee shall be allowed to plaintiff’s attorney.”). This statute was upheld in Thayer v. Phillips Petroleum Co., 613 P.2d 1041, 1045 (1980); South Dakota: S.D. Codified Laws Ann. § 60-11-24 (Cum. Supp. 1984) (where defendant removes in actions for wages, court may award attorney fees); Utah: Utah Code Ann. § 78-6-10 (1977) (attorney fees to prevailing party on appeal). \textit{See also} Liedtke v. Schettler, 649 P.2d 80, 81 (Utah 1982) (limiting plaintiff’s right to appeal but not defendant’s does not violate equal protection).

\textsuperscript{70} See Roodhouse, \textit{Small Claims Courts: What Should It Provide and How Well Does It Do So?}, 51 Cal. St. B.J. 126 (1976). The author states: “A comparison of the studies shows that small claims procedures probably reach the correct decisions most of the time, apparently because most of the actions brought are valid.” Id. at 166. Indeed, if this assumption is incorrect, then the issue is not one of small claims procedures needing reexamination and improvement but a much greater one challenging the overall competency of an entire level of the judiciary of a state.
that in order to recover attorney's fees, a statute permitting the recovery is required.\textsuperscript{71} Thus, even where a contractual clause provides for recovery of attorney's fees, the court will refuse to enforce such a provision.\textsuperscript{72} In 1944, the court showed no willingness to relax this rule. In \textit{Shepard v. Shepard},\textsuperscript{73} the court stated: "As a general rule of practice in this state attorney fees are allowed to the successful party in litigation only where such allowance is provided by statute."\textsuperscript{74}

In later decisions such as \textit{Gamsoni v. County of Otoe},\textsuperscript{75} the court recognized that in a few situations, particularly in equitable actions, some exceptions to the strict rule announced earlier might exist.\textsuperscript{76} In \textit{Gamsoni}, the court allowed recovery of attorney's fees from a fund from which those benefitting from the litigation would be entitled to share.\textsuperscript{77}

In \textit{Winkler v. Roeder},\textsuperscript{78} the court stated that in an assault and battery civil suit, the plaintiff could not recover attorney's fees since they were in the nature of vindictive or punitive damages and should not be allowed any more than in a contract action unless the statutes change the rule. In other cases, the supreme court of Nebraska has refused to allow punitive or exemplary damages because of constitutional provisions that require penalties in civil actions to be paid to the common school funds.\textsuperscript{79} It is possible that the court would, in 1985, decide that punitive damages or those damages other than strictly compensatory could be constitutionally permissible. If this is not the case, then several current statutes are unconstitutional.\textsuperscript{80} For example, in landlord-tenant disputes, there are at least two sections permitting treble damages.\textsuperscript{81} There is no indication that these were viewed as presenting any constitutional problems when they were originally enacted by the legislature. It appears, therefore, that where a statute has been enacted permitting the award of an attorney's fee, the Nebraska Supreme Court has, without exception, upheld such provision and that no public policy is either frustrated or violated by allowing such awards.

It is also significant that in the cases upholding the awards of at-

\begin{itemize}
\item \textsuperscript{71} Dow v. Updike Bros., 11 Neb. 95, 98, 7 N.W. 857, 858 (1881).
\item \textsuperscript{72} Id.
\item \textsuperscript{73} 145 Neb. 12, 15 N.W.2d 195 (1944).
\item \textsuperscript{74} Id. at 16, 15 N.W.2d at 198.
\item \textsuperscript{75} 159 Neb. 417, 67 N.W.2d 489 (1954).
\item \textsuperscript{76} Id. at 437, 67 N.W.2d at 502.
\item \textsuperscript{77} Id. at 437-38, 67 N.W.2d at 502-03.
\item \textsuperscript{78} 23 Neb. 706, 37 N.W. 607 (1888).
\item \textsuperscript{79} Id. at 709, 37 N.W. at 608.
\item \textsuperscript{80} For example, NEB. REV. STAT. § 48-905 (Reissue 1984) allows an award of attorney fees and treble damages where the plaintiff is injured by a secondary boycott.
\item \textsuperscript{81} NEB. REV. STAT. § 76-1437(3) (Reissue 1981).
\end{itemize}
torney’s fees, the court has not indicated that the amount of the fee might be limited in some manner by the amount of the actual damages sustained. Rather, the court has adopted, in absence of statutory limitations, a view that the amount of a reasonable attorney’s fee is to be based, in all instances, upon time, difficulty, risk, complexity, and other relevant factors in setting the fee. Thus, it is very likely that an attorney’s fee may well exceed the jurisdictional amount of the small claims court and the amount of the actual damages sustained. This in itself would naturally act as a deterrent to the filing of a frivolous appeal.

Examination of all Nebraska statutes permitting an award of attorney’s fees to the prevailing party:

§ 48-1120(6) (appeals in employee discrimination cases);
§ 42-351(1) (marriage, custody, and settlement of property rights);
§ 25-1336 (affidavits made in bad faith or solely for the purpose of delay);
§ 25-824 (allegations or defenses made without reasonable cause or found to be untrue);
§ 55-189 (actions against active state military personnel);
§ 87-303(b) (groundless trade practice complaint or a party willfully engaged in a deceptive trade practice);
§ 87-409 (franchisee versus franchisor);
§ 48-1231 (employee claim for wages not paid in 30 days);
§ 32-1001.29 (contention of election results by a contestant).

Plaintiffs, if they prevail, are specifically allowed to recover reasonable attorney fees in the following statutes:

§ 48-1206 (recovery of unpaid minimum wages);
§ 25-1801 (withholding of exempt wages by employer);
§ 44-359 (all insurance cases and appeals by insured, unless against own insurer judgment is less than insurance company offers);
§ 44-137.07 (contract of insurance with unauthorized insurers);
§ 48-905 (injuries in a secondary boycott);
§ 36-213.01 (violations of assignment of wages by head of family);
§ 76-296 (filing notices to slander real estate title);
§ 74-715 (claim for loss or damage to property by common carrier);
§ 69-1607 (sales made in violation of door-to-door personal property act);
§ 76-1428(1) (defense or counterclaim by tenant without merit or not in good faith);
§ 76-1415(2) (deliberate use of prohibited lease provisions);
§ 76-1430 (landlord’s unlawful ouster of tenant);
§ 76-1431(3) (noncompliance by tenant in a rental agreement);
§ 76-1415(3) (failure of landlord to return tenant’s possessive security deposit);
§ 76-1437(3) (tenant remains in possession without landlord’s consent);
§ 76-1438(2) (unlawful entry by landlord);
§ 8-819 (personal loans by unregistered banks);
§ 84-1414(3) (unlawful motion, resolution, rule, or regulation by a public body);
§ 9-1118(1) (sale of security in violation of security act);
§ 7-801(1) (UCC) (lost and missing documents in bailments);
§ 9-504(1)(a) (UCC) (disposal of collateral after default by secured party);
§ 9-506 (UCC) (debtors right to redeem collateral after default); § 3-106(1)(e) (UCC) (sums payable on negotiable notes);
§ 57-205 (forfeited leases involving oil, gas, and mineral interests);
§ 60-1423 (violated expressed or implied warranty by franchisor or franchisee);
§ 42-364.07 (obtaining the order to withdraw and transmit earnings in child support cases);
§ 43-1215(2) (violation of custody decree of another state);
§ 28-340 (employment discrimination against persons refusing abortion);
§ 25-530.07 (actions against unauthorized foreign or alien manufacturers and distributors of motor vehicles);
§ 76-1014 (refusal to request a reconveyance on trust deeds);
§ 75-143 (appeals to supreme court by commission or other interested parties);
§ 81-1812 (compensation for civil injuries not exceeding five per cent of compensation).

Plaintiffs may be allowed to recover reasonable attorney fees from government agencies or other third parties under the following statutes:

§ 19-2907 (failure of a municipality to conduct an annual audit);
§ 24-204.01(3) (cases against the state involving constitutionality of an act of the legislature);
§ 48-646 (recovery of employment benefits; attorney fees may be paid out of the
attorney's fees shows no consistent public policy that is being furthered by permitting such awards. Possibly the enactment of a particular statute occurred simply because of the persuasiveness of certain lobbying groups. Yet, it is still possible that there is at least one consistent policy. Where the legislature believed that the judicial system was being used improperly or where there was a violation of what society basically considers a socially desirable objective or where there was some urgency because of the circumstances, the legislature appeared more willing to allow attorney's fees to the plaintiff. Certainly, awarding attorney's fees to the prevailing party has been viewed as one method deemed appropriate by the legislature to encourage expeditious settlement or payment of money due. Moreover, it is apparent that attorney's fees have been awarded or allowed by statute to discourage delay in payment and to discourage appeals where it is likely that an appeal would be unsuccessful, and is brought primarily for purpose of delay or to be "vexatious." The best expression of this public policy is found in Nebraska Revised Statutes section 30-160383 which determines that a party who has filed an appeal "vexatiously or for delay" may have attorney's fees assessed against him. The same public policy supports the recommendation of this article.

Most appeals today from small claims to the district court involve both parties being represented by lawyers.84 This means that the appellee who chooses to use the "fast, efficient, inexpensive" small claims procedure is now required to employ an attorney to pursue the appeal de novo.85 This is true even though present Nebraska law attempts to allow non-lawyers to handle their own small claims, even after removal to the regular court, by providing that court approval be required before additional pleadings may be filed. Never-
theless, the appeal procedure is, at present, too difficult for most non-lawyers to use comfortably. This is especially true when an unrepresented party must face an attorney representing the other party.

As several judges and attorneys pointed out in the survey, the de novo appeal is, in practice, an effective and inexpensive device allowing the affluent party to prevail in spite of the merits of the claim because the non-represented party will simply terminate the action by defaulting. The Omaha small claims court survey suggests this conclusion. While such a result may satisfy the rare district judge who abhors any pro se appeals from small claims, it does little to instill in the plaintiff any sense of justice done. Instead, the plaintiff feels doubly wronged. This presents obvious frustration to that party who probably has a meritorious claim, to the attorney who may have urged the use of the small claims process, and to the small claims judge who initially ruled in the party's favor.

Changing the procedures on appeal to provide for the use of the same simple, nontechnical procedure as used in small claims did not receive overwhelming support from any of the three groups surveyed. The time it would take to hear such simplified appeals would probably be too great to justify such a change. It would also make it much more difficult to manage the district court docket efficiently since estimation of the time required to resolve such trials might be far more difficult than when attorneys are representing the parties. The parties, therefore, should be discouraged from filing appeals, unless the decision is clearly erroneous, by way of the legislature statutorily providing that the appellant be assessed a reasonable attorney's fee upon appeal unless successful.

Insofar as the plaintiff who chooses the small claims procedure is concerned, he or she has little to complain about by such a rule since the choice to use small claims was voluntary. The defendant who loses on the merits in small claims will not be able to defeat easily the purpose of the small claims court by simply employing an attorney who will file the appeal and win the case by default. Yet, this defendant-appellant will be entitled to a full due process hearing if the appellant believes the decision of the small claims judge to be wrong. At least in theory, the attorney contacted by a client after the client's loss in small claims court would scrupulously examine the case before recommending an appeal out of concern that his client might have to pay a rather large attorney's fee. The appellee likewise will not likely defend against an appeal where his or her counsel concludes that the decision of the small claims court was clearly wrong, at least incurring his own nonrecoverable attorney's fee in an obviously weak case. In such a situation, or even where the
ultimate resolution of the matter is unclear, a prompt settlement is the likely result. Generally, the law encourages settlements by the parties as positive public policy.

The statute, because of the same policy considerations, should provide for the same relief where a counterclaim is filed by a defendant and is the subject matter of the appeal. Again, this would discourage the plaintiff from filing frivolous appeals or an appellant from prevailing by default.

As pointed out earlier, it is easy and inexpensive in Nebraska for the party sued in small claims court to move the action to the regular docket. After removal, attorneys may be used and the ordinary rules of evidence will apply. It is true that the parties are both limited in the pleadings that may at that point be filed, motions made, etc., and thus there is some discouragement to the proceeding becoming unduly technical. But the fact remains that after removal, the removing party is usually represented by an attorney. It appears from the statutes that the court, after removal, is at least in theory required to follow the usual rules of evidence and procedure of the county courts. For most attorneys, this will present no problem, but for the layperson, the judicial mystique and maze of rules will effectively deter further action. Since the amounts being sued for are usually too small to warrant employment of an attorney, the result is a likely victory by the defendant simply by removal. Because of the importance of this issue, it is further explored below.

IMPACT AND EFFECT OF REMOVAL FROM THE SMALL CLAIMS DOCKET TO THE REGULAR DOCKET

The study period chosen was January 1, 1984, until June 30, 1984. The cases were all of those which had been filed in the Omaha Municipal Court, Small Claims Division. No cases were excluded from examination. Ninety-four cases were shown to have been removed pursuant to Nebraska Revised Statute section 24-525. The time span chosen was considered sufficient to provide an accurate representative sample of all cases filed within small claims court that have been removed during the past ten years.

Of these ninety-four cases, twenty-nine percent were dismissed because the plaintiff could not or did not pursue the case in any manner after the removal petition was filed. The records indicate that the removal petitions were filed only by attorneys with no showing that any individual removed pro se. The effective result of this was a

86. See note 84 and accompanying text supra.
88. Twenty-seven cases comprise this percentage.
victory for the defendant since the matter would be dismissed either by nonprosecution of the action or by passage of time and then dismissed by the court automatically. In twenty-six of the twenty-seven removal cases, the plaintiff did not obtain an attorney. In one an attorney was retained, but the attorney did not appear in court and the action was subsequently dismissed.

In thirty-five cases, thirty-seven percent of the cases that were removed, the plaintiff obtained an attorney for representation in the regular hearing. Thirty-one of these thirty-five cases actually went to trial after removal to the regular court. The plaintiff was victorious in eighteen cases while the defendant won in thirteen cases. The most pertinent factor was that the plaintiff was significantly more successful when he obtained an attorney; in the eighteen times that the plaintiff won after removal of the case to the regular court, an attorney had been retained in fourteen instances. When the plaintiff appeared pro se after removal, the plaintiff won only four times. While the defendant won in thirteen cases, the defendant was successful at a much higher percentage when the plaintiff appeared pro se.

These records also show that of the ninety-four cases removed, the plaintiff was significantly more successful overall, i.e., either in obtaining a settlement out of court or through trial where the plaintiff employed a lawyer. The plaintiff prevailed in forty-two cases for a success rate of forty-five percent. This number is meaningful only if it is kept in mind that the suit against the defendant in small claims resulted in default favoring the defendant merely by removal in thirty percent of all cases removed.

All cases dismissed after removal were separated, and a random sample was chosen for further analysis by personally contacting those plaintiffs to inquire as to their reasons for not pursuing the matter after removal. The answers revealed almost complete uniformity in response: the plaintiff did not wish to spend the money to obtain a lawyer and believed that a lawyer would be necessary after removal in order to win the case because of the technicalities that would be encountered. Several attorneys responding to the survey indicated they felt obliged to use the removal device because they knew it was a "cheap way to win for their client." All groups sur-

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89. This represents a total of 58% of the cases.
90. This represents a total of 42% of the cases.
91. This correlates to 78% of the cases.
92. This correlates to 22% of the cases.
93. In the 13 cases won by the defendant, the plaintiff appeared pro se 62% of the time and was represented by an attorney 38% of the time.
veyed indicated the removal procedure was a major defect of the small claims system.

So that various alternative solutions might be fully considered, it is necessary to discuss the possible misconception that every defendant is entitled to have a jury trial if requested at some point in all civil actions. The Nebraska Supreme Court has not actually held this to be true in any case where it has been properly argued. When the original small claims court was established in Nebraska, the drafters allowed removal only if a jury was requested. That provision assumed that the right existed. That provision has also been deleted in favor of the present unrestricted right of removal rule.

The Iowa Constitution regarding a right to a jury trial in civil cases is almost identical to the provision in the Nebraska Constitution. The Iowa Supreme Court in an unanimous opinion in Iowa National Mutual Ins. Co., v. Mitchell, concluded that a jury trial in law matters of "small" amounts is not constitutionally required in all cases.

The right to a jury trial preserved by the Iowa Constitution, Article I, Section 9 is the right that existed at common law. A settled common-law rule withheld that right in small claims in interest of cost to parties, time constraints, and judicial resources. Clearly, today's economic conditions justify categorizing as a small claim one involving one thousand dollars or less.

In State v. Hauser, the Nebraska Supreme Court spoke in much the same way when stating that the constitution merely preserved

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94. It may be possible that the right to a jury trial may be negated by the repeal of the law limiting removal to cases where a jury was requested.
97. IOWA CONST. art. I, § 6 provides:
The right of trial by jury shall remain inviolate; but the General Assembly may authorize trial by a jury of a less number than twelve men in inferior courts; but no person shall be deprived of life, liberty, or property, without due process of law.
98. NEB. CONST. art. I, § 6 provides:
The right of trial by jury shall remain inviolate, but the Legislature may authorize trial by a jury of a less number than twelve in courts inferior to the District Court, and may by general law authorize a verdict in civil cases in any court by not less than five-sixths of the jury.
99. Id. at 728-729.
100. Id. at 729.
101. Id. at 728-729. It is important to note that in Iowa all civil matters for less than $2,000 must be tried in the small claims court although an attorney is permitted at the initial hearing and throughout the litigation if desired. Even so, the procedures are simple, and the court has been tailored to allow laypersons to practically and comfortably appear without attorneys.
"the right of trial by jury as it existed at common law and under statutes in force when the constitution was adopted."\textsuperscript{103}

The opinion in \textit{Mitchell} and the reasoning in \textit{Hauser}, however, contradict the Nebraska Attorney General Opinion \textsuperscript{254.104} The latter has concluded that article I, section 6 of the Nebraska Constitution mandates a jury trial in all law cases, regardless of amount.\textsuperscript{105} The Attorney General's Opinion states:

\begin{quote}
[A]ctions for monetary damages, such as those within the jurisdiction of the small claims court pursuant to section 24-522, R. S. Supp. 1979, are actions at law, thus subject to the guarantee of Article I, section 6 of the Nebraska Constitution.\textsuperscript{106}
\end{quote}

Obviously, this opinion \textit{assumes}, without any historical analysis, that at common law all actions at law required a jury trial if requested, whereas the Iowa Supreme Court concluded unconditionally, citing various cases and scholarly treatises to support its conclusion, that a jury trial was not constitutionally guaranteed. There is nothing suggested to this point that the Nebraska Supreme Court could not reach the same conclusion, especially since the respective provisions of the state constitutions are essentially identical. The public policies that support an inexpensive, expeditious, non-technical procedure for resolving large numbers of small claims possibly counterbalance or outweigh what would otherwise be a right to insist upon a jury trial in every civil case irrespective of amount.

It is important to note that the Iowa court in \textit{Mitchell} stated:

\begin{quote}
[T]his small claim nonjury concept was incorporated directly into the seventh amendment to the federal constitution in the twenty dollar limitation. . . . If the basic Iowa law is rooted in English Common Law, then the constitutional direction that the right of trial by jury shall remain inviolate carries with it the common law concept that minor claims may be adjudicated without a jury.\textsuperscript{107}
\end{quote}

The Iowa Supreme Court had no difficulty in determining that the original monetary amount of "forty shillings" should not be considered a fixed amount. In fact, during colonial times the monetary jury limitation was frequently changed by legislatures,\textsuperscript{108} thus rejecting the idea that the amount was static. Based on this reasoning,

\begin{footnotes}
\item[103] Id. at 140, 280 N.W. at 520 (emphasis added). \textit{See} Omaha Fire Ins. Co. v. Thompson, 50 Neb. 580, 584, 70 N.W. 30, 32 (1897).
\item[105] \textit{Id.} at 371.
\item[106] \textit{Id.}
\item[107] 305 N.W.2d at 727.
\item[108] \textit{Id.} at 728.
\end{footnotes}
the court concluded that when the question is raised as to when a jury must be granted under both the federal Constitution and the state constitution, the court will use a common sense approach:

This concept in turn must be brought into the twentieth century in terms of nonjury limitations based on almost two hundred years of increasing monetary supply. In a shorter period, we note economic conditions have changed since a Henry County eighty acres could be purchased for $126.50. . . . In summary, the right to a jury trial preserved . . . is the right that existed at common law. A settled common-law rule withheld that right in small claims in the interests of cost to the parties, time constraints, and judicial resources. Moreover, a basic characteristic of the common law is its capacity for dynamic adaptation to changing social and economic conditions. Clearly, today's economic conditions justify categorizing as a small claim one involving $1000 or less. Thus no jury need be provided in such a case under the historic common-law principle that recognized the right to jury trial only in certain categories of cases that were not small claims.\footnote{109}

When the Iowa legislature recently amended its statute\footnote{110} to increase the jurisdiction of the small claims court to $2,000, it also included a provision stating that in the event the supreme court of Iowa should determine that such an amount was too great, i.e., that a jury trial would be required in cases that involve a large monetary amount and thus make the provision unconstitutional, the amount would revert to the $1,000 limit previously upheld. Research of the Iowa cases does not show any constitutional challenge to this larger amount.

It should be noted that this article does not advocate abolition of a jury trial in small claims, only that there appears to be sufficient judicial authority to at least consider that possibility should the legislature wish to do so.

It is recommended that the provision permitting removal to the regular court be repealed\footnote{111} that a jury trial at the district court

\footnotesize{Appeals in some states are by a trial de novo. Unless this mode of appeal is restricted, it emasculates the function of the small claims court and indicates a lack of trust in these courts by the legislature. In addition, it encourages defaults by defendants since they can relitigate the case in its entirety on appeal. However, appeal by trial de novo would be necessary in those states that bar attorneys from the small claims court. This appeal would satisfy any due process arguments raised against the exclusion of attorneys. To discourage appeals, some statutes impose conditions on the right to appeal by trial de novo,}

\footnote{109. \textit{Id.} at 728-29.}
\footnote{111. \textit{See Special Project, supra} note 47, at 782 (recommending no removal be allowed in the model small claims court system).}
level be permitted in the appeal de novo with full right to counsel, and that the appellant be required to pay the appellee's attorney's fees as well as costs if unsuccessful on appeal. The above recommendation is certainly supported by Nebraska Attorney General Opinion 254, which states that "it is generally held that the constitutional guarantee of a trial by jury in civil cases does not mean that a party is always entitled to a jury trial in the first instance. Said constitutional right is secured if there is a right of appeal without unreasonable restrictions, to a court in which a jury trial may be held. . . ."112 The opinion goes on to cite the United States Supreme Court decision of Capital Traction Co. v. Hoff.113 The words of that decision are relevant today:

The legislature in distributing the judicial power with . . . a view to prevent unnecessary delay and unreasonable expense must have a considerable discretion, whenever in its opinion, because of general increases in litigation, or other change of circumstances, the interest and convenience of the public requires it, to enlarge within reasonable bounds the pecuniary amounts of the classes of claims entrusted in the first instance to the decision of justices of the peace provided always the right of trial by jury is not taken away in any case in which it is secured by the constitution.114

Should this recommendation be viewed as premature at this time, it is recommended that, at minimum, the legislature impose upon a party removing an action from small claims to the regular court reasonable attorney's fees should he be unsuccessful after removal.

Disallowing removal while allowing appeals de novo with right to counsel and jury, subject to the imposition of attorney's fees if unsuccessful, is not likely to increase significantly the case load of the district courts. It is believed that neither party (nor their attorneys) such as the posting of a bond or the awarding of appellee's attorney fees if appellant loses. An additional limitation might involve the establishment of a dollar limitation below which no appeal is allowed. Finally, some states provide that a party commencing an action under the small claims statutes shall be deemed to have waived his right to appeal. Thus the judgment of the small claims court is conclusive as to the plaintiff in California and Massachusetts. In New York an appeal may be had only on the ground that substantial justice has not been done. In addition, some statutes require the judge to notify all small claim litigants concerning their right of appeal. In addition, any appeal should be limited, like the New York statute, to the sole ground that substantial justice has not been done. Such a statute would discourage frivolous appeals, invest greater confidence in the small claims judge, and by necessity require that the position of judge be filed by persons of the highest calibre.

113. 174 U.S. 1 (1899).
114. Id. at 44-45.
will appeal and seek a jury unless he or she is fairly confident that the small claims decision was erroneous. In fact, there is as great a possibility that the case load would decrease as small claims judges are somewhat more careful in making their decisions so as to avoid reversal on appeal.

MISCELLANEOUS ISSUES AND PROBLEMS

Substantive Law

One problem raised in the survey by both lawyers and judges was that often small claims judges decide cases based upon subjective analysis of "what appears to be fair" rather than upon the substantive law. This problem is not unique to Nebraska. Many state statutes creating small claims courts faced similar problems.\textsuperscript{115} Some commentators argue that legislatures act redundantly when they provide by statute that "small claims shall be decided according to the substantive law." But such statutes might be necessary if for no other reason than to act as a reminder to some small claim judges.

Several comments from lawyers and a few from judges indicated that this problem could be resolved in various ways. One of the more persuasive suggestions recommended that all county associate judges who are not attorneys fulfill a requirement of instruction in those areas of the law which are commonly litigated in small claims. This could be done by making the annual institute more substantive in nature.\textsuperscript{116} In addition, it should be possible to develop a manual stating the substantive law of Nebraska in those areas which commonly arise in small claims. While there will be some differences between the cases in urban and rural areas, there is much greater similarity than dissimilarity. For example, an examination of the court docket records of the Omaha small claims cases for the past ten years reveals that the most common kinds of cases filed are tenants suing landlords for return of a security deposit, landlords suing tenants in suits for unpaid rent or damages to property, and plaintiffs suing for damages, either for personal injury or property, arising out of automobile accidents. Actions for wages due and for defective goods are also fairly common. These areas of substantive law appear frequently enough in small claims court to warrant enhancing the knowledge of those who often adjudicate the cases.

\textsuperscript{115} Examples of state statutes which affirmatively require small claims judges to apply the substantive law for fear that those judges might be inclined to apply their own "rates of fairness" or "common sense rules of equity" include: IND. CODE ANN. § 33-4-3-8(D) (Burns 1985); LA. REV. STAT. ANN. § 13:5207(A) (West Cum. Supp. 1985); MASS. GEN. LAWS ANN. ch. 218, § 21 (West Cum. Supp. 1985); MICH. COMP. LAWS ANN. § 600.8411 (West Cum. Supp. 1985); VT. STAT. ANN. tit. 12, § 5531 (Cum. Supp. 1984).

\textsuperscript{116} See NEB. REV. STAT. § 24-508 (Reissue 1979).
In addition, a common problem for the judge is how much evidence and what form of evidence to require in determining the appropriate damages allowable. A few years ago, a manual was prepared for use by the Omaha Municipal Court judges.117 This source could be an excellent beginning point for preparation of a reference booklet detailing substantive law and evidentiary procedures most commonly encountered in small claims court. While providing invaluable assistance to the non-law-trained associate county judge, such a manual would also be of some help to those with formal law training. Funding for updating this manual, initially and on a regular basis, would probably be available from various foundations. Moreover, the annual institute statutorily required for the associate county judges could devote part of the day to the “common problems" of substantive law.118 It would not be unreasonable to require such personnel to pass an examination demonstrating familiarity with the basic principles of law which are essential when deciding frequently arising problems in small claims cases.

Expediency and Judicial Courtesy

A related problem that was raised by several lawyers and some judges was the attitude of the persons hearing small claims. Charges of outright rudeness and extreme delays in resolving cases were frequently mentioned as issues that needed attention. Even assuming that the problems were overstated, there does appear to be at least a perception that some judges hearing small claims act unjudiciously. There is no effective check and balance in the system because of the absence of attorneys. More importantly, there appears to be a general hesitancy of the layperson to object to a hostile or unfair verbal attack upon an individual. While those persons could file formal complaints with the appropriate boards or invite the press to investigate those judges who are more frequently inclined to act in this manner, a better approach would be for the judges themselves to rec-

117. See Appendix D infra. The first draft of the manual for use by small claims judges was provided with the permission of Honorable Walter Cropper, Omaha Municipal Court judge.

118. Neb. Rev. Stat. § 24-508(3) (1979) states, for the institutes or training courses: No person shall take office for the first time as an associate county judge until he has attended an institute on the duties and functions of the office, unless such attendance is specifically waived by the Supreme Court. The Supreme Court shall provide for the establishment of such institute, and also shall provide for annual institutes or training courses for all county judges and associate county judges. No associate county judge shall be eligible for reappointment if he does not have a satisfactory record of attendance at such annual institutes or training courses, unless such attendance is specifically waived by the Supreme Court.

Id. (emphasis added).
ognize the pervasiveness of the problem.\textsuperscript{119} It could be a subject for discussion at regular conferences. It is certainly something that the Chief Justice of the Nebraska Supreme Court might consider as an issue meriting at least an informal study.

In addition, the bench could improve its public image by voluntarily agreeing to conduct small claims hearings at least one evening a week for those individuals who have great difficulty in getting time off from their jobs. Time spent in investigating, appearing, and filing is generally not compensable items even when the plaintiff prevails. For many persons, the time required is more than they can afford, especially if they must appear during the day. Many statutes in other states have mandated evening and Saturday sessions for small claims. It is suggested that this matter be considered by the state judiciary.\textsuperscript{120}

\textbf{Difficulty of Collecting Judgments}

The problems relating to collection of judgments obtained in small claims is probably the number one small claims problem throughout the United States. Part of the problem results simply from misperceptions of how the court functions. Many users of small claims do not see the distinction between a determination of liability and collection of a judgment. This confusion is understandable but should be dealt with effectively. In addition to this, a second problem may be that, in the past, attorneys have exaggerated the risk of a possible wrongful execution or wrongful attachment and the possibility of enormous damage suits as a result of that error. These persons imply that victorious plaintiffs in small claims should not risk collection for fear of making a simple mistake. Obviously that risk can be minimized greatly, and parties should be allowed to collect on a judgment wherever they have won a lawsuit against a solvent defendant. Some alternatives for consideration are suggested below.

During the initial small claims hearing, the defendant might be questioned under oath by the judge regarding the defendant’s assets, bank account, ownership of motor vehicles and real estate, and employment. Obtaining this information at that time and in that manner is certainly no more offensive or intrusive than requiring parties involved in motor vehicle accidents to exchange information regard-

\textsuperscript{119} The Code of Judicial Conduct, Canon 2(A) (1972) states: “A judge should show respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”

\textsuperscript{120} The Legislature was considering L.B. 125 at the time this article was being prepared which would allow the plaintiff to file the small claims action, without having to go to court to fill out the form, simply by signing in the presence of a notary public.
ing insurance companies at the scene of the accident. It is difficult to see where this presents any constitutional problems or an undue invasion of privacy. To require both parties to indicate their place of employment and checking and savings accounts, for example, would require little of the court's time while making garnishment a practical alternative.

Attorneys who recommend the use of small claims to individuals should point out that collection of any judgment is often difficult and that determination of liability does not mean that the defendant will have the money to pay even if the plaintiff is successful. Letting the party know that judgments are not self-enforcing will help prevent frustration. Certainly it does not seem inappropriate to mention that an attorney may be helpful or necessary in order to collect on the judgment once obtained.

A most useful alternative might be to encourage prompt payment by the defendant by allowing the successful plaintiff to recover, in addition to the judgment, a reasonable attorney's fee if it is necessary to use an attorney to collect on the judgment. Safeguards could include a provision that such a fee would not be recoverable unless the plaintiff has advised the defendant in writing that an attorney would be obtained for collection unless payment was made by the defendant.

This is somewhat analogous to Nebraska Revised Statute section 25-1801 which requires a ninety day demand before the victorious plaintiff will be allowed the statutory attorney's fee.121

In attempting to discover procedures to encourage prompt payment to the victorious plaintiff in small claims, it might be possible to double the award or add a certain amount to it unless payment is made within a certain time period after time for appeal has expired. Unfortunately, it is not clear that Nebraska law would permit such an alternative. The Nebraska Constitution does not support awarding punitive damages or penalties to the private plaintiff.122 In Abel v. Conover,123 the supreme court discussed the Nebraska law at length in denying treble damages to a private party based upon a state statute prohibiting certain conduct.124 Still, should the legislature decide that the problem is great enough, nothing would prohibit it from imposing a penalty for nonpayment upon the defendant so long as the penalty went for public school purposes. This is the present practice in some unfair trade cases. It is unlikely that the Ne-

122. See notes 78-80 and accompanying text supra.
123. 170 Neb. 926, 104 N.W.2d 684 (1960).
124. Id. at 927-39, 104 N.W.2d at 687-93.
braska Constitution will be amended in the near future to allow for punitive damages.

It should also be noted that several states statutorily impose an obligation upon either the small claims judge or the clerk in small claims to assist in collection of judgments.125 A practical solution might be simply to provide that within each small claims court there be designated personnel with sufficient expertise, either by way of legal training or special training, to explain clearly the collection procedures and process to victorious plaintiffs.

This would not be prohibitively difficult. Again, it is an item that could be both covered in the annual institute for the associate county judges and included in a small claims manual used by all small claims personnel. It is not enough simply to have someone tell the winning plaintiff that he or she can garnish or execute and realistically expect him or her to be able to do so. Contrary to some commentators' suggestions, this is not technically practicing law. Even if this assistance could be viewed as such, a statute or court rule could specifically remedy the problem. A few states have found it advisable to include such a disclaimer or protective provision although it does not seem to be necessary.126

Another suggestion is that persons who are about to use the small claims court would benefit from observing a videotape carefully explaining how the small claims court operates, the forms of evidence that they should bring with them, the method of service of process, the importance of suing and correctly naming the right defendant, the importance of having the correct corporate name, and the various methods allowed or provided for collection of a judgment. Such a videotape could be available on a fairly continuous basis in a convenient place in the courthouse. The cost would be minimal, and the benefit would be enormous.127 In addition, this videotape could

125. ME. REV. STAT. ANN. tit. 14, § 7485(5) (Cum. Supp. 1985) (mandates the state supreme court to provide "a simplified enforcement of money judgment proceeding."); N.Y. JUD. LAW §§ 1812, 1813 (Supp. 1985) (allow for possible treble damages and revocation of a license to do business, as well as attorney fees incurred in collection if the defendant does not promptly pay); N.D. CENT. CODE § 27-08.1-03 (Supp. 1983) (provides that "[a]fter the court has found that money is owing by any party to the proceeding, the court may inquire of the debtor as to plans for payment of the debt. The court may examine the debtor concerning the property owned by the debtor . . . without first having issued execution . . . and without further notice . . . "); VT. STAT. ANN. tit. 12, § 5537 (Cum. Supp. 1984) (specifically allows court to treat nonpayment of the small claims judgment within 30 days as civil contempt); WASH. REV. CODE ANN. § 12.40.110 (Cum. Supp. 1985) (provides for certification of the judgment and any remedy provided by law necessary to secure payment of the judgment).


127. One Nebraska television station filmed actual small claims trials and interviewed various court personnel, including the judge, academics, and the supreme court
specifically discuss the most common problems arising in small claims, i.e., landlord-tenant problems, automobile damage cases, and claims for wages. Funds for such a project likely would be available from several private foundations in Nebraska.

A complete analysis of the statutes and court rules of the fifty states and the District of Columbia covering small claims procedures was made as part of this research as shown in Table A. This study shows a sincere attempt by almost all the states to implement systems that operate to: (a) provide an inexpensive procedure; (b) use the substantive law to resolve controversies; (c) promote expeditious resolution of claims; and (d) provide non-technical procedures for the non-lawyer. The statutes show a continuum of experimental devices in many states. California, for example, allows the judge to investigate informally the matter.128 Many statutes129 impose an affirmative obligation on the judge to ask questions, conduct the inquiry, actively assist the parties to ascertain the nature of the claim, and raise defenses that might exist. Statements such as “the judge is to attempt to arrive at the gist of the matter” are commonly found in the statutes.

Legislative bodies, supreme courts, state bar associations, and the news media have attempted to encourage greater use of the small claims mechanisms. Traditional objectives are rapidly giving way to encouragement for renewed experiments. It is no longer only the social workers, activist consumer groups, and law professors that are seeking improvement in these areas. Today, practicing attorneys everywhere also show that they strongly support this system of small

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129. LA. REV. STAT. ANN. § 5208 (Cum. Supp. 1985) allows the judge to raise any defenses that might exist, and assist in all other matters so as to arrive at a correct judgment. ME. REV. STAT. ANN. tit. 14, § 7484(2) (Cum. Supp. 1985) states that the court shall assist in developing all relevant facts. MO. ANN. STAT. § 482.310(4) (Vernon Cum. Supp. 1985) provides: “The judge shall assume an affirmative duty to determine the merits of the claims and defenses of plaintiffs and defendants and may question parties and witnesses.” MONT. CODE ANN. § 3-12-101 (1983) requires the small claims judges to help parties obtain justice. N.D. CENT. CODE § 27-08.1-03 (Supp. 1983) requires the court to conduct hearings and inquiries at any time before or during the hearing. OR. REV. STAT. § 46.415(3) (1983) specifically allows the judge to investigate and informally consult with witnesses and others. WASH. REV. CODE ANN. § 12.40.080 (Cum. Supp. 1985) provides that “the judge may informally consult witnesses or otherwise investigate the controversy.” See also Demeo v. Manville, 68 Ill. App. 3d 843, 386 N.E.2d 917, 919 (1979), making it clear that a judge in small claims cases may aggressively question witnesses without being deemed an advocate; Ferris-Prabhu v. Dave & Son, Inc., 142 Vt. 479, —, 457 A.2d 631, 633 (1983), stating that the court will not allow a represented party to take advantage of an unrepresented party.
SMALL CLAIMS COURT AND NEBRASKA LAW

Nebraska small claims law is in some respects a "model" small claims law. Nebraska, for example, was one of the first two states to limit formally the number of claims that a person could file in small claims court within a year or certain period. Yet, despite its innovativeness, Nebraska still experiences all those problems of discussed above and requires clarification of legal issues and procedures relating to the functions of the small claims court in the state.

In the original Nebraska small claims court research published in 1973, it was suggested that a constitutional issue existed that needed correction. It is even more imperative that this problem be corrected now. In Nebraska, under the present appeals procedure, a person who has lost in small claims court cannot have a "due process hearing with the right to counsel" unless a bond has been paid. On the other hand, the defendant could have removed the matter pursuant to Nebraska Revised Statute section 24-525. Still the defendant would be required to part with property in that he or she would be required to pay the difference between the filing fee in small claims court and that required in the regular court. If this procedure is challenged, the Nebraska Supreme Court would almost certainly be bound to reach the same result that was reached in Brooks v. Small Claims Court, holding that the practice of requiring an undertaking prior to appeal deprived the defendant of due process of law. This is most probable if and when the removal provision is repealed.

The answer or solution is fairly simple: No bond should be required before a person could appeal from the small claims court to the regular docket of the Nebraska District Court. It is not likely that this will increase the number of appeals since the bond is relatively small at the present time.

James W. Brown, President of the Nebraska State Bar Association, has stated that "if the system does not serve the needs of all, and especially of the poor, both the system and we are in trouble and the problem will and should seek alternatives." The Chief Justice

130. See note 54 and accompanying text supra.
131. See generally Forbes, supra note 1.
133. Id. at —, 504 P.2d at 1254, 105 Cal. Rptr. at —.
134. The present amount required is $50.
135. Cf. Special Project, supra note 47, where the author argues that "appeals bonds are necessary to discourage appeals from small claims courts, both to decrease docket congestion in the circuit courts and to protect the litigants' right to a simple
of the Nebraska Supreme Court in the same publication stated that the "strength of the law lies in the fact that it is available to everyone and not only to those with the financial ability to purchase it." Nebraska’s state motto, "The Good Life," should apply no less in our judicial system. The problems raised here and the suggestions made in response to those problems may well enhance "The Good Life." The changes should go far in showing the ordinary citizen that the judicial system is subject to modernization without undue delay. It is hoped that the judiciary, the bar, and the legislature will respond promptly to the issues raised and that the provision of the Nebraska Constitution stating that "[a]ll courts shall be open, and every person, for any injury done him in his lands, goods, person or reputation, shall have a remedy by due course of law, and justice administered without denial or delay," will be more effectively implemented.

**Alternatives To Small Claims Involving Simplified Procedures**

One alternative to small claims sometimes suggested is arbitration. Unfortunately, Nebraska does not have a modern arbitration law. Most important, and unfortunately, the Nebraska Supreme Court in *Phoenix Ins. Co. v. Zlotky* held that agreements providing for arbitration of future disputes were unenforceable because of article I, section 13 of the Nebraska Constitution. This decision is still the controlling law in this state. The Uniform Arbitration Act has been introduced in the 1985 session of the Nebraska legislature. But unless the decision of *Phoenix* is overruled, adoption of the statute will mean little absent a constitutional amendment.

To the extent that federal jurisdiction can be asserted upon an appropriate basis, the federal arbitration statutes should provide assistance. It is also likely that these statutes would supersede any Nebraska state statute and Nebraska case law. Where arbitration is used in cases involving large sums of money, it is probable that attorneys will, and should, be used. Where small amounts are involved, an informal system of arbitration should be available.

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and final adjudication of small disputes within the summary procedure." *Id.* at 786.

This would be true in Nebraska unless the provisions regarding the award of attorney fees is enacted.


138. 66 Neb. 584, 92 N.W. 736 (1902).

139. *Id.* at 588, 92 N.W. at 737.
Particular Kinds of Disputes

a. Automobile Purchasers and Dealers/Manufacturers

When the dispute is between a consumer-purchaser and an automobile dealer or manufacturer regarding any vehicle manufactured since 1984, there may be practical relief under the dispute resolution mechanisms existing under state law and voluntary agreements. One Nebraska attorney recently concluded a successful procedure where the consumer alleged that her automobile was a "lemon" and she wished to use the "arbitration system" created by the manufacturer. While the attorney involved in this particular dispute concluded that the use of an attorney was not essential to obtain relief, she was dubious of successes without the assistance of counsel.

140. The report of the attorney, in summary form, is presented below:

Clara had purchased a 1983 model car in August, 1983. Four weeks later her difficulties began. The car would not start immediately—it required three or four tries. After starting, it would hesitate and often stall. For several months, the problem recurred. The dealership was unable to correct the problem after nine attempts. In October, 1983, while the starting problems occurred intermittently, the car began to idle improperly. The car would idle very high and tapping the accelerator did not lower it. In December, 1983, Clara requested the dealership to buy back the car. Between January and October, 1984, Clara experienced innumerable difficulties with the car, including a "crackling" noise from the steering column, continued starting difficulties, intermittent stalling, engine cessation when gear shifted to reverse, poor gas mileage, and varied noises from transmission and underbody of the car. In January, 1984, Clara sought legal assistance to revoke her acceptance. Months of delay, due almost entirely to manufacturer, resulted in an arbitration hearing in October, 1984. The arbitration process commenced with a request by Clara to resolve informally the dispute directly with the dealership and manufacturer. Upon their refusal, she agreed to arbitrate through the Better Business Bureau (hereinafter BBB). Since the manufacturer had not established a specific process for arbitration through the BBB, it was required to complete a written commitment to be bound by the arbitrators' decision. Once it had done so, Clara had provided a one paragraph summary of her difficulties with the car. Three arbitrators where selected from a list of five—each party ranked the five in order of preference and the three upon which both parties were agreed became the arbitrators. The parties selected the arbitrators based on a brief summary of their occupations, education, membership on civic and community organizations, and other information. The dispute resolution system used was successful because of several advantages over traditional courtroom procedure. Foremost was the relaxed evidentiary requirements. Clara kept a detailed account of the difficulties she had experienced. That accounted for a table which was five typewritten pages. Due to the relaxed evidentiary rules, no lengthy foundation was required and the typewritten summary was acceptable. Of course the handwritten notes were available at the hearing for the "arbitrator's" review. Due process was preserved—the manufacturer had the opportunity to review the major part of the evidence prior to the hearing and was provided an opportunity to review at the time of the hearing as well. Also due to the less rigid nature of the proceedings, each party could respond immediately to questions posed by the "arbitrators." Each party could also clarify and respond to each other's responses, if necessary. Another advantage of this method is the fact that the persons deciding the dispute had some expertise either in decision making or mechanics.

The author wishes to thank Ms. Ida Jones for this information.
b. Landlord-Tenant Disputes

Some of the most common disputes filed in small claims courts involve landlord tenant problems. Few voluntary mediation or arbitration systems exist for resolution of these disputes. Local real estate boards are in an excellent position to help create and foster such panels. In addition, State Real Estate Licensing Boards or Commissions can take a more aggressive approach in encouraging the use of such systems. Perhaps the license of real estate personnel should not be renewed automatically; rather, inquiry into their dispute resolution practices should be examined.

c. Merchant-Consumer Disputes

Some Better Business Bureaus offer dispute resolution assistance. Since these are rare and unadvertised, they do not offer a realistic alternative in 1985. The opportunity for creation and implementation of such bodies, however, is excellent. The prospects for such creation and implementation diminish unless the bar actively encourages such action.

d. Voluntary Mediation and Conciliation Services by Attorneys

This writer is not familiar with any attorneys who have advertised a voluntary mediation and/or conciliation center as an alternative community service to litigation. This is true even though many, if not most, attorneys would probably be excellent organizers of such a service because of their training and skills. Local bar associations could commence an advertising campaign using a voluntary list of lawyers who would act as non-paid volunteer mediators/conciliators in small disputes on a regular basis. This could certainly be considered part of the “pro bono” activity that lawyers are urged to provide as part of their basic professional responsibility as officers of the court. Such a plan, supported by local bar associations, could possibly lead to lawyers being perceived more as “peace makers” rather than simply litigators and “trouble makers.” The appealing aspect of this plan is that it could work in almost any community and within any economic environment.

Such a system would certainly be consistent with the use of an expanded small claims court, improved arbitration procedures, and more justice at reasonable costs to the public. On the other hand, a failure of the bar to consider these alternatives may result in other less qualified groups developing these services, and if that happens both the public and the bar may suffer. Such personnel, untrained in law, may well commence advertising services in other areas, such as those discussed above. In 1985, for example, a movement began in
many states to provide a "simple marital dissolution procedure" where lawyers will not be needed where there are no children or real estate involved in the marriage.\textsuperscript{141} Agitation for "simple estate and probate procedures" where attorneys will not be used is not uncommon. Yet, the bar has not in most instances responded in a positive way. It is not difficult to understand why the public views lawyers, as a group, as being interested only in preserving a system that requires their presence in a traditional role as adversary representatives for which they command high fees.

Undoubtedly, the bar has a significant role to play in the alternative mechanisms. Even in the small claims courts, the bar needs to be involved. It is often through the recommendation of one's own attorney that the plaintiff files in small claims. An explanation of the controlling substantive law to the small claims litigant prior to the hearing is not uncommon. These initial consultations, even for one-half hour to explain the use of the various alternative and preferred methods, can be productive. While such consultations will not initially produce a great deal of income in fees, it is likely to allow the individual to see that the system of justice can provide relief. This creates a positive relationship with that attorney and lets the client see that real justice through small dispute resolution mechanisms is possible. Because a relationship of trust has been created, this can, of course, lead to more lucrative arrangements with those individuals when more difficult legal issues arise. Overall, such a system necessarily improves the image of the bar. This in turn improves the image of the sole practitioner or "store front lawyer" as well as that of the large commercial law firm. Certainly the latter group should also become familiar with the small claims or small disputes resolutions mechanisms and participate in the recommended voluntary programs. Both sole practitioner and commercial firm lawyer alike contribute to the public good and the profession's image by participating in such a program, particularly in a time when funds for public legal services are becoming markedly less available.

\textbf{CONCLUSIONS}

Much has been written during the past twenty years regarding the small claims procedure. Some of this is written from the viewpoint of the person with a pre-conceived idea that a certain device is

\textsuperscript{141} During 1984 an unauthorized practice of law case received national publicity when a former legal secretary opened her own "shop" and began providing services to individuals. The bar of that state, insofar as all news reports show, responded defensively and made no positive suggestions to consider the points raised by her in her defense and by press commentators.
the only correct one. Some have been so theoretical that they have been virtually useless to people who are concerned about the realities of making the small claims process work. Philosophical inquiries as to what kind of small claims court is best, while ignoring the realities of funds available, do not provide much assistance to the pragmatist.

For example, some writers have suggested that referring a matter to the small claims court, dependent only upon the monetary amount involved, is an error and that the determination should be based on the complexity of the legal issues. Other writers have suggested mandatory pre-trial hearings in all small claims matters, mandatory night sessions, mandatory placement of the courts in various neighborhoods, nonlawyers' presence with the small claims judge as arbiters of the fairness of procedures, and a mandatory provision of attorneys to both parties in small claims so that the law will be applied more certainly and fairly. Also, commentators have suggested that no hearing be allowed in an adversary manner until conciliation has been tried and has failed. Some even suggest that professional small claims advocates, law students, or paralegals should be allowed where attorneys are barred.

All these are interesting suggestions and should be carefully considered. This writer finds most of them somewhat impractical. If real reform is desired, it is strongly recommended that the suggestions made in this article should be carefully considered. In summary, these are:

1. Repeal the statutes permitting removal from small claims, or provide that the plaintiff whose action is removed from small claims may recover reasonable attorney's fees if the removing party is unsuccessful after removal;
2. Provide for the appellee from small claims to recover a reasonable attorney's fee if successful on appeal as a method of discouraging meritless appeals;
3. Provide greater education in the law for those who hear small claims through a manual and/or expanded institute;
4. Make judges aware of public criticism of perceived insensitivity, rudeness, and undue delays in deciding cases;
5. Provide greater information for small claims litigants through projects funded by private foundations; and

The Nebraska small claims experience since 1973 has been, except for those areas mentioned in this article, a positive one. Attorneys and judges generally give the process an excellent evaluation. When established, the court was not intended to be a "poor man's court" but rather a court in which the poor and the middle class
could both find greater justice. Those who were truly poor, as defined by federal and state guidelines, might well qualify for legal aid although those offices are not necessarily available in smaller communities and are generally becoming subject to budget cuts. Funding for these kinds of offices will probably continue to decrease during the next five years. The small claims courts must be allowed to grow and expand in such a manner as to meet the needs of those who cannot afford legal assistance, as well as those who might technically be able to afford it but who should not be required to expend most of what is recovered in a small claim as payment for the services of an attorney. The Nebraska Small Claims Court was intended to function well in both urban and rural areas. The survey, which was taken statewide, showed no statistically observable differences in attitudes about the court as between rural and urban areas. Both the problems and the suggestions for improvement were often the same. Through adoption of these recommendations, it is hoped that justice might continue to be provided to even more Nebraskans at the least possible cost, with the least possible delay, and with the greatest possible satisfaction to those with legitimate claims appropriate to small claims resolution.
TABLE A
REVISED CODES OF FIFTY STATES AND DISTRICT OF
COLUMBIA

SUBJECT MATTER

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 or replevy actions
C  - Same as civil actions for the recovery of money in other lower courts
D  - Money actions, equitable relief, or possessory actions
E  - Contract, motor vehicle damage, and landlord-tenant relations

VENUE

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

OTHER LIMITATIONS

A  - Not mentioned in statute
B  - Assignees excluded
C  - Allows only plaintiffs who cannot financially resort to other lower courts
D  - Number of claims that may be filed or special circumstances
E  - Corporations excluded or limited
F  - No jury trial or special provisions regarding jury trial

TRIAL PROCEDURE

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

APPEAL PROCEDURE

A  - Not mentioned in statute
B  - Defendant only, or plaintiff only where there is a counterclaim
C  - No appeal allowed
D  - Defendant and plaintiff

ATTORNEY

A  - No restrictions
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<th>State</th>
<th>Amount</th>
<th>Subject Controversy Matter</th>
<th>Venue Limit</th>
<th>Proc. Appeal</th>
<th>Attorney</th>
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2. Hawaii

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1 Georgia abolished small claims courts in 1983.
2 Hawaii allows landlord-tenant relations disputes in small claims regardless of amount. Attorneys are not allowed in landlord-tenant relations disputes.
3 Rent in landlord-tenant relations disputes cannot exceed $500 per month.
APPENDIX A

COUNTY AND MUNICIPAL COURT JUDGES QUESTIONNAIRE

1. What is your zip code?
2. Do you presently hear small claims matters?
3. Do you find the present procedures adequate and appropriate?
4. What major problem have you perceived in the small claims court procedures since you first began hearing small claims?

5. When a small claims matter is transferred from the small claims docket to the regular docket, do you believe it is practical for nonlawyers to continue to represent themselves?
   a. Would you favor changing the law to prohibit removal from small claims to the regular docket?
   b. Do you favor the limitations on the number of small claims a party may file in a particular month or year?

6. Would you suggest changes to require that the procedures upon transfer be no more complex or technical than in the small claims procedures other than allowing an attorney?

7. When a small claims matter is appealed, would you favor a simplified procedure that would encourage individuals to perform their own appeals in the district court while still permitting attorneys?

8. What jurisdictional amount would be most appropriate in Nebraska for small claim matters?

9. What is the most obvious or greatest problem in small claims procedures in Nebraska today as you view the process?
APPENDIX B
DISTRICT COURT JUDGE QUESTIONNAIRE

1. What is your zip code?

2. Were you a County or Municipal Court Judge prior to being appointed a District Court Judge?

3. If the answer to Question 2 was yes, did you hear small claims matters in that capacity?

4. Do you hear appeals from small claims courts at this time?

5. What procedures do you follow in hearing such appeals—
   a. Do you treat them more informally than regular proceedings?
   b. Do you treat them exactly the same as regular proceedings?

6. Do parties appear pro se in appeals from small claims in your court?

7. Would it be realistically practical for parties to appear pro se in small claims appeals under procedures presently followed in your district?

8. Would it be, in your opinion, an improvement in the judicial process to change the appeals procedures in small claims appeals to make them as simple and informal as in the small claims proceedings initially?

9. Would you favor increasing the jurisdictional limits of the small claims court? To what amount?

10. What one area in small claims court jurisprudence would you suggest needs the most improvement or what is the greatest problem with the small claims procedures, including appeals, as you view the problem?
APPENDIX C

ATTORNEY QUESTIONNAIRE

1. What is your zip code?

2. Do you advise persons to use the Nebraska small claims courts?

3. Are most clients pleased, so far as you can tell, when they have used the small claims courts?

4. What would be your attitude toward changing the law to prohibit removals from the small claims docket to the regular docket?

5. What would be your attitude toward legislatively providing that the same simplified, nontechnical procedures be used on appeal from small claims to the district court as are used in small claims presently?

6. What jurisdictional amount do you believe most appropriate for the small claims court in Nebraska?

7. Should the present limitation on the number of times a party can use small claims in a month and year be changed? If you said yes, then what should the limitations be?
   Per month ________ Per year ________

8. What one problem do you believe to be the greatest in the small claims practices and procedures?

9. What solution, if any, do you suggest to the problem you have indicated?
APPENDIX D

LANDLORD & TENANT; DAMAGES; SUBLETTING; DEMINIMIS RULE:

A landlord may not refuse to accept a qualified and suitable tenant for the purpose of mitigating damages recoverable against a tenant who has abandoned his lease. (Bernstein vs. Siglin, 184 Neb. 673, 171 N.W.2d 247 - 1969) (Accord, URLTA § 76-1405, R.S. Supp. 1976). But burden of proof is imposed upon the tenant to prove the landlord unreasonably failed to rent the premises. (ibid)

LANDLORD & TENANT; EXCULPATORY CLAUSES; BINDING EFFECT:

Lease provision that landlord will not be liable for damages to personal property in the premises resulting from water, gas, etc., does not relieve him from liability for sewer back-up and ensuing flood in the property. (Butt vs. Bertola, — Cal. —, 242 P.2d 32 - 1952)

LANDLORD & TENANT; SAME:

Where exculpatory clause does not in plain terms exonerate the landlord from his own acts of negligence, it is no bar to the tenant's claim for damage resulting from the landlord's negligence. (Meyer Jewelry Co. vs. Professional Bldg. Co. — Mo. —, 307 SW2d, 517-1957)

LANDLORD & TENANT; INTERPRETATION:

Exculpatory clauses are to be strictly construed against the indemnitee and where the parties fail to refer expressly to negligence in their contract such failure evidences their intention not to provide indemnity for the indemnitee's negligent acts. (Vinnell Co. vs. Pacific Electric, — Cal. —, 340 P2d 604 -1959)

LANDLORD & TENANT; LIABILITY OF LANDLORD FOR INJURY TO TENANT:

Landlord is liable in damages to tenant where, without fault, tenant is injured by reason of defective repairs made by landlord. (Randall vs. 1st National Bank, 102 Neb. 475, 167 NW 564; Dame, Inferior Court Practice, 806)

LANDLORD AND TENANT; URLTA; TENANT'S RESPONSIBILITY FOR DAMAGES TO PREMISES AND PERSONALITY DURING HIS OCCUPANCY.

Since URLTA, the convenants of the respective parties regulate their rights. The landlord must under his warranty of habitability in good faith keep the premises in satisfactory and habitable condition. (§ 76-1402(2)(b), 76-1411 and 76-1419, R.S. Supp. 1976) The burden
rests upon the landlord to show compliance with this warranty of fitness. (§ 76-1418, 1419)

Concomitant with the landlord's warranty is that of the tenant to sue the landlord for breach of warranty of habitability (§ 76-1425(2)) and to comply with the rental agreement (§ 76-1422(1) and 76-1431(1)).

If there is a written lease governing tenant's duties to repair damages to the realty, the terms of the lease will govern unless they are patently unlawful or unconscionable (§ 76-1412(2); Lonquist and Healey, Prospectus on Uniform Residential Landlord and Tenant Act, 8 Creighton Law Review, 350-Note 63 (1975). If there is not a written lease, prior case law not in conflict with URLTA will govern and general principles of law and equity will determine damages (§ 76-1403).

Prior law stated that the lessee would surrender the premises in as good condition as when he entered, usual wear, natural decay, and loss or destruction by the elements excepted. This does not require the lessee to make substantial or lasting improvements. (Turner vs. Townsend, 42 Neb. 376, 60 NW 587) If the damages claimed by the landlord is limited solely to personal items (rugs, furniture, appliances, etc.), the landlord must prove the difference in the value of the goods before and immediately after the injury if such exceeds the cost of repair (Hunt vs. C.B. & Q R.R., 180 Neb. 375, 143 NW2d 263) and if such is beyond fair wear and tear. Law of Balments, supra, would be applicable in determining tenant's duty to exercise ordinary care in using

LANDLORD & TENANT; LIABILITY TO TENANT FOR DEFECTIVE CONDITION:

Landlord who agrees to make repairs is liable in damages to tenant for failure to do so and tenant is entitled to recover rental value of the premises if such repairs had been made and the value of the premises "as is." (Caves vs. Bartek, 85 Neb. 511, 123 N.W. 1031); (Dame, Inferior Court Practice, Sec. 806)


LANDLORD & TENANT; DAMAGES; SECURITY DEPOSITS:
(See Sec. 76-1416, RS Supp. 1974)

Intent of parties governs whether or not a deposit will be regarded as a penalty or provision for liquidated damages. (32 A.J. Landlord & Tenant, 448)

If the security is shown by the lease or other evidence to be a security for the performance of landlord's covenants, such is an indication that the deposit was not intended as liquidated damages. (ibid), (Page 449, note 13)

Intent of the parties rather than descriptive words or statements will control in determining whether a provision will be regarded as a valid liquidation of damages, or whether the lessee will be given relief against such provision on the ground that it constitutes a penalty. (ibid note 14)

If the parties intend the security provision as stipulated damages, the language must be clear. (ibid, p. 449, Note 16)

If the lessee's deposit is shown to be applied to the rent for the last portion of the term, the landlord cannot terminate the lease for non-payment of rent. (ibid, note 20)

While formerly the courts were disposed to regard liability provisions with disfavor and construe them strictly, and as providing for a penalty so that nothing could be recovered except the actual damages sustained, the modern tendency is to look upon them with candor, if not with favor, and to allow parties to make their own contracts and carry out their own intentions, even where it will result in recovery of the amount stipulated as liquidated damages. (15 A.J. Damages Sec. 245)

Rent, after re-entry by the landlord, cannot be recovered unless a reasonable effort has been made to rent the premises based upon the de minimus rule. Landlords cannot recover from both former tenant and present occupant. (ibid, note 8)

LANDLORD & TENANT; SELF-HELP; FORCIBLE ENTRY:

Landlord entitled to possession must, on tenant's refusal to vacate, resort to the legal remedy to secure possession; otherwise he is liable in damages for using force. Self-help is is not condones to regain possession. (Bass v. Botel, 191 Neb. 733 (1974). (See also Sec. 76-1430, RS Supp. 1974).