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## THE ESTABLISHMENT OF SMALL CLAIMS COURTS IN NEBRASKA

Our judicial system is predicated upon the proposition that all men are equal before the law.<sup>1</sup> Recent decisions by the United States Supreme Court in the realm of criminal prosecutions have supported this proposition.<sup>2</sup> However, while equality has been the goal of the criminal judicial process, certain inequities of the civil judicial process still exist. One of these inequities is the inability of a poor individual to sue for his rightful small claim.<sup>3</sup> Seldom does a man of meager means have the financial ability to hire an attorney<sup>4</sup> to prosecute his case, and to pay the court costs in his effort to collect a small claim due him. Even if a suit is instigated, the costs of the suit may exceed the amount of his recovery.<sup>5</sup>

The inequities of the present system are equally apparent from the indigent defendant's point of view. For example, assume the defendant is sued for ten dollars plus court costs and a reasonable attorney's fee. If the costs of the suit and the plaintiff's attorney's fee amount to more than ten dollars, which they invariably will, the

<sup>1</sup> U.S. CONST. amend. XIV, § 1.

<sup>2</sup> See, e.g., *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>3</sup> "There are two classes of controversies in particular in which our ordinary legal procedure has broken down to such an extent that it may fairly be said that the result has frequently been a denial of justice: First, in those cases in which the amount in controversy is small; and second, those in which one of the parties is so poor that he cannot afford to wage a legal battle.

"The ordinary procedure has proved too cumbersome as a method of enforcing small claims. The necessity for written pleadings and a formal issue reached on those pleadings, and a trial by jury of issues of fact, necessarily means a considerable expense, an expense which is entirely disproportionate to the amount involved in the litigation of small causes." Scott, *Small Causes and Poor Litigants*, 9 A.B.A.J. 457 (1923). "A third problem is to make adequate provision for petty litigation, to provide for disposing quickly, inexpensively, and justly of the litigation of the poor, for the collection of debts in a shifting population, and for the great volume of small controversies which a busy, crowded population, diversified in race and language, necessarily engenders. It is here that the administration of justice touches immediately the greatest number of people." Pound, *The Administration of Justice in the Modern City*, 26 HARV. L. REV. 302, 315 (1913).

<sup>4</sup> Normally the expense involved in hiring an attorney and prosecuting the claim is more than the claim involved.

<sup>5</sup> But see NEB. REV. STAT. § 25-1801 (Reissue 1964), which allows recovery in specific instances for court costs and attorneys' fees in any action where there is a claim of \$1,000.00 or less.

defendant would be held liable for more than twice the amount of the debt.<sup>6</sup> While it may be argued that the defendant could halt the suit by payment of the ten dollars, it is also true that he may have a litigable defense. Can it be said that he should be so penalized for his right to defend a lawsuit? Thus, in the area of civil suits for small claims, "equal justice for all" is a hollow phrase.

The most feasible solution which would allow justice for both plaintiff and defendant in suits for small claims is the establishment of small claims courts.<sup>7</sup> These courts are characterized by their informal rules of procedure. While substantive law is retained as a basis for the ultimate decision reached by the small claims court,<sup>8</sup> rules of procedure are stated in terms easily understood by laymen without the advice of legal counsel.<sup>9</sup> As one authority in this area has succinctly and summarily stated: "The essential features of a small claims court are extremely low costs or none at all, no formal pleadings, no lawyers, and the direct examination of parties and witnesses without formality by a trained judge who knows and applies the substantive law."<sup>10</sup> Any establishment of small claims courts in Nebraska, however, is dependent upon their proper enactment according to the Nebraska constitution.

## I. THE NEBRASKA CONSTITUTIONAL QUESTION

Small claims courts have been established in the United States by many state legislatures and in the District of Columbia by Congress.<sup>11</sup> Each was established within the constitutional man-

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<sup>6</sup> This is assuming they are allowable under a statute similar to the one in effect in Nebraska. *Supra* note 5.

<sup>7</sup> See generally Note, 1950 WIS. L. REV. 363; Comment, 52 CALIF. L. REV. 876 (1964), for a concise history of small claims courts.

<sup>8</sup> "The purpose of the legislation was to secure the prompt and inexpensive adjudication of small claims, free from technicalities of procedural law; that persons unable to employ counsel and not versed in the law might sue or defend without encountering the delays and pitfalls which too often distinguish law from justice. In our opinion Congress did not intend to deprive litigants of their lawful claims or defenses, or to substitute the abstract conception of justice of an individual judge for recognized rules of substantive law." *Interstate Bankers Corp. v. Kennedy*, 33 A.2d 165, 166 (Munic. Ct. App. D.C. 1943). See also *McLaughlin v. Municipal Court*, 308 Mass. 397, 32 N.E. 2d 266 (1941); *Levins v. Buchholtz*, 208 Misc. 597, 145 N.Y.S.2d 79 (Sup. Ct. 1955). Most states by statute declare that the small claims court is bound by ordinary rules of substantive law. *E.g.*, CAL. CIV. PRO. CODE § 117(h) (West 1954).

<sup>9</sup> Legislation, 34 COLUM. L. REV. 932 (1934).

<sup>10</sup> R. H. SMITH, *JUSTICE AND THE POOR* 56 (2d ed. 1921).

<sup>11</sup> Act of Mar. 5, 1938, ch. 43, 52 Stat. 103.

date of its respective jurisdiction.

The establishment of small claims courts in Nebraska depends upon the interpretation of the applicable provision in the Nebraska constitution. It provides:

The judicial power of the state shall be vested in a supreme court, district courts, county courts, justices of the peace, and such other courts inferior to the supreme court as may be created by law; but other courts may be substituted by law for justices of the peace within such districts, and with such additional civil and criminal jurisdiction, as may be provided by law.<sup>12</sup>

The significant language is the phrase "and such other courts inferior to the supreme court as may be created by law." The Nebraska Supreme Court, while not passing directly on the precise meaning of the phrase, has ruled that municipal courts may be established under the authority of that section.<sup>13</sup> From this holding, it can be inferred that any inferior courts created by state statute are within the constitutional mandate. Such a construction can also be drawn from a clear reading of the constitutional language. In further construction of this phrase the Supreme Court of Nebraska has also stated:

It is true, of course, that the provision as amended empowered the legislature to create courts other than those designated, inferior to the supreme court. But such provision does not have the effect of creating any such courts *ipso facto*. The provision is in no sense of the word self-executing; the affirmative action of the legislature is required to give it effect.<sup>14</sup>

In light of the foregoing discussion, therefore, it may be concluded that a constitutional amendment is not necessary as a prerequisite to the establishment of small claims courts. By proper statutory enactment the state legislature can constitutionally establish small claims courts in this state.

The establishment of a small claims court system, however, must be done with more than a broad enactment of jurisdictional power to a court. It must contain, in addition, an enactment of uniform rules as to how the small claims court is to function and its effect upon other judicial processes.

## II. PROBLEMS TO BE SOLVED IN ESTABLISHING SMALL CLAIMS COURTS

If the constitutional power alone is not enough to establish

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<sup>12</sup> NEB. CONST. art. V, § 1.

<sup>13</sup> Hunter v. Maguire, 136 Neb. 365, 285 N.W. 921 (1939).

<sup>14</sup> May v. City of Kearney, 145 Neb. 475, 495, 17 N.W.2d 448, 460 (1945).

small claims courts, the Nebraska Legislature must enact statutory authority for such courts. Such enactment, however, will undoubtedly raise many questions as to how these courts should function. To establish successful small claims courts, these questions must be solved by the statute.

The first and most important consideration in the establishment of small claims courts is the determination of the types of remedies these courts should grant. Historically small claims courts have existed only for the recovery of a money judgment.<sup>15</sup> This is necessary to keep the procedure of the court simple, which is part of its established purpose.

The jurisdictional limit of the amount in controversy must be carefully determined when enacting a statute establishing small claims courts. This amount should be large enough to include most minor claims, and yet small enough to exclude the more complicated issues involved in a major law suit. The maximum jurisdictional amount ranges from twenty dollars in one state<sup>16</sup> to more than 500 dollars in others.<sup>17</sup> The reason for such variance is that the small claims courts of the various states are not uniform in purpose. Each system of small claims courts varies according to its legislative mandate. Therefore, it is up to the state legislature when enacting small claims courts to set the jurisdictional limits of that court in accordance with the economy of the state, the population of the state, and the relative availability of other judicial forums in the state.

To establish a successful and useful small claims court, the costs of a suit in this court must be kept at a minimum. The costs of filing the suit in the small claims court is normally from one dollar to two dollars and fifty cents.<sup>18</sup> Such minimal cost is an

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<sup>15</sup> Most statutes declare that claims in the small claims courts are to be suits for "damages." These jurisdictions vary, however, as to whether this limitation extends to all suits, whether founded on tort or contract. *E.g.*, *Hartman v. Marshall*, 131 Colo. 88, 279 P.2d 683 (1955), holding that "damages" includes only suits in contract; *Hopkins v. Parsons*, 10 N.J. Misc. 435, 159 A. 308 (Dist. Ct. 1932), holding that "damages" includes both suits in tort and contract. The solution to this problem of interpretation is to declare by statute that claims may be brought in the small claims court on causes of action arising either in contract or in tort.

<sup>16</sup> KAN. GEN. STAT. ANN. § 20-1304 (1964). The Kansas small claims procedure is criticized in *Oglesby & Carr, The Small Claims Court in Texas*, 3 KAN. L. REV. 238 (1955).

<sup>17</sup> WIS. STAT. ANN. § 254.04 (1957). This statute is discussed in Note, 1950 WIS. L. REV. 363.

<sup>18</sup> Silverstein, *Small Claims Courts versus Justices of the Peace*, 58 W.

important consideration in the establishment of a small claims court procedure if all persons are to avail themselves of the court's jurisdictional power. Even such minimum costs, however, might not be justified if a pauper wishes to avail himself of the court's judicial power. To keep this court open to all persons on an equal basis, some states have provided that the filing fee be waived if the plaintiff is a pauper.<sup>19</sup> It should be pointed out, however, that the existence of low filing fees will undoubtedly eliminate most of the waiver problems, since most persons with a just claim can afford a nominal filing fee.

In furtherance of the rule that costs must be kept at a minimum in small claims courts, service of process in the small claims court is best effectuated by registered mail.<sup>20</sup> This method of service properly apprises the defendant of the claim against him and keeps the total cost of the suit at a minimum. Ordinarily, normal state service of process is also permitted upon request by the plaintiff.

After proper service has been effectuated, states vary on the answer to the question of whether the defendant can or should be required to answer the summons. Of the states that assert that the defendant need not answer, the argument is advanced that such answering only prolongs and complicates the pleadings in opposition to the informal purpose of the small claims court.<sup>21</sup> Other jurisdictions require the defendant to answer. The procedure most consistent with the purpose of the small claims court system is to give the defendant the alternative choice of filing an answer before hearing date or not to file an answer. Since it is the plaintiff who initiates the suit in this particular court, as much discretion as possible should be given to the defendant to adequately defend his position.

The date for hearing the validity of the claim should be stated on the summons. Most statutes provide that the hearing be within a certain number of days after the filing of the suit in the small

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VA. L. REV. 241 (1956). But see ME. REV. STAT. ANN. tit. 14, § 7453 (1965), where the filing fee is \$3.00.

<sup>19</sup> This idea was suggested by one authority wherein he states "in the United States, it is submitted that even small claims courts should have *in forma pauperis* rules and powers." Maguire, *Poverty and Civil Litigation*, 36 HARV. L. REV. 361, 398 (1923). Many jurisdictions have followed such suggestion, e.g., FLA. STAT. ANN. § 42.11 (1961).

<sup>20</sup> Service of process by registered mail has been upheld as constitutional. *Wise v. Herzog*, 114 F.2d 486 (D.C. Cir. 1940).

<sup>21</sup> Note, 52 CALIF. L. REV. 876 (1964). California does not require the defendant to answer. CAL. CIV. PRO. CODE § 117(h) (West 1954).

claims court.<sup>22</sup> This allows speedy adjudication of the claim in the interest of the plaintiff and prevents harassment of the defendant. The maximum time before a hearing set by statute varies from state to state and is determined by the probable burden litigants will place upon the court.

Throughout the entire process of a suit in a small claims court the necessity of a lawyer may be questioned.<sup>23</sup> Some states, in order to keep the procedure of the small claims courts informal, have expressly excluded attorneys from conducting cases for their clients in the small claims courts.<sup>24</sup> The constitutional provision of right to counsel not being applicable to civil matters, such legislative expression is undoubtedly constitutional.<sup>25</sup> Such preclusion, however, may be questioned as being unnecessary as long as attorneys are forbidden by statute to hinder the informal speedy process of the small claims court.

The question of a jury trial has been explicitly eliminated by other jurisdictions adopting a small claims court procedure. It is normally declared by statute that the plaintiff waives his right to a jury trial by bringing suit in the small claims court,<sup>26</sup> but the defendant may get a jury trial if he appeals the small claims court decision or if he requests one in the small claims court.<sup>27</sup>

In defending in the small claims court, it must be pointed out that the defendant should not be deprived of his right to counter-

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<sup>22</sup> The time for the hearing varies from jurisdiction to jurisdiction, but the maximum time is normally set by statute. *E.g.*, FLA. STAT. ANN. § 42.10 (1961) (within 5 to 15 days from the date of the service of the notice); COLO. REV. STAT. ANN. § 127-1-3 (1963) (within 5 to 10 days from the filing of the plaintiff's petition).

<sup>23</sup> See generally Annot., 167 A.L.R. 820 (1947).

<sup>24</sup> *E.g.*, COLO. REV. STAT. ANN. § 127-1-5 (1963); CAL. CIV. PRO. CODE § 117(g) (West 1954); IDAHO CODE ANN. § 1-1508 (1948).

<sup>25</sup> In *Prudential Ins. Co. v. Small Claims Court*, 76 Cal. App. 2d 379, 173 P.2d 38 (Dist. Ct. App. 1946), it is asserted that the prohibition of counsel is not unconstitutional as depriving the litigant of "due process of law" since the California act provides for appeal where a trial de novo with counsel may be had. Thus, if the defendant desires an attorney he may appeal the small claims court decision and be represented by counsel in the review proceedings.

<sup>26</sup> *E.g.*, COLO. REV. STAT. ANN. § 127-1-6 (1963) (except in certain situations, *e.g.*, suits for wages or salary earned); CAL. CIV. PRO. CODE § 117(j) (West 1954).

<sup>27</sup> CAL. CIV. PRO. CODE § 117(j) (West 1954); *Prudential Ins. Co. v. Small Claims Court*, 76 Cal. App. 2d 379, 173 P.2d 38 (Dist. Ct. App. 1946). MASS. GEN. LAWS ANN ch. 218, § 22 (1964); *McLaughlin v. Municipal Court*, 308 Mass. 397, 32 N.E.2d 266 (1941). TEX. REV. CIV. STAT. ANN. art. 2460(a) (11) (1964).

claim or set-off against the plaintiff.<sup>28</sup> This may be effectuated by providing by statute that all other actions concerning the same transaction shall be settled and pleaded the same as the original action, provided such claims remain within the jurisdictional limits of the small claims court.

Since small claims courts are founded upon the principle that persons should be able to litigate their own small claims in an informal and inexpensive manner, most jurisdictions provide certain statutory limitations upon the use of such courts by certain persons. Some jurisdictions preclude the use of the small claims court procedure by corporations.<sup>29</sup> These jurisdictions argue that small claims courts were enacted solely as an aid for individuals of meager means who are not versed in the law. They allege that the small claims courts should not be overburdened with suits of corporations against individuals, since this would contravene the very purpose of the small claims courts. The validity of these arguments is questioned, however, by the authorities who have considered the problem.<sup>30</sup> An alternative method allows corporations as well as individuals to sue in the small claims court, but limits the number of times per year each corporation or individual may sue.<sup>31</sup> This compromise position would seemingly open the court to all, yet put an end to any abuse by any one person or corporation. In further discussion of who may initiate the judicial process of the small claims court, it should be pointed out that most states preclude an assignee of a cause of action from suing on that cause of action in the small claims court.<sup>32</sup> This preclusion is justified upon the basis that small claims courts were enacted to aid individuals in litigating their own small claims and not to adjudicate the causes of action of one buying that right. To allow an assignee of a cause of action to sue on such cause of action would violate the fundamental reason for which small claims courts were founded.

After the hearing of the claim before the small claims court judge, a decision is rendered by him. This decision raises several issues as to its ultimate validity. The application of *res judicata*

<sup>28</sup> CAL. CIV. PRO. CODE § 117(h) (West 1954); OKLA. STAT. ANN. tit. 39, § 659 (Supp. 1966).

<sup>29</sup> *E.g.*, TEX. REV. CIV. STAT. ANN. art. 2460(a) (1964).

<sup>30</sup> See R. H. SMITH, *JUSTICE AND THE POOR* 56 (2d ed. 1921).

<sup>31</sup> N.H. Laws c. 179 § 5 (1939). Repealed in 1955, N.H. REV. STAT. ANN. § 503:5 (Supp. 1965).

<sup>32</sup> *E.g.*, CAL. CIV. PRO. CODE § 117(f) (West 1954); TEX. REV. CIV. STAT. ANN. art. 2460(a) (1964). *Merchants Serv. Co. v. Small Claims Court*, 35 Cal.2d 109, 216 P.2d 846 (1950).

to the judgment rendered in the small claims court may affect further litigation between the two parties. Upon sound legal principles the res judicata affect of the small claims court should be severely limited. Because of the limited judicial process which is characteristic of the small claims court, the res judicata affect of the small claims court judgment must be limited to the amount in controversy. No other issues should be held to be res judicata in other legal actions between the two parties. Just as the res judicata affect of a small claims court decision must be limited in its application, so too the review of a small claims court decision must be limited. Most jurisdictions hold that the small claims court's decision is binding upon the plaintiff since it is he who first initiated the suit in this particular court.<sup>33</sup> As to the defendant, however, all jurisdictions assert that he has the right to appeal a judgment against him.<sup>34</sup>

### III. PROBLEMS PARTICULAR TO THE ADOPTING OF SMALL CLAIMS COURTS IN NEBRASKA

Among the problems to be solved before enacting a system of small claims courts in Nebraska, none are more important than determining in what localities these courts are to be set up, and determining the means of selection of the judges to preside over them. In the larger cities of the state such courts could be set up as branches of the municipal courts. In the smaller cities and counties, however, such courts would have to be set up as branches of the state courts. In the larger cities the judges may be selected as full-time judges of the small claims courts, whereas in the smaller counties the state judge would have to be allowed by statute to sit as a part-time small claims court judge also. In either situation, however, compensation must be fixed by statute and must not be dependent upon the fees paid into the court.

In the enactment of this type of court, a decision must also be made as to whether these courts are to have exclusive jurisdiction of small claims or are to have concurrent jurisdiction with the other established courts of the state. Most jurisdictions regard a suit in the small claims court as an alternative to a suit in another state court. This approval of concurrent jurisdiction by the other jurisdictions and by the authorities in the area, lend force

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<sup>33</sup> *E.g.*, CAL. CIV. PRO. CODE § 117(j) (West 1954); MASS. GEN. LAWS ANN. ch. 218, § 23 (1964). But see TEX. REV. CIV. STAT. ANN. art. 2460(a) (12) (1964) which states that either party may appeal if the amount in controversy is over \$20.00.

<sup>34</sup> *E.g.*, CAL. CIV. PRO. CODE § 117(j) (West 1954); COLO. REV. STAT. ANN. § 127-1-6 (1963).

to the argument that these courts should be available to those who do not want to or who for purely financial reasons cannot initiate a suit in one of the other already established state courts.

#### IV. CONCLUSION

Small claims courts are founded upon the principle that all persons are entitled to court adjudication of their just small claims. To ensure their successful operation, however, the establishment of these courts must follow exhaustive consideration by the enacting authority of the ways these courts are to operate. This article, it is hoped, will serve to generate interest and thought for future legislative action in this area.

*Stephen G. Olson, '66*