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SMALL CLAIMS REVISIONS—A BREAK FOR THE LAYMAN

HARRY JAMES FOX*

THE SMALL Claims Court as it now exists in most states is the product of a reform movement which began in the early part of the century. The theory underlying this movement was that such a court would "obviate the expense and delay due to ordinary methods of litigation and . . . operate for rich and poor alike."¹ Thus, the basic philosophy behind a small claims court is that the courts must respond to the right of the unrepresented plaintiff to file and process his own claim.² The movement is well documented and is in a sense memorialized in the state statutes establishing small claims or debtors courts.³

The small claims court with its streamlined procedure had an appeal which could not long be overlooked by the collection litigant who could well consider this court nothing more than an extension of his collection agency.⁴

The spirit that was meant to assist the individual had failed. The machine had turned against both rich and poor. One could no longer process his own claim because in the rush for efficient management of the growing small claims caseload, no one had time for

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1. *Leuschen v. Small Claims Court*, 191 Cal. 133, 136, 215 P. 391, 393-94 (1923).

2. H. SMITH, *JUSTICE AND THE POOR* 56 (1919).

3. *Leuschen v. Small Claims Court*, *supra* note 1; *Small Claims Court—Reform Revisited*, 5 COLUM. J.L. AND SOCIAL PROB. 47; Note, *Small Claims Courts*, 34 COLUM. L. REV. 932 (1959); INSTITUTE OF JUDICIAL ADMINISTRATION STUDIES 1 (1959); INSTITUTE OF JUDICIAL ADMINISTRATION STUDIES, Part. 2, 16, 18 (1955).

4. Note, *Small Claims Courts as Collection Agencies*, 4 STAN. L. REV. 237 (1952); Carlin and Howard, *Legal Representation and Class Justice*, 12 U.C.L.A. L. REV. 381, 421 (1965).

him.⁵ If he sought private counsel, he was told that such a claim was not sufficiently lucrative for the counsel to pursue.⁶

Realizing that the problem of the unrepresented claimant is in many respects a problem involving the alienation of a large segment of the population, one must look to proposals which would resolve this conflict between the court and the claimant and which would dispel any notion that the courts are the exclusive domain of collection agents and attorneys. It is not within the scope of this paper to speak generally to the needed reforms of the small claims court, but rather to look at those proposals which seek to fulfill the needs of the unrepresented and occasional plaintiff. It will be obvious that many of the proposals are an attempt to eliminate known abuses in the small claims court and are, thus, relevant to such a court, be it a "collection agency" or a "forum for the people."

It is the hypothesis of this paper that a separation of cases by class based upon the distinction between "collection" and unrepresented plaintiff cases must be made in order to create that atmosphere which will allow the unrepresented plaintiff his day in court, while providing those safeguards and orderly procedure essential to the integrity of the judicial institution. To sustain the separation, limitations must be proposed. To sustain the court, procedures and techniques must be developed. When looking at the small claims court, many commentators see the abuses that are present and suggest limitations to eliminate or curb the abuses. The theory of the small claims court can operate for the benefit of both classes of small claims. If the argument were otherwise it appears questionable that any restrictions based upon a theory of discouraging access to the court as a method of hindering or disuading collection cases⁷ is as il-

5. In the calendar year 1969, 88,559 small claims, exclusive of tax cases, were begun in the Municipal Department, Circuit Court of Cook County. Letter from Administrative Office of the Illinois Courts to the Judges of the Circuit Court of Cook County, March 6, 1970. In the first quarter of 1970, 17,236 such cases were begun in the First District of the Municipal Department, Circuit Court of Cook County. Letter from Administrative Office of the Illinois Courts to the Judges of the Circuit Court of Cook County, May 26, 1970. It has been estimated that less than two percent of the cases filed in the First District were filed by unrepresented plaintiffs. Interview with William Zaret, Court Coordinator, Circuit Court of Cook County, Oct. 28, 1970.

6. Robinson, *A Small Claims Court in Chicago's New Circuit Court*, 44 CHI. B. REC. 421, 421-22 (1963).

7. Note, *Small Claims Courts*, 21 STAN. L. REV. 1957, 1974 (1969).

logical as the statement that there is no room for the unrepresented plaintiff in the small claims courts.

SEPARATION BY SECTION

The separation should take the form of a section of the circuit court, for example, a section of the Municipal Department of the Circuit Court of Cook County. The proposal is based upon several factors. First, Illinois has a unified court system⁸ which should not be disturbed simply to provide for a separate court for small claims. Second, legislative provision has been made for special treatment of the small claim, as the Supreme Court of Illinois has been given power to make rules governing pleading, practice, and procedure including service of process governing the small claim.⁹ Third, the Supreme Court of Illinois has taken the lead from this authorization and has established rules relating to small claims.¹⁰ Fourth, further rules by the Supreme Court of Illinois could be an effective method of producing the separation by class. These rules would at the minimum be ones which would describe the characteristics and features required of the plaintiff before filing in the section. This method has the advantages of being applicable throughout the state and of having existing machinery for settlement of disputes with a minor work load increase. In contrast, those proposals which suggest extrajudicial and parajudicial approaches, such as arbitration boards and conciliation departments,¹¹ are burdened by the need to establish such dispute centers. Certain of the problems of these alternative approaches will be noted in a discussion of the New York system, which has an excellent small claims court where an unrepresented claimant may file. The California and Detroit Courts will also be noted as they can best be compared to one which might be established in Illinois.

LIMITATIONS ON THE PLAINTIFF

The limitations, which can be referred to as "jurisdictional," are to

8. Judicial Article 8. See also Fins, *Analysis of Illinois Judicial Article of 1961 and Its Legislative and Judicial Interpretation*, 11 DE PAUL L. REV. 185 (1962); Mulliken, *The Unified Trial Court*, 50 ILL. B.J. 668 (1962).

9. ILL. REV. STAT. ch. 110, § 2 (1967).

10. Ill. Sup. Ct. R. 281-88, ILL. REV. STAT. ch. 110A, § 281-88 (1969).

11. Jackson & Taylor, *Center for Dispute Settlement—A New Use for an Old Tool*, 27 LEGAL AID BRIEFCASE 131 (1969).

separate the small claim from other claims and to distinguish the classes of small claims. These limitations on plaintiffs include restrictions upon the size of the claim, number of claims, type of claim, type of plaintiff, and the representation of the plaintiff.

The claim we are dealing with is by definition small. The Supreme Court Rules now provide that a small claim is one which is either in contract or tort (including tax claims) for an amount of less than one thousand dollars.¹² The separation by class would not appear to warrant a change in the one thousand dollar limit which is intended to separate the small claim from other claims.¹³

The second limitation is one which would limit the number of suits a plaintiff could file in the small claims section within a stated time period. This limitation is intended to discourage any claimant from undertaking mass filing, which would abuse the section and defeat the separation of classes. It is also intended to discourage mass filing without the assistance of counsel, although an unrepresented claimant could file as many claims as he wished in the collection section. Such a claimant would not be permitted to enjoy the "atmosphere" of the unrepresented section and, thus, would not "pollute" it. This rule alone could effect the desired separation of classes.

The small claims court in Detroit provides for such a rule by not accepting any case for placement on the conciliation docket when the plaintiff has had adjudicated on a conciliation docket four cases within the immediate preceding twelve months.¹⁴ Policing a rule of this nature could be handled by an affidavit of compliance similar to the one now required of attorneys.¹⁵

The third limitation is one which would limit the type of suit.

12. Ill. Sup. Ct. R. 281, ILL. REV. STAT. chap. 110A, § 281 (1969).

13. *Contra, supra* note 6, at 423.

14. Common Pleas Court of Detroit R. 41. The Detroit small claims Court was limited to claims of less than \$100 until January 1, 1970, when that limit was raised to \$300. In 1968 the Detroit court had 373 cases. In 1969, the number grew to 517. As of April 24, 1970, more than 200 cases had been filed in 1970. Letter from Peter B. Spivak, Judge Common Pleas Court to James Fox, April 24, 1970.

15. The affidavit would have warnings which, similar to those used in other small claims courts, alert the plaintiff to the fact that he may be waiving certain rights by filing his case in the small claims court.

This limitation may be necessary to prevent an ingenious plaintiff from using a device such as an assignment for the purpose of evading the limitation on the number of actions. For example, California, New York City, and Detroit small claims courts have rules regarding the type of claim. In addition, the California and New York rules prohibit assigned claims,¹⁶ whereas the Detroit rules prohibit filing, where the plaintiff acquired the claim by assignment, transfer, in trust or otherwise, from a previous owner.¹⁷ Only the Detroit rule provides a limitation on the number of cases. At present, the Supreme Court Rules provide that, if the claim is based upon a written instrument, a copy of it must be copied on, or attached to the complaint.¹⁸ If a rule of this nature were developed, this requirement would alert the court to the wrongful docketing of a case in the section. Also, this method could be supplemented by an affidavit of compliance.

Thus, the New York and California restrictions¹⁹ are similar. While the New York court has been praised, numerous commentators have noted that not only has the California court lost the atmosphere which is conducive to the unrepresented plaintiff, but it has become almost the exclusive territory of the mass filing collection plaintiff.²⁰

The fourth limitation is one which would restrict the type of plaintiff. The Detroit court rule provides for the exclusion of both corporate and partnership plaintiffs unless the person who personally presents the claim to the clerk is a bona-fide member of the partnership.²¹ The New York court rule provides that no corporation, partnership or association shall institute such an action.²² It appears to the writer that this restriction, while apparently preventing an abuse, may have been based upon a false impression gleaned from statistics, which show that the mass filing plaintiffs are of the corporate or

16. CAL. CIVIL PROC. CODE § 117f (West 1954); N.Y. City Civ. Ct. Act, § 1809 (McKinney 1963).

17. Common Pleas Court of Detroit R. 41.

18. Ill. Sup. Ct. R. 282, ILL. REV. STAT. chap. 110A, § 282 (1969).

19. CAL. CIV. PROC. CODE § 117f (West 1954); N.Y. City Civ. Ct. Act, § 1809 (McKinney 1963).

20. Note, *supra* note 4.

21. Common Pleas Court of Detroit R. 41.

22. N.Y. City Civ. Ct. Act, § 1809 (McKinney 1963).

partnership variety and should therefore be restricted. This exclusion of plaintiffs is of questionable validity, except where the excluded plaintiff has another section to turn to for redress. However, it may be an unnecessary or at least a cumulative restriction if the second and third restrictions have already been enacted. It may be argued that the allowance of fictional persons such as corporations in the courts as plaintiffs would stifle the "atmosphere," but this argument is tenuous at best, considering the fact they may be sued there as defendants. It may be argued that this policy will be helpful, but the Illinois legislature should await further developments before a restriction such as this would be enacted.

LIMITATIONS UPON REPRESENTATION

The fifth limitation is one which invariably has caused the most debate in discussions prior to the creation of a small claims court. The problem is: What limitation or prohibition of attorney participation in the small claims court is necessary in order to provide the requisite atmosphere for the process to operate as envisioned? It has been suggested by many thoughtful commentators that the discouragement²³ or prohibition of attorneys in this section is essential.²⁴

The absolute bar of attorneys has been enacted in several jurisdictions, notably California.²⁵ Besides an absolute bar, other means of discouraging the participation of attorneys in the small claims section have been utilized.²⁶ New York, which does not have a prohibition upon attorneys in the small claims section, does have provisions as to the time court is held and other such procedures to discourage attorney participation. The question of prohibition of attorneys must then be first viewed from the perspective of the plaintiff. It is obvious that the plaintiff has had first choice as to the type of court. Prohibition of plaintiff attorneys is not a problem, since it was the plaintiff who chose this forum. This restriction does not appear to be unconstitutional where the section is not the exclusive means of

23. Institute of Judicial Administration Studies 1 (1959); Institute of Judicial Administration Studies Part 2, 16, 28 (1955).

24. *Supra* note 2.

25. *Lee v. Small Claims Court*, 46 Cal. App. 2d 530, 116 P.2d 170 (1941).

26. *McLaughlin v. Municipal Court of Roxbury Dist.*, 308 Mass. 397, 32 N.E.2d 266 (1941) (not prohibited but participation by judicial discretion); *Doanne v. Stein*, 87 Or. 97, 169 P. 781 (1918).

being heard,²⁷ as the plaintiff can be said to have waived representation by his selection of forum. The question of the prohibition against a plaintiff's attorney is most important in the situation where the defendant seeks to raise the question of counsel. The possibilities are: (1) the defendant seeks to remove the case from the section by demanding representation; (2) the court recognizes the demand and allows the defendant to have representation within the section; and (3) notwithstanding the defendant's demand, the court prohibits his representative to an appearance in court.

The fact that jurisdiction is forced on the defendant may create constitutional problems where there is an arbitrary prohibition against defendant representation. The United States Supreme Court stated that "if in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of hearing, and therefore due process in the constitutional sense."²⁸ California courts in attempting to avoid any constitutional defect have interpreted their statutes as allowing the defendant to be represented by counsel when he takes an "appeal" to the superior court.²⁹ The court held that due process is not denied "as long as the right to appear by counsel is guaranteed in a real sense somewhere in the proceeding."³⁰ The California approach of allowing appeals as a method of relieving a possible constitutional defect may not only be unrealistic,³¹ but is also inoperative in Illinois where review of a lower court by a court of similar jurisdiction is prohibited.³²

The California approach is inappropriate in Illinois, unless every defendant submitted to jurisdiction and waived the appearance of counsel. If the defendant is allowed to force the case out of the section by a demand for counsel, a greater frustration of purposes will

27. *Prudential Ins. v. Small Claims Court*, 76 Cal. App. 2d 379, 173 P.2d 38 (1946).

28. *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

29. *Supra* note 27. This procedure is actually a trial *de novo*.

30. *Id.*

31. "Is a right of counsel for 91% of defendants who lose in small claims courts guaranteed in a real sense when it can be empirically demonstrated that fewer than 1% appeal." *Supra* note 7, at 1676.

32. Judicial Article 8. *See also* Fins, *supra* note 8; Mulliken, *supra* note 8.

occur than if the defendant could retain counsel and dispose of the matter within the section, for if the case remains within the section the unrepresented plaintiff will still benefit from the composition of the court as to its staff, procedures, and informality. The provision could be couched in such terms as to provide that, where the defendant demands representation, the *plaintiff* would have the choice of removing the matter to another section by retaining counsel or remaining in the section unrepresented.

The previously mentioned restrictions are substantive in nature and go to the question of the court's jurisdiction. Before looking at the remaining substantive questions, such as the right to jury trial, the right to appeal, and the right to a finding on both liability and damage, the restrictions of venue which can be considered both substantive and procedural should be examined.

The present supreme court rule does not refer to venue, but only provides that process out of county is not permitted when certified mail is used for service.³³ The rule therefore allows, but does not require, this form of service. This allowance raises the possibility of personal service outside the county based upon the venue statement that a claim can be filed where the transaction arose.³⁴ A possible abuse of the court has occurred in the small claims courts which are used for collections. The practice has been to file suit at the site of the transaction, or at a site which was arranged at the time of the transaction, such as the home office of the potential plaintiff.³⁵ In the area of the unrepresented plaintiff there is no reason to discriminate against him without a similar restriction in the collection section; such a discrimination based upon representation is constitutionally questionable.

Any limitation of this nature must be as to both sections. The limitation cannot be by supreme court rule, as the authorization of power to the court does not go as far as venue.³⁶ The ability of the court to govern service of process and, thereby, limit the action to the

33. Ill. Sup. Ct. R. 284, ILL. REV. STAT. chap. 110A, § 284 (1969).

34. ILL. REV. STAT. ch. 110, § 5 (1967).

35. See Comment, *The California Small Claims Court*, 52 CALIF. L. REV. 876 (1964).

36. ILL. REV. STAT. ch. 110, § 2 (1967).

county of filing by this power, appears to be inconsistent with the provisions of the act relating to venue³⁷ and is, therefore, unauthorized.³⁸

Any attempt by the Court to limit process to certified mail, rather than reserving that process as an *alternative* procedure, is not only defective, but unwise, as many who use certified mail know that the sophisticated defendant will not accept the mail and the sheriff, thus, will be necessary for service of process. Any such limitation should be by amendment to the Civil Practice Act itself.

JURY TRIAL

The next substantive problem is that of the jury trial.³⁹ The arguments regarding the restrictions on jury trials are basically those raised in the attempts to place limitations upon representation. The answer is not as easy as the answer to the question of representation which was to allow the appearance of an attorney for defendant, which gives the plaintiff a choice of either retaining counsel and thereby removing the case to the other section or remaining unrepresented and facing a skilled adversary in the small claims section. The real question is whether it is at all possible for the unrepresented plaintiff to present a case to a jury, especially where the defendant is represented. Unless jury trials can be eliminated,⁴⁰ the same rationale for allowing the case to remain in the section when the defendant demands an attorney must prevail.

APPEALS

Any rationale that appeals should be prohibited⁴¹ or permitted for the losing defendant only⁴² must meet and answer the same arguments which have attempted to prohibit or restrict the right to representation and the right to a jury trial. The argument is that the plaintiff has elected his court and, thus, has waived his right to appeal.

37. ILL. REV. STAT. ch. 110, §§ 5, 6, 7 (1967).

38. ILL. REV. STAT. ch. 110, § 2 (1967).

39. Ill. Sup. Ct. R. 285, ILL. REV. STAT. chap. 110A, § 285 (1969).

40. Cf. O'Connell, *Jury Trials in Civil Cases?*, 58 ILL. B. J. 796 (1970).

41. *McLaughlin v. Municipal Court of Roxbury Dist.*, 308 Mass. 397, 32 N.E.2d 266 (1941).

42. *Superior Wheeler Cake Corp. v. Superior Court*, 203 Cal. 384, 264 P. 488 (1928).

However, as seen *supra*, a limitation on the defendant's right to appeal where the defendant is forced into a court which would prohibit appeals is inconsistent with the described concept of ordered liberty and is, hence, a clear violation of due process. In Illinois, appeals must be allowed and must be taken in the same fashion as other appeals. Any attempted prohibition on defendant's right to appeal would only be possible where an effective waiver of appeal had been made by the defendant. It is doubted that such a waiver would be made.⁴³

LIABILITY AND DAMAGES

The theory of the small claim assumes informality, but demands an application of the substantive law.⁴⁴ If Illinois is to provide a true court for the unrepresented, it is not at liberty to dispense with a finding as to both liability and damages.⁴⁵ Suggestions regarding alternative techniques and procedures have been used as supplements to the court structure. Often these devices are measures to coax settlement or arbitration in order to eliminate the need for court findings. As small claims practitioners know, the judge all too often sends the unrepresented defendant into the hall to work something out with the collection attorney. It is doubtful that the court will be as trusting with unrepresented plaintiffs; therefore, a formal structure for arbitration should be built into the unrepresented small claims section.⁴⁶ However, the fact is that most alternative techniques which do not have the standing of law or the persuasive power of the court are often as ineffective as a letter from an attorney, or the Legal Aid Bureau. It is only where the parties are willing to abide by the alternative that such a possibility is viable. It may be noted that in the New York system a provision within the small claims court has been made whereby the case can be heard before an arbitrator, rather than

43. The New York small claims court has a provision where the litigants can have their dispute heard before an arbitrator. However, one observer of that court has stated that litigants often prefer to go before a judge and not waive their right to appeal by going before the arbitrator. Letter from Karen Davidson, Assistant Counsel, Department of Consumer Affairs, New York to James Fox, May 15, 1970.

44. *Supra* note 2. *Interstate Bankers Corp. v. Kennedy*, 33 A.2d 165 (D.C. Cir. 1943).

45. *Croft v. Lampkin*, 112 Ill. App. 2d 321, 251 N.E.2d 88 (1969).

46. Consumers' Advisory Council, New York City, *How to Sue Someone In New York City Small Claims Court*.

before a judge. This alternative technique has a very persuasive feature which may be described to the unrepresented plaintiff in the following manner: "You can have the judge hear your case, if you are willing to wait until about nine o'clock in the evening. If you do not want to wait until then, you can have a lawyer, called an arbitrator, hear your case."⁴⁷ Therefore, where the alternative is built into the court's existing machinery, it appears to offer the hoped-for relief for burdens which otherwise would be placed upon the court.

PROCEDURAL ASPECTS

The foregoing description relates to the substantive aspects of the court; and while it is beyond the scope of this paper to touch upon all the possible procedural problems presented, a few are deserving of mention here.

The simple complaint and pleadings essential to the court have been provided for,⁴⁸ as well as the dispensation of an answer⁴⁹ by the defendant. Assistance in filing and pleading has been considered essential for this court. In Illinois, the statute which prohibits clerks from preparing such pleadings presents a problem.⁵⁰ However, the statute providing for duties of the clerk requires the clerk to do and perform all duties as may be required by the rules and orders of the courts.⁵¹ The prohibition statute excepts from its operation those situations in which the clerk may be required by law, or given authorization by statute, to prepare the necessary pleadings and papers. It is then to be argued that the reading of the two statutes together would allow such assistance, if the duty to do so was required by order of court.

Service of process must be kept inexpensive, but effective. To what extent different papers can be served by certified mail has been presented by other writers,⁵² but there seems to be no sound argument for the prohibition of its use for summons, wage deductions, and

47. *Id.* at 15.

48. Ill. Sup. Ct. R. 282, ILL. REV. STAT. chap. 110A, § 282 (1969).

49. Ill. Sup. Ct. R. 286, ILL. REV. STAT. chap. 110A, § 286 (1969).

50. ILL. REV. STAT. ch. 37, § 328 (1969).

51. ILL. REV. STAT. ch. 25, § 13 (1969).

52. Fins, *Service of Process by Mail*, 50 CHI. BAR. REC. 198 (1969).

garnishments.⁵³ Lastly, no judgment should be entered when based upon the pleadings alone. A "prove up," or "inquest," as it is referred to in New York, is essential—particularly where the plaintiff is unrepresented.

CONCLUSION

The substantive aspects of the unrepresented small claims plaintiff in court proceedings must be viewed in light of its purpose. Thus, certain restrictions have been made. Where changes in these restrictions are made, the rationale and balance of the system may require a restructuring of the entire proceeding. Although the procedural aspects are in no way complete, areas such as discovery, service of other writs, and the question of counterclaims can be developed only if the small claims court retains its status as a court rather than an extrajudicial body.

53. Ill. Sup. Ct. R. 285, ILL. REV. STAT. chap. 110A, 285 (1969).