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WISCONSIN SMALL CLAIMS PRACTICE UNDER CH. 299: A DISCUSSION AND SOME SUGGESTIONS

ROBERT F. BODEN*

INTRODUCTION

Wisconsin lawyers have now been living with Chapter 299 of the Statutes, the small claims act born of court reorganization, for almost two years, and perhaps the time is now ripe to review its workings. As this is written, the 1963 Legislature is in session and there are numerous bills, notably the corrective measures of the Judicial Council, now pending which would amend the chapter. These will be discussed and further suggestions for amendment will be made.

It is not the purpose of this article to discuss Ch. 299 practice in every detail; nor is it concerned in any way with the incidental areas of its application, that is, in forfeiture, unlawful detainer and replevin actions. Our concern is with Ch. 299 as a workable tool in small claims damage actions.

SMALL CLAIMS AND COURT REORGANIZATION

Court reorganization gave us a reasonably uniform system of county courts with civil jurisdiction.1 In the absence of a special statute to govern small claims matters, the rules of pleading and practice set forth in Title XXV of the Statutes, so-called “circuit court practice,” would apply in every county court, because such court is a court of record.2 The abolition of the many municipal and inferior courts left no forum for small claims other than justice courts. The obvious need existed for an expeditious inexpensive method of disposing of small claims. When the Judicial Council began its consideration of the problem, there existed in Wisconsin law three models of such procedure. They were:

Justice Court Procedure. As old as the state, and governed by Title XXVIII of the Statutes,3 this procedure was essentially applicable to courts not of record, but did contain certain features recommended by long experience to any small claims procedure, among them being a day certain for return of the summons, physical appearance on that day, informal pleading, early trial, etc. Among the features of justice court practice not recommended for small claims handling in a court of record

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was the concept of trial de novo on appeal. Since court reorganization removed from the justices jurisdiction in garnishment and attachment, as a practical matter the use of these courts in most small claims actions was virtually eliminated, requiring a county court act that would, generally speaking, adapt to a court of record the general scheme of justice court practice, with refinements as necessary.

**Small Claims Procedure Under Old Ch. 254.** This pre-court reorganization chapter provided for small claims courts of record at county board option in all counties except Milwaukee. Summary proceedings were the rule under this chapter, which incorporated many justice court concepts, and contained some short-cut and expense-reducing innovations, as service of process by the clerk and by mail. Many of these provisions have found their way into Ch. 299. The Small Claims Court of Dane County, the workings of which were viewed with alarm by many non-Madison lawyers, was the model of this type of court.

**Milwaukee Civil Court Procedure.** This curious, yet highly workable, procedure obtained in the old Milwaukee County Civil Court. It was built upon a dual system, in general, but only in general, adopting circuit court practice to matters over $200 and justice court practice to matters under $200, with the necessary refinements to accommodate a court of record. The exceptions to this division were numerous, and the whole practice baffled out-state lawyers. But once a lawyer learned Civil Court practice in all of its complexity, one thing became apparent—for Milwaukee County at least, it worked. Whether this could be said state-wide was another matter, but quite naturally Milwaukee lawyers tried to get, and in certain areas succeeded in getting, some Civil Court provisions into Ch. 299.

In this climate the Judicial Council produced the basic plan of small claims practice. In the latter days of the 1961 Legislature, the Council’s proposal was buffeted around, amended and re-amended, until there emerged Ch. 299, entitled “Procedure in County Court in Small Claims Type Actions.” As it exists today it represents a compromise

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5 The justice practice basis of old ch. 254 is apparent, but Wis. Stat. §254.07(1) (1959) contained the express directive (not found in new ch. 299) that the “practice and procedure of said small claims court shall be summary in nature.” Mail service by the clerk was authorized by Wis. Stat. §254.11(2) (1959).
6 Created as a municipal court by Wis. Laws 1909, ch. 549. Amendments thereto, until 1951, amended that chapter. By Wis. Laws, 1951, ch. 168, the Civil Court Act was reenacted, as amended, and as printed in the 1950 Wisconsin Annotations. Wis. Laws, 1953, ch. 493, raised the status of the court from municipal to inferior, according it state-wide jurisdiction except in matters under $200. A separate act, Wis. Laws 1921, ch. 338, organized a small claims branch of Civil Court for matters not exceeding $50. As amended, it was reenacted in similar fashion by Wis. Laws 1951, ch. 169.
7 The principal sources of ch. 299 as printed in the 1961 Statutes were Wis. Laws 1961, chs. 519, 614, 618, and 643.
between two schools of thought on the subject of small claims handling: (1) the advocates of a thoroughly informal, almost administrative type process; and (2) the proponents of an essentially judicial approach, with exceptions to circuit court practice as dictated by necessity. The result is a hybrid, but not, as some have alleged, a hodge-podge. That Ch. 299 was not enacted by acclamation in the form originally proposed indicates that it must contain "bugs" and contradictions requiring amendment.

SMALL CLAIMS PRACTICE UNDER CHAPTER 299

Besides governing forfeiture, unlawful detainer and replevin actions in county court, the Act applies to all damage actions involving $500 or less.  

The chapter is designed as an exception to the general rule that Title XXV or "circuit court" practice applies in civil actions in county court, and, therefore, in all instances where Ch. 299 does not provide a rule of procedure, circuit court practice governs. An outline of practice in county court small claims actions then proceeds upon the differences or exceptions to basic circuit court practice as contained in Ch. 299.

A. THE SUMMONS AND PERSONAL JURISDICTION

1. The Summons. As in justice, old small claims and Civil court practice, the summons required to commence an action is (1) issued by the clerk, and (2) returnable on a day and at a time certain. It must be returnable not less than 8 nor more than 17 days from its issue date, and it must be served not less than 8 days prior to the return date. The form of the summons may be found in §299.05. Conforming to the scheme that pleadings may be oral, the summons must state the nature of the action, substantially in the general terms of §299.01, which sets forth the types of cases to which the Act applies. Some courts have made printed forms available, and they may be purchased for $3 apiece in blank, this being the combined charge for suit tax and clerk’s fee.

2. Service of Summons; Personal Jurisdiction. The Act provides that jurisdiction of the person may be obtained by two types of service: (1) by mail; and (2) by personal or substituted service. Service by mail is an innovation to lawyers not familiar with old Ch. 254. The summons and sufficient copies are left with the clerk, who collects a 50c fee for mailing. The court by rule may require the use of registered

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8 Wis. Stat. §299.01(4) (1961).
10 Wis. Stat. §299.05 (1961).
11 Wis. Stat. §299.05(3) (1961).
mail, and service is considered complete upon mailing, unless the envelope is returned unopened to the clerk before the return day. Local option by court rule to eliminate mail service and require all service to be personal or substituted is provided, and has been exercised by the County Courts of Milwaukee, Racine, Kenosha, Waukesha, Ozaukee, Dodge and Washington Counties.

Under §299.14, a procedure is provided for reopening default judgments (or otherwise permitting defense where judgment has not been entered) in the case of failure of actual notice by mail. Defendant must petition the court "within 15 days of receiving actual knowledge of the pendency of the action or of the entry of judgment therein against him" and the court has discretion to reopen. An appearance and submission to the court's jurisdiction without so moving waives the right to reopen.

The great volume of cases in Milwaukee County and the other populous counties of the southeastern part of the state immediately suggested that service by mail would be unworkable for the great number of reopening petitions that would be brought, and the court rule abolishing mail service in the seven southeastern counties resulted.

Personal service is authorized and, with the exceptions discussed below, is governed by §299.13(2). Service by publication, except as to in rem or quasi-in rem actions governed by §299.16, is prohibited.

3. Limitations on Personal Jurisdiction. Preserving to some extent the concept that territorial jurisdiction should be limited in small cases, the Act, in §299.12, sets up a complex triple standard prescribing the limits of personal jurisdiction, doing so in terms of the type of service used and the amount involved. The entire test must be qualified by §299.11, which places a territorial limit on personal service.

Where service is by mail under §299.13(1) the statute provides that jurisdiction of the person is obtained only: (1) when the defendant, at the commencement of the action, is a natural person present in the county when served, or having his usual place of abode in the county, or is a corporation or unincorporated association or member of a partnership engaged in substantial business in the county; or (2) when

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17 Ibid. In such case, the clerk's fee is increased to $1.50. The term "registered mail" includes certified mail, subject to the limitations of Wis. Stat. §990.001-(13) (1961).
18 Ibid.
19 Rule 3 of the Rules of County Court, Civil Division, Small Claims. The rules of court established for the seven southeastern counties named have been printed and distributed to attorneys by the Milwaukee Bar Association. Several of the important rules are alluded to throughout this article. Unfortunately, the rules as published are unnumbered. The author, therefore, has taken the liberty of numbering them consecutively for purposes of reference herein.
21 Supra note 19.
the action, regardless of defendant's domicile, arises out of the use or operation of a motor vehicle in the county.

This would suggest that mail service must be within the county, except for domiciliaries of the county and non-resident motorists, but §299.11 provides in part:

Service of process by mail in actions under this chapter to obtain a judgment against a party personally shall be limited to the territorial limits of the county. . . .

As discussed hereafter, this renders the non-resident motorist provision meaningless, but in addition and in general limits mail service to the county.

Where personal service is had under §299.13(2), the jurisdiction of the court over the defendant's person depends upon the amount involved. Preserving a distinction in the old Milwaukee Civil Court Act which limited the court's jurisdiction to the county in matters within justice court jurisdiction, but which accorded state-wide jurisdiction in matters over $200, an amendment to the original bill now limits jurisdiction of the person in matters $200 or less to the county (expressed in the same terms as the mail-service limits described above), but in matters over $200 jurisdiction is state-wide. §299.11 again modifies these rules by providing that in matters "involving $200 or more" (note the different treatment of the $200-even case) personal service to obtain a personal judgment "may be made outside the county but within the state." From this it probably must be inferred that: (1) in matters under $200 personal service must be made within the county; (2) in $200-even matters the court's jurisdiction is county-wide, but its process is state-wide; and (3) despite the provision in §299.13(2) that service on a natural person may be made in any manner authorized by §262.06(1) (a) or (b), or (2), personal service cannot be made outside the state. The matter is further confused by the express provisions in §299.13(2) purporting to authorize personal service on a corporation by serving its officers, agents, etc., anywhere in the state, and the seemingly contrary limits of §299.11 with respect to service outside the county in matters involving less than $200.

4. Non-Resident Motorist Cases. The limitations on jurisdiction of the person have, as indicated above, ousted the county court of jurisdiction over non-resident motorists, unless service is accomplished as upon any other defendant. §345.09 permits service of process against non-

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23 In addition, Wis. Stat. §299.11 (1961), provides that the general non-resident motorist statute, §345.09, does not apply, and personal service, by implication from §299.11 is limited to the state, except in matters under $200, where it is apparently limited to the county. See discussion, infra.


resident motorists upon the motor vehicle commissioner, who then notifies the defendant by mail. §299.11 provides that this statute does not apply to small claims actions. The obvious substitute would be direct mail service upon the non-resident, eliminating the necessity of the middle-man commissioner, and §299.12(1)(b) is actually written in terms that indicate an intention to permit such service in providing that jurisdiction of the person may be acquired where service is by mail "when the action regardless of defendant's domicile arises out of the use or operation of a motor vehicle in the county." (emphasis added) But §299.11 effectively eliminates service by mail upon non-resident motorists by its provision that mail service is limited to "the territorial limits of the county." Thus Wisconsin has the curious policy that its residents with small claims must be put to more expensive circuit court proceedings and that non-residents may enjoy practical immunity from suit, but only in county court.

5. Present Status of Personal Jurisdiction Sections. An analysis of §§299.11, 299.12 and 299.13 discloses that about one half of the verbage in those sections is not law at all, because contradicted and modified by other language in the sections. It would seem that what the sections mean to say is simply this: In all cases where service by mail, and where it is personal in cases $200 or less, small claims jurisdiction extends to natural persons present in the county when served or having their usual place of abode there, and to business entities and partners engaged in substantial business in the county, and service must be had upon such persons within the county to obtain a personal judgment, except for the $200-even case, where personal service may be had state-wide (this exception being simply a fluke); in all other cases jurisdiction is state wide, and service must be had within the state to obtain a personal judgment.

6. The Venue Problem. It is to be noted that in the $200-$500 category of small claims cases, jurisdiction is state-wide. A Kenosha County creditor could sue a Douglas County debtor for $201 in the Kenosha County Court, serve the debtor in Douglas County, and thereby obtain jurisdiction of his person, just as he could do in Circuit Court. Ch. 299 is silent on venue, so the Ch. 261 provisions of Title XXV apply.26 The debtor's only remedy would be a change of venue to Douglas County. In the short time that Ch. 299 has been in operation, it is apparent that there has been some abuse of these liberal jurisdictional provisions, precisely in the manner described above.

Of course it may be argued that the creditor could proceed in similar fashion in circuit court, as indeed he could; but in this writer's judgment that does not answer the problem—it simply poses another. We

cannot discuss here any amendment of circuit court practice rules. The great danger of venue abuse arising under Ch. 299 is that we are dealing with a type of case where the amount involved is not great, where the defendant may not seek counsel, and where proceedings are summary. Consider alone the proposal before the legislature to limit the time for reopening default judgments taken under Ch. 299 to 90 days, discussed below, and it is apparent that a different problem exists in county than in circuit court.

The answer, however, does not seem to be in restricting all small claims jurisdiction of the county court to the county. There is a great deal of merit in the flexibility that permits a Waukesha County debtor to be sued in Milwaukee County, for instance, and the venue abuse really arises only when considerable distances are involved or when very little money is at stake. Traditionally, we have made venue jurisdictional only in actions involving real estate, and we consider proper venue as waived when the defendant does not object.27

However, in the type case under consideration, waiver probably should not be presumed from silence—silence in many cases arising from the ignorance of the defendant, his disbelief in the validity of proceedings against him in a distant county, his failure to employ counsel, etc. And the plaintiff who has chosen a forum inconvenient for the defendant should not be heard to complain if the defendant is given another chance to break his silence. Therefore, one suggestion for a cure might be a provision in Ch. 299 of the following tenor:

When in any action under this chapter it shall appear from the return of service of the summons or otherwise that the county in which the action is pending is not a proper place of trial of such action under the provisions of §261.01, the court shall, on the return day of the summons, adjourn the action to a day certain not less than 14 nor more than 21 days from such return date, unless the defendant shall have appeared in the action on or before the return date. No default judgment shall be entered in such action unless the plaintiff shall, at least 7 days prior to the adjourned return date, serve upon the defendant and file a notice in writing directed to the defendant and advising him of the pendency of the action; the jurisdiction of the court; his right to a change of venue to a proper place of trial, naming it or them; and the adjourned return date. Such notice shall be served in the manner prescribed by this chapter for the service of a summons. It shall not be served prior to the original return date. On the adjourned return date of such action, the court shall consider any request by the defendant for a change of the place of trial as a motion for change of venue, whether such request be oral or written, or made to the court or to the plaintiff. An order for change of venue hereunder shall direct the plaintiff to accomplish the change in accordance with §261.10. No default

judgment shall be entered upon such adjourned return date for the failure of the defendant to appear or respond to such notice unless the plaintiff or his attorney shall make and file an affidavit that no request for change of venue was received from the defendant.

A statute of this type might deter considerably the deliberate choice of wrong venue, would give the defendant a second chance, and at the same time would preserve the flexibility in extended county court small claims jurisdiction. The penalty for not accomplishing the change after order would be dismissal of the action after six months under §299.225, discussed below.

Another alternative, of course, would be to give the court discretion to change venue on its own motion, but this solution might not be productive of uniformity among county courts. Other possible solutions might be to extend the time for reopening a default taken in the wrong venue, to require notice and opportunity to reopen before collection attempts, etc. All of these seem to tend to destroy the finality of the judgment, however, and it is recommended that protection be afforded the defendant before judgment is entered.


If we assume a solution to the venue problem along the lines suggested above, then the very closely related personal jurisdiction question resolves itself into the following issues: (a) Should personal jurisdiction be limited to the county in mail service cases and in all cases $200 or less? (b) Should non-resident motorists be amendable to suit in small claims by mail service? (c) Should the language of §§299.11, 299.12 and 299.13 be clarified?

For some reason we trust the post office to make local deliveries but not out-of-county or out-of-state deliveries. There is less logic to so limiting mail service than there is to the jurisdictional limit of over $200 on the state-wide jurisdiction of the court in personal service cases, but both are to some extent artificial. However, it does seem that there should be some cut-off in terms of the "smallness" of a claim below which defendant need not be concerned with the prospect of defense, or even of venue change motion, in a distant county. As much as we might regret the creation of a separate class of "small small claims," it is probably proper to limit the jurisdiction of the court to the county in these small cases. And if the legislature does not trust the post office department to carry the mail over county lines (except when process is being mailed to the sheriff for local service), it is probably simply a curiosity which should not be of great concern.

The real problems in this area are in the non-resident motorist cases and in the utter confusion of language in the three jurisdiction sections. Certainly a Wisconsin plaintiff with a small claim against a non-resi-
dent motorist should be accorded the facilities of the county court for disposition thereof, and it should make little difference that the hand dropping the letter containing the summons into the mailbox is that of the clerk of court rather than the motor vehicle commissioner. Assuming, therefore, that jurisdiction should be extended in this department, let us examine the jurisdictional provisions of §§299.11, 299.12 and 299.13.

In the final analysis, what these sections do is lift all of the material on jurisdiction of the person and service methods out of Ch. 262, making certain exceptions, to wit: (a) county-wide jurisdictional limit in mail service and $200 or less cases; (b) abolition of service outside the state; (c) abolition of mail service on non-resident motorists. It is in restating this material that confusion occurs. Because all of Ch. 299 is an exception to Title XXV, it would seem that there is no real need for this restatement. Why could not all three sections be replaced by one section consisting merely of the exceptions and the addition of the new concept of mail service? Such a section is herewith proposed, and it makes no changes in the law except to eliminate the special treatment of the $200-even case and to authorize direct mail service on non-resident motorists, wherever they may reside.

(1) Except as otherwise provided in this chapter, all provisions of Title XXV with respect to jurisdiction of the persons of defendants, the procedure of commencing civil actions, and the mode and manner of service of process, shall apply to actions and proceedings under this chapter.

(2) In all matters involving $200 or less, personal service of process to obtain a personal judgment must be made within the county where the action is commenced. In all other actions, such service to obtain such judgment must be made within the state. Except as provided in §299.16, there shall be no service by publication. §345.09 shall not apply to actions under this chapter.

(3) As an alternative to service of process in accordance with sub. (1) and (2) hereof, the summons may be served upon any of the defendants by mailing in the manner following: . . . (copying the mailing procedure in the present statute). . . . Except as to actions against non-resident motorists, service by mail to obtain a personal judgment shall be limited to the territorial limits of the county where the action is commenced.

(4) Jurisdiction over a person in a matter involving $200 or less or in any action where the defendant is served pursuant to sub. (3) may be obtained only when the defendant at the time the summons is served . . . (copying the present language of §299.12 limiting personal jurisdiction to the county) . . . ; provided that when the action, arises out of the use or operation of a motor vehicle in the county, the court shall have jurisdiction of the person of the defendant upon service pursuant to sub. (3) regardless of the domicile of the defendant.
(5) Except as to actions against non-resident motorists, any county court may by rule require that service of the summons in some or all actions be made as prescribed in sub. (1) and (2).

B. IN REM JURISDICTION; GARNISHMENT; ATTACHMENT

With minor exceptions, circuit court garnishment and attachment practice applies under Ch. 299.28 §299.16 provides the machinery for adjournment and publication where the court has jurisdiction of the res but not of the defendant personally. Court rules in the seven south-eastern counties have to some extent amplified the practice.29

It is considered by many that a more simplified procedure should be available in small claims matters. For example, under justice and Civil court practice30 a formal garnishee complaint was not required; a simple affidavit might be filed and the summons alone served. A formal judgment against a defaulting garnishee did not have to be entered31 as now required by §27.10. It is commonly known that the garnishment statutes are in need of revision. Any such project should consider not only the substantive but also the procedural aspects of that problem.

28 Wis. Stat. §299.01(4) (b) (1961). By express provision in the cited section, §266.09 (alias writs of attachment to the sheriffs of different counties), §267.01 (2) (providing for garnishment procedure to be the same as civil action procedure in circuit court), and §267.16 (interpleader in garnishment cases) do not apply in small claims cases in county court, except that §267.16 applies to natural persons having their usual place of abode within the county and to business entities and partners engaged in substantial business activities within the county. In other respects ch. 266 and ch. 267 practice applies with the general modifications imposed by ch. 299.

29 The following Rules of County Court, Civil Division, Small Claims, should be noted:

Rule 11(1) requires a copy of the garnishee summons and complaint to be filed with the clerk prior to the issuance of the summons for service.

Rule 11(1) (A) provides a form of garnishee summons and answer. The courts make printed forms available, issued in blank, upon payment of the filing fee and suit tax of $3.

Rule 11(1) (B) governs the content of garnishee releases and requires them to bear the title of the action, the case number and return date, the amount to be paid, if any, and to whom, language releasing the garnishee, signature by the party or his attorney. They must be directed to the garnishee and be submitted to the court in duplicate for approval, signature and filing. The rule restates the old Civil Court practice.

Rule 11(1) (C) provides that orders to garnishee shall be substantially in the same form as releases, shall be signed by the court or clerk, and need not be signed by the parties.

Rule 11(1) (D) restricts disbursement of moneys paid into court and requires an order for the same.

Rule 11(1) (E) restates the provision in §27.3 of the old Civil Court Act requiring a bond for the disbursement of monies paid into court by garnishees in cases where the principal defendant has been served by publication only and has defaulted. Query whether this rule is authorized by any provision of chs. 267 or 299.

Rule 12 relates to the mechanics of noting adjournment for publication under §299.16.

30 Wis. Stat. §304.20 (1959) (justice court); Wis. Laws 1951, ch. 168, §27.10 (Civil Court).

31 Wis. Stat. §304.34 (1959) (justice court); Wis. Laws 1951, ch. 168, §27.4 (Civil Court).
C. Pleadings

The act provides that pleadings may be oral or written, following justice and old Ch. 254 practice. The notation on the summons takes the place of a written complaint in telling the defendant why he is being sued. Court rules requiring written and verified pleadings are authorized, and the courts of the seven southeastern counties have by rule required written and verified pleadings in all cases. It was felt in Milwaukee County at least that permitting oral pleading on the return day, with the large calendar, would lead only to chaos and confusion.

D. Trials

1. In General. Unless a 12- or 6-man jury is demanded, it is waived and trial is to the court. Defendant of right may have a seven day adjournment beyond the return day, and the court has discretion to give a longer time. The theory of the statute, as with most small claims acts, is to discourage jury trials, and substantial extra jury fees are charged. 12-man jury cases are tried under Title XXV procedure in county court, or may be transferred to circuit court for trial. After jury selection, 6-man jury cases are also tried under Title XXV procedure.

2. 6-Man Jury Selection. As originally proposed, the scheme of 6-man jury selection contemplated for state-wide adoption the old justice court method of jury selection; that is, the picking of a jury in advance of trial without the presence of the jury panel and without voir dire examination or challenges for cause, from a local and not a county wide panel. Peremptory challenges are simply made from a list, and the sheriff or constable rounds up those not stricken to sit as a jury. Milwaukee attorneys opposed this plan as unworkable in a large city, and rightly so. The result was the provision in §299.21(6) and (7) that 6-man juries be selected in the manner provided by §957.054, but that in Milwaukee County juries be drawn from the circuit court panel regardless of the juryman's residence. The concession to the Milwaukee problem was satisfactory, but the use of §957.054 practice for selecting 6-man juries in civil cases left considerable to be desired. The section governs jury selection in criminal cases. It provides for a panel of 18, from which the state and the defendant each strike 6 names, leaving a jury of 6. Except in Milwaukee County, no voir dire or challenge for

33 Ibid.
34 Rule 7, Rules of County Court, Civil Division, Small Claims.
38 Ibid.
39 Ibid.
cause is permitted and jurors may all be residents of the municipality in which the court sits (selected from a municipal jury list), unless defendant demands a county-wide jury.

Section 957.054 does not fit civil cases because: (1) No provision is made for the case with more than two parties where additional parties may be entitled to separate peremptory challenges; (2) Only the defendant is entitled to demand a county-wide jury; and (3) It would seem that providing six strikes in a civil case was unnecessary (not a problem out-of-state where picking is from a list, but a real problem in Milwaukee where the panel must attend).

A committee of Milwaukee lawyers presented a bill to the 1963 legislature to cure this problem, and unfortunately it has muddied the waters considerably. It does remove 6-man jury selection in civil cases from the criminal section, and it rewrites §299.21 to accomplish this purpose. Much of the restatement is proper and clarifies that section, but in dealing with 6-man juries it (1) reduces the number of peremptories to two per party and (2) eliminates the municipal jury list. The result is that parties united in interest (i.e., an insurance company and its assured) each get two strikes; and the jury itself must always be drawn in every county from a county-wide panel, a hardship in large, sparsely settled counties. A good feature of the bill is a provision that the size of the jury panel be determined by adding 8 to the number of peremptories to be accorded, leaving after strikes are taken a panel of 8 from which the sheriff may summon any 6 he can find, in this manner lessening the impossibility of trial due to an absent juror.

But the proposed new §299.21, insofar as its provisions for 6-man juries are concerned, is badly lacking and should be amended in the particulars discussed above. What everybody seems to want, but what nobody has yet expressed, is a system of selection in this area which will give Milwaukee Title XXV jury selection in both 6- and 12-man cases and the rest of the state a justice practice in 6-man cases. No violence will be done to the principle of uniformity beyond that already in the law if we simply say so, instead of trying to work exceptions into the justice court setup which in effect provide circuit court selection procedure for Milwaukee.

The attempt to reduce the number of peremptories from 6 to 2 is important only where the panel must be in physical attendance for voir dire, again in Milwaukee. Therefore it would seem that, with the Milwaukee problem answered by reference to Title XXV, the rest of the state could be nicely taken care of by lifting existing §957.054 practice into §299.21, with exceptions dealing with the right of both parties to a

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40 Wis. Laws, 1963 Session, Bill No. 261-S.
41 And also of a Judicial Council proposal not at this writing passed, but being 1963 Session, Bill No. 472-S and relating to a similar change in §957.054.
county-wide jury and the size of the panel in multi-party cases. Language such as the following, by way of amendment to §299.21 as proposed to the 1963 legislature, would accomplish such purpose:

If a six-man jury is demanded, no *voir dire* examination or challenge for cause shall be permitted, except in counties having a population of 500,000 or more, where all juries shall be drawn from the circuit court jury panel and selected in accordance with the procedure set forth in Title XXV hereof. In all other counties, such juries shall be selected as provided in §§957.054, except that any party may demand trial by a county-wide jury and that the clerk shall select, by lot, the names of sufficient persons qualified to serve as jurors as will provide to each party entitled to separate peremptory challenges the number of challenges specified in §957.054.

E. FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENTS

1. Necessity of Written Findings of Fact and Conclusions of Law. Because Title XXV practice applies where Ch. 299 is silent, it appears that Ch. 299 as originally enacted required the small claims judge to observe in every case the provisions of §270.33 and to give his decision in writing within 60 days of submission, stating separately the findings of fact and conclusions of law. This, of course, was simply not done in most small claims cases. Lawyers do not want to be burdened with drawing detailed findings and conclusions in such cases; judges want to be able to rule from the bench; and the rule does not seem to be at all necessary in small cases. Therefore, the 1963 legislature passed a bill creating §299.21 taking small claims cases out of the general rule and providing that in those actions the judge shall state separately the facts found and the conclusions of law, but that this may be done “orally immediately following the trial or in writing and filed with the clerk within 60 days after submission of the cause.”

2. Judgments; In General. Default judgments may be entered before the clerk in contract actions upon filing a written and verified complaint. Other defaults must be proved before the court. A plaintiff defaulting on the return day may have his action dismissed. All judgments are entered by the clerk in the case docket automatically and without counsel having to prepare a written formal judgment, and he must give written notice of entry, except in municipal and county forfeiture actions.

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43 Wis. Laws 1963, ch. 37.
47 Wis. Stat. §299.24 (1961), as amended by Supreme Court rule, 14 Wis.2d vii, effective September 1, 1962. The Supreme Court, upon recommendation of the Judicial Council, relieved the clerk of the duty of giving like notice of entry of orders and struck the reference in §299.24 to “appealable orders.”
3. Judgment Liens; Docketing Practice. §299.24 governs the docketing of small claims judgments and the manner in which they become liens on real estate under §270.79. Under the old practice out-state, the clerk of circuit court maintained a single judgment docket for the county, and transcripts of the judgments of inferior, municipal and justice courts were docketed therein to provide liens upon real estate.\(^{48}\) Under the old Milwaukee Civil Court Act\(^{49}\) the court maintained its own judgment docket, and Civil Court judgments became liens upon docketing therein.\(^{50}\) The system resulted in two judgment dockets for Milwaukee County. The original Judicial Council proposal for small claims procedure adopted the out-state system, and for two reasons: (1) the Milwaukee system was considered unnecessarily duplicative, requiring double checking by abstracters and others; and (2) it was believed that small judgments should not, without overt action by the creditor (filing a transcript) become liens on real estate.

Section 299.24 was enacted, but with some confusing amendments designed to preserve the Milwaukee system. §299.24(1) provides for entry of the judgment in the case (not to be confused with judgment) docket in county court. The case docket, a chronological record of the proceedings, is required by §299.10, but it is not a judgment docket, and mere entry therein will not satisfy the calls of §270.79 and constitute the judgment a lien.\(^{51}\) But the amendment added to §299.24(1) the following sentence: “Any such judgment shall be a docketed judgment for all purposes upon payment of a fee of 50 cents to the clerk.” The effect of this sentence is not clear. Presumably it has the effect of making the case docket a judgment docket at least for those cases where the 50c is paid.

Section 299.24(2) contained and still contains the originally proposed procedure for docketing a transcript of a small claims judgment in circuit court, requiring a $2 fee to the clerk in accordance with §59.42(8)(b). The same result is now obtained by paying 50c to the clerk to effect docketing in county court. To this extent each county now has a dual docket system, and the record searcher must examine the small claims case docket for judgments and to determine if the 50c has been paid. This is no greater burden in Milwaukee County, but it has caused dissatisfaction in the rest of the State, as well it should.

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\(^{48}\) The several special acts creating inferior and municipal courts and providing for docketing of their judgments in circuit court need not be cited. Wis. Stat. §254.17 (1959), provided for such docketing of the judgments of small claims courts.

\(^{49}\) Wis. Laws 1951, ch. 168, §25.1.

\(^{50}\) Ibid.

\(^{51}\) For the requirements of a judgment docket see Wis. Stat. §270.74 (1961).
The Judicial Council’s 1963 proposal calls for: (1) the abolition of the 50c practice and a return to the old system; and (2) a reduction from $2 to $1 in the fee to be charged by the clerk for docketing a transcript in circuit court.

Whatever besides sentiment for the old Civil Court may be the merit of the dual system, the present statute is not an answer. It is not clear why the two dockets in Milwaukee cannot be merged, particularly since they are both maintained by the same clerk’s office under court reorganization. But the rest of the state should not suffer, and the amendment, if not passed before this article appears should be passed, with a proviso, if necessary, permitting Milwaukee to keep its two dockets.

4. Reopening Default Judgments; Appeals from Defaults. In its present form Ch. 299 is silent on the time within which a default judgment may be reopened. Therefore, Title XXV practice applies, and the defendant may have one year within which to move. In line with the philosophy that small claims practice be more summary and that proceedings be more speedily terminated, the Judicial Council has recommended the creation of §299.29 which would limit the time for such a motion to 90 days in ordinary civil actions and to 20 days in ordinance violation actions. The section would, in addition, prohibit appeals from default judgments, presently authorized by §299.30(1) with leave of the appellate court, because such appeal is a useless procedure, review under §299.30 being on the record.

The proposed section eliminates useless procedure and accomplishes a worthy objective in speeding the finality of small claims judgments. It should be adopted.

5. Mail Service; Failure of Actual Notice; Reopening. Under present §299.14, discussed above, there is no time limit upon the reopening of a default judgment obtained upon mail service where the defendant contends and proves that there was a failure of actual notice. Defendant must move “within 15 days of receiving actual knowledge,” but the time of receipt of such knowledge might be years after the entry of judgment, and, considering only §299.14, defendant would still be entitled to move.

The relationship between this section, proposed §299.29, and §269.46 should be resolved. The latter sections, discussed immediately above, A corollary problem is presented in the relationship of §299.14 (reopening default judgments for failure of actual notice where service is by mail), and the question is whether the time limits of §269.46 or proposed §299.29 apply to such an application, §299.14 containing no time limit from entry of judgment within which the defendant must move. See discussion, infra.
apply generally to reopening default judgments. If §299.29 is adopted, we will have a 90 day rule in all but ordinance violation cases; if not, the one year granted by §269.46 will continue to apply. Do these sections apply to reopening under §299.14? Ch. 299 is silent on the subject. There would be more reason for inferring that the one year provision of §269.46 applies, because a mere 90 day period makes a pretty hollow right out of §299.14. But if §299.29 is passed, §269.46 will be no part of small claims practice, and we will be faced with the issue in a very practical way. The issue should be resolved by legislation and not left to the courts as a problem in statutory construction.

It is submitted that 90 days is too short a time limit for reopening under §299.14; but, on the other hand, the legislature should set a time limit because every judgment worth entering deserves finality at some time. If we will not accord finality to mail judgments, then it seems we don't trust mail service and the whole concept should be scrapped.

6. Dismissal of Pending Actions Where Issue Not Joined. A rule of court adopted in the seven southeast counties and pertaining to small claims practice provides:

Where an action shall be held open, the adjournment shall be to a day certain not more than 6 months from the date of the order. An additional adjournment may be granted only if a written stipulation of settlement, with alternative judgment provision incorporated therein, is filed. If the case shall not be disposed of on or prior to the adjourned date, the clerk shall place the same upon the adjourned day calendar for disposition. If the case is not otherwise disposed of it will be dismissed. Attorneys or litigants will not be notified of the approach of the dismissal date.

The rule arises from the old practice of "holding open" which prevailed in Milwaukee Civil Court. On the return day, plaintiff, with an installment settlement made or in prospect, would "hold the case open," which meant that it was adjourned without joinder of issue and without specific date, to be placed later on the clerk's own motion on a dismissal calendar (usually within about 6 months). If plaintiff had then received his money, he could let the action be dismissed; if not he could, by application to the clerk, get the matter "held open" again.

Feeling that the practice was disruptive of calendaring and the orderly disposition of actions, the county judges, after court reorganization, adopted the current rule, which, in effect, gives the plaintiff one "hold open," unless he can get a written settlement stipulation with defendant, providing for alternative entry of judgment upon default. The rule may be laudible as applied to the average case, but this writer at least has found it unduly oppressive in specific instances. The curiosity is that there does not appear to be one word in Ch. 299 or Title XXV which would authorize a rule of this type, and, applied to a given
To give the court the necessary power to police its calendar, the Milwaukee committee has proposed and the legislature has passed\textsuperscript{57} §299.225, providing:

The court may without notice dismiss any action or proceeding, in which issue has not been joined, which is not otherwise disposed by judgment or stipulation and order within 6 months from the original return date.

At least the court has jurisdiction to exercise discretion, and it is to be hoped that the passage of the statute will not result in the continuance of an inflexible rule. But the difficulty is in the terminology "not otherwise disposed (of) by judgment or stipulation and order." The phrase obviously includes a stipulation and order of dismissal or settlement stipulation with alternate judgment provision as mentioned in the court rule, but what else does it include? Just as "holding open" is a concept foreign to statutory practice, so is the concept of "disposal." It is just too general; and it may be expected that counsel will devise all sorts of ingenious "stipulations and orders of disposal" to avoid dismissal. However much language of greater precision might be indicated, it does appear that (1) the court may refuse to sign an order "of disposal" which does not "dispose," and (2) at least some discretion is provided by the section.

F. New Trials; Appeals

1. New Trials. New trials may be granted upon the traditional grounds, including newly discovered evidence, under §299.28.

2. Appeals. 12-man jury cases are appealed to the Supreme Court under Ch. 274.\textsuperscript{58} In other cases appeal is governed by §299.30. The policy of the act is to prevent delay by intermediate appeals from orders, and therefore at present the only appeals are from the judgment\textsuperscript{59} or from an order denying a new trial on the ground of newly discovered evidence.\textsuperscript{60} Appeal is to the circuit court and is upon the record.\textsuperscript{61} It must be taken within 20 days of the date of mailing notice of entry of the judgment.\textsuperscript{62}

It is considered that the rule should be relaxed to permit appeals from orders (1) denying a petition to reopen under §299.14 after failure of actual notice where service is by mail; denying a new trial under any provision of §299.28; and (2) denying the reopening of a default

\textsuperscript{57} Wis. Laws 1963, ch. 37.
\textsuperscript{58} Wis. Stat. §299.30 (2) (1961).
\textsuperscript{59} Wis. Stat. §299.30 (1961) (including at this writing appeals from default judgments with leave of the appellate court, an anomaly discussed below).
\textsuperscript{60} Wis. Stat. §299.28 (2) (1961).
\textsuperscript{61} Wis. Stat. §299.30 (1961).
\textsuperscript{62} Ibid.
judgment (instead of the useless appeal on the record from the default now authorized by §299.30(1). The Judicial Council bill\textsuperscript{63} would accomplish this extension of appeal.

There is a great deal of sympathy for the position that all appeals should be to the Supreme Court, regardless of the amount involved. Those favoring that procedure argue that the county court provides a competent tribunal; that another trial court should not be involved with reviewing the determinations of the county court; and that if a matter is worth appealing, it is worth appealing to the Supreme Court. The main argument contra is an economical one; namely, that small claims cases simply do not warrant the expense of Supreme Court appeal for initial review. Present §299.30 has produced the rather unusual situation of small claims judgments being entitled to double appellate review, once in circuit and once in the Supreme Court, whereas all other judgments are reviewable only through appeal to the Supreme Court.

However incongruous this may be, it does appear that there is a great deal of merit in providing inexpensive, local review of small claims judgments. In the final analysis, the existing practice is an example of the result naturally flowing from a court system providing two levels of trial courts. The justification for the system must be in procedures such as §299.30. Logic aside, and purely from a practical point of view, it would appear that we should retain circuit court review of small claims judgments, simply on the ground that a party is entitled to review, and where a small amount is involved he should be able to get it cheaply.

G. Court Rules Affecting Small Claims Practice

Just prior to the January 2, 1962, effective date of court reorganization, the county courts of the seven southeastern counties above mentioned adopted a set of court rules designed to implement Ch. 299 practice. Several of these rules have been discussed throughout this article; others of importance not previously mentioned are at this point quoted in the footnotes.\textsuperscript{64}

\textsuperscript{63} Supra note 40.

\textsuperscript{64} The more important of the rules not previously mentioned are:

Rule 3, requiring that the summons must be filed at least 4 days before the return date, preserving a provision in the old Milwaukee Civil Court Act, §15.3, designed to permit orderly calendaring.

Rule 10 providing for exchange of process and remission of fees by affidavit and order of court, as in the case of spoiled or unused process previously issued in blank.

Rule 13 requiring that motions be filed at least 4 days before the time for hearing, likewise to permit orderly calendaring.

Rule 16 providing for the correction of non-jurisdictional errors (i.e. violation of Rules 3 or 13 above) by order to show cause returnable at least 8 days from service, by ex parte order or by stipulation, preserving an old practice of the Milwaukee Civil Court.

Attention is directed to the published rules (\textit{supra} note 19) for other regulations applying to ch. 299 practice.
CONCLUSION

It is hoped that the above will be of aid as a guide to small claims practice, as an explanation of the more important 1963 amendments both adopted and proposed at this writing, and as a discussion of those areas where further improvement is indicated. As the years go by, other problem areas will undoubtedly develop, but, viewing the overall picture, it does appear that Ch. 299 in the main provides and efficient and workable system for small claim disposition within the framework of traditional judicial procedure, at the same time providing where necessary those summary short-cuts which insure that in small cases justice will not be denied through entanglement in unnecessary procedure. It might be observed in closing that, when Ch. 299 has been given an opportunity to jell and the bugs have been worked out, some consideration should be given to extension of this practice, at least on an optional basis, into the area of cases just above the $500 mark, for it would seem that a perfected Ch. 299 procedure might lend itself admirably to the efficient disposition of many types of routine cases in that dollar category.