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BUDGET PLANNING CONTRACTS PROHIBITED

Chapter 31 of the 1956 New York Sessions Laws takes cognizance of an abusive business practice which has been operated in New York for many years. It outlaws budget planning to all but attorneys-at-law through the addition to the Penal Law of sections 410-12.

A number of businesses, conducted throughout New York State as debt adjustment agencies or budget planners, had the avowed purpose of aiding debtors in overcoming their financial distress. Whereas legitimate budget planning companies operate to adjust, settle, compromise or otherwise discharge a client's debts out of money which the client debtor pays to the adjustor, budget planning as it was generally practiced in this state fell to such a degrading level that it was termed an unfair business practice by the Governor of New York[1] and was prohibited by the aforementioned amendment to the Penal Law.[2]

Prior to 1956, the New York statute books were devoid of laws pertaining to the regulation of these concerns and they flourished with remarkable success. The pattern was similar in any well-populated community. Upon opening, the debt adjustment office would immediately resort to a full-scale advertising campaign, using such appealing slogans as, "Your best bet yet to get out of debt," and "Get out of debt, stop borrowing from Peter to pay Paul." Their salesmanship efforts were directed at the small wage-earners, both urban and suburban, who had become burdened with debt. Being pressed by a variety of individual creditors, a debt-plagued wage earner would in many cases be ready to grasp at any possible solution to his problems.[3] A debt adjustor, or what New York has chosen to call a budget planner, would offer the service of consolidating the debtor's outstanding obligations by having the debtor pay to him sums of money either weekly or monthly; he, in turn, would formulate a plan for paying off the individual accounts, and would then seek creditor acceptance of the payment plan. These companies claimed that through these arrangements they could prevent garnishments, repossessions, levies and other legal actions. The debt adjustor was in effect nothing more than a paid agent of the debtor who distributed such funds as the debtor might pay him. Had the adjustors, as a group, performed this service ethically, the legislature in all likelihood would never have acted. However, they failed to do so. The more unscrupulous adjustors did not as a rule disclose their service charges, which ranged anywhere from 15 per cent to 25 per cent of the debtor's total obligations, plus a bookkeeping charge.[4] Many times their fees were taken out of the first installments paid to them, and creditors almost invariably would not be paid, nor even notified of their debtor's good-faith attempt to pay, with the result that a debtor would be confronted with

1. Governor's message, N.Y. Sess. Laws 1956, c. 31.

2. N.Y. Penal Law §§ 410-12.

3. Budget planners had a wide market for their services as nearly half the families in the United States owe some installment debts. See Fact Sheet Prepared for Use at the Governor's Conference on Consumer Debt, Consumer Counsel, Oct. 13, 1954.

4. Bloom, Beware of "Debt Adjustment" Racketeers, Reader's Digest Magazine, Oct. 1955.

the very legal actions he had sought to avoid. The debtor would gain nothing, and in fact would have lost the fees paid. In addition, had he attempted to withdraw from his contract with the budget planner before the complete fee had been paid, he was threatened with further litigation.

These practices are effectively blocked by the new amendment, entitled "Budget Planning," which has added three sections to the Penal Law. The first section defines budget planning,[5] the second prohibits it,[6] and the third sets forth the penalties for violations.[7] Attorneys-at-law are specifically excluded from the above provisions.[8]

The New York Better Business Bureau as far back as 1954 warned of the danger of debt adjustment.[9] A survey conducted by the St. Louis Better Business Bureau concluded that debt adjustment agencies were not rendering a public service.[10] The National Legal Aid Association, through its own publication, sought to correct this situation.[11] The Attorney General of New York, pending

5. "Definitions. 1. Budget planning, as used in this article, means the making of a contract with a particular debtor whereby the debtor agrees to pay a sum or sums of money periodically to the person engaged in the budget planning who shall distribute the same among certain specified creditors in accordance with a plan agreed upon and the debtor further agrees to pay to such person any valuable consideration for such services or for any other services rendered in connection therewith.

"2. Person, as used in this article, shall not include a person admitted to practice law in this state.

"3. Firm, as used in this article, shall not include a co-partnership, all the members of which are admitted to practice law in this state." N.Y. Penal Law § 410.

6. "Budget planning prohibited. No person, firm, association or corporation, shall, after the effective date of this act, engage in the business of budget planning as defined in section four hundred ten of this chapter, but nothing herein contained shall affect any contract theretofore made." N.Y. Penal Law § 411.

7. "Penalty. Whoever either individually or as an officer, director or employee of any person, firm, association or corporation, violates any of the provisions of section four hundred eleven of this chapter shall be guilty of a misdemeanor and shall be subject to a fine of not more than five hundred dollars and to imprisonment for not more than six months or to both for each such violation." N.Y. Penal Law § 412.

8. See note 5 supra.

9. Better Business Bureau of N.Y.C., Monthly Memo, Oct. 1954.

10. Ninety per cent of the responses to the questionnaires sent out said debt adjustors were not useful. Ten per cent stated they were useful for some purposes. St. Louis Better Business Bureau, Debt Adjustors—Are they a Blessing or Burden?, Bulletin, Dec. 28, 1954. For other articles by the Better Business Bureau on the subject of debt adjustment, see: Better Business Bureau of Kansas City, Some Complainants Misled by Debt Pro-Rater Advertising, 33 Bulletin No. 36, Oct. 6, 1954; The Toledo Better Business Bureau, Debt Pro-Rating Firms Mushroom in this Area, 7 Report No. 1, Jan. 1955; Better Business Bureau of Los Angeles, "Debt-Adjustors" Copy to be Cleared by BBB, 8 Report No. 22, Dec. 28, 1955. See also: Conference on Personal Finance Law, Quarterly Report, Summer 1954; Borrowers Are Being Played for Suckers by so-called "Debt-Adjustors" or "Pro-Raters," CXX American Banker, No. 39, Feb. 28, 1955.

11. Bloom, Debt Adjustment—Meanest Racket Out, XIII Legal Aid Brief Case, No. 5, June 1955. A condensed version of this article was printed in Reader's Digest Magazine, see note 4 supra.

passage of the bill under discussion, took action early in 1956 by conducting an extensive investigation in this field[12] and subsequently obtained an injuction restraining the largest company then existing in this state from further operations.[13]

Opponents of the bill argued that it was too broadly drawn and that many legitimate commercial organizations would come under the bill's condemnation.[14] While some revisions within these organizations were necessary, complete opposition proved unwarranted as they readily adopted their procedures without adverse effect.[15]

New York is not alone in unethical debt adjustment practices.[16] Legislation enacted in Maine, Massachusetts and Wisconsin is typical of that adopted or proposed in other states.[17]

In Maine, three new sections, very similar to the New York amendment, were added to chapter 137 of the Maine Revised Statutes, entitled "Crimes Against Public Health, Safety and Policy."[18] Under the Maine law, however, a person performing budget planning work gratuitously could be prosecuted. New York has not gone that far, and, since the real abuse lay in the high charges imposed, has wisely added the necessity of consideration.

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12. See letter from the N.Y. Dept. of Law to The Fordham Law Review, Aug. 13, 1956, on file with The Fordham Law Review.

13. New York v. Silver Shield System Inc., File No. 40327, Supreme Court, New York County, 1954.

14. "For example, we are informed that the bill would require the New York Credit Men's Association [New York Credit and Financial Management Association] to recover its costs of operation from its member-creditors rather than from the estate of the debtor being rehabilitated." Ass'n of the Bar of the City of N.Y., Comm. on State Legis. at 344 (March 5, 1956).

15. A recent article states that these organizations will not accept compensation from the debtor, but will request payment from the creditor who will be advised of this added expense before any settlement. The article concludes, ". . . that this is a sounder, more realistic and more efficient manner of handling these cases." 49 Credit Executive No. 5, p. 8, May 1956. To clarify the present situation concerning debt adjustment activities in New York, two facts should be noted. First, the only debt adjustment companies that now exist are those in which the creditors are organized so that the adjustment company can be assured of payment for its services from these creditors. Second, an independent debt adjustment company obviously cannot function as it will incur expenses in aiding the debtor without any guarantee of payment for services from his creditors.

16. See note 10 supra.

17. In addition to the above stated, other jurisdictions have combatted this problem in various ways. In Ohio, there has been no need for a budget planning prohibition, as such, since a state statute allows a debtor to apply to the municipal court for the appointment of a trustee who will perform much the same services as would a budget planner. Ohio Rev. Code Ann. § 2329.70 (1953). Pennsylvania enacted a statute covering budget planning which is very similar to that of New York. Pa. Stat. Ann. tit. 18, 4897 (1955). California has not as yet passed any legislation controlling budget planning. However, many of its newspapers recognizing that unethical practices are prevalent have adopted stringent rules in relation to the acceptance of advertising from such enterprises. Better Business Bureau of Los Angeles, "Debt-Adjustors" Copy to be Cleared by BBB, S Report No. 22, Dec. 28, 1955.

18. Me. Rev. Stat. c. 137, §§ 51-53 (Supp. 1955).

Massachusetts has made the furnishing of advice in regard to budget planning a practice of law,[19] and, therefore, has confined it solely to members of the bar.[20]

In Wisconsin a different approach was taken since it placed debt adjustment companies under regulatory statutes, compliance with which was necessary before they could legally transact business.[21] The State Commissioner of Banks was given supervisory powers, while statutory requirements were prescribed relating to licenses, applications, fees and bonds. Stringent regulations were thereby placed upon any who wished to engage in this business, and members of the bar as well were made subject to these regulations.

As noted previously, some jurisdictions have limited debt adjustment endeavors by determining that they constitute the practice of law. New York has not as yet gone that far, though at the last session of the legislature a bill to that effect was introduced and subsequently withdrawn.[22] Those arguing that budget planning constitutes the practice of law rely principally on the fact that these agencies have to distinguish between types of creditors: general, preferred, or secured, and in so doing encroach upon activities which are within the sole purview of the legal profession. The opposing position is that such defining and categorizing of creditors merely is a form of financial advice. Additional arguments were advanced to show this was a practice of law, noting that the debtor would be advised as to the remedies of his creditors and as to alternative forms of relief under the Bankruptcy Act.

It must be noted in any discussion of wage-earner debt plans that Congress has considered the same on the national level by the enactment of chapter XIII of the Bankruptcy Act.[23] Chapter XIII provides an aid to wage-earners with an income of $5,000 or less in the adjustment and liquidation of their debts.[24] Under this procedure, a wage-earner debtor may petition a federal district court for the formulation of a plan whereby the debtor pays so much to a court-appointed trustee who in turn distributes these amounts to the creditors.[25] The

19. New York attempted to attain the same solution. See note 22 infra.

20. Mass. Ann. Laws c. 221, §§ 46, 46C (1955). It might also be noted that the Province of Quebec amended its Bar Provision Act by classifying budget planning activities as an unauthorized practice of Law. Borrowers are Being Played for Suckers by So-called "Debt-Adjustors" or "Pro-Raters," CXX American Banker No. 39, Feb. 28, 1955.

21. Wis. Stat. § 218.02 (1955).

22. "The furnishing of advice or services for compensation to a debtor in connection with a debt pooling plan, pursuant to which the debtor deposits funds for the purpose of distributing them among his creditors, shall constitute the practice of law. Any person who, not being admitted to practice as an attorney-at-law in this state, furnishes or offers to furnish such advice or services shall be guilty of a misdemeanor." S. Bill Int. 54 179th N.Y. Legis. Sess. (1956). The probable reason that this bill was not passed was the legislature's realization that the legitimate debt adjustment activities such as those carried on by the New York Credit and Financial Management Association would necessarily cease.

23. 11 U.S.C.A. §§ 1001-86 (1946).

24. An amendment increased the income limit from $3,600 to $5,000, 11 U.S.C.A. § 1006 (Supp. 1955).

25. This plan goes into effect only if a majority of creditors agree, 11 U.S.C.A. § 1052 (1946). Secured creditors may agree to accept this plan or they may look to their security, 11 U.S.C.A. § 1046 (1946). General creditors are bound by the majority, 11 U.S.C.A. § 1052 (1946).

debtor has three years to pay, during which period he is safe from legal actions of all creditors who are under the plan. Upon the expiration of this three-year period, if the court finds justification for so doing, it may discharge the debtor as to unpaid balances owed.[26]

Representatives of the legitimate debt-adjusting houses throughout the country, in order to justify their existence in the face of such a federal statute, contend that chapter XIII plans are disadvantageous to creditor and debtor alike. They point out that under a wage-earner plan a creditor does not retain control over his debt and that the expense to the debtor is greater than the legitimate debt adjustor's services which are substantially similar.[27] There is some support for this argument,[28] though a recent authority argues that a chapter XIII proceeding is relatively inexpensive and is being resorted to more frequently today.[29]

The New York legislature was confronted with a business practice characterized by dishonesty and corruption. A radical step was taken by its passage of the budget planning statute in that it completely prohibited the business community from again entering this field. It may be argued that the abuses justified this action, but in the light of all the circumstances this appears doubtful. The legislature, in drafting the present bill, was dealing with an enterprise which was totally unrestricted prior to 1956. Such prior legislative acquiescence might well have been held a contributing factor to the unethical practices then prevalent, and one which should have been considered when attempting to find a proper remedy for this problem. The exclusion of that segment of the business populace which might now, or in the future, desire legitimately to earn a livelihood in this field has a far-reaching effect, and is an act which should not have been resorted to until every affirmative regulatory measure had been exhausted. Certainly a positive plan, such as that applied in Wisconsin,[30] would have been more in keeping with the prevailing tenor of aiding business enterprise within this leading commercial state.

The foregoing argument would, of course, be unfounded if the legislature had taken either of two steps. First, had they agreed that debt adjustment activities did not afford a public service, in which case regulatory measures would obviously be to no purpose. This, impliedly, they did not do since members of the bar are specifically authorized to continue in this field.[31] Secondly, had the legislature said in explicit terms that these activities were a practice of law, then budget planning would have been deemed to fall solely within the realm of the legal pro-

26. 11 U.S.C.A. § 1061 (1946).

27. There are administrative charges, plus the expenses of an attorney, referee, and trustee. See 11 U.S.C.A. §§ 1024, 1026, 1059 (1946). Further, the approval of this plan amounts to a discharge in bankruptcy and another discharge would not be available to the debtor for a six-year period. 11 U.S.C.A. § 32 (1953).

28. Note, Wage-Earner Plans in Chicago, 8 Chi. L. Rev. 105 (1940).

29. Hefter, The Lucky XIII, Legal Aid Brief Case, Feb. 1955.

30. See note 21 supra. A prime consideration and possible deterrent to the initiation of such a plan is the allocation of state funds to support it.

31. See note 5 supra.

fession and again there would have been no need for affirmative measures. This, too, they failed to do.[32]

Therefore, while the legislature has admitted that such budget planning services are useful and that they do not constitute a practice of law, it has not attempted to eliminate the unethical few by affirmative regulations which would have afforded the honest business populace their opportunities in this field.[33] Instead, it has prohibited all extra-legal participation. It is submitted that the better solution to this problem, and those of this nature, lies in supervisory and statutory regulations, not in exclusionary measures.

DISCOVERY PROCEEDINGS EXTENDED

Chapter 270 of the New York Session Laws of 1956 amends section 205 of the Surrogate's Court Act so as to include "money deposited" in the definition of the term "money or other personal property" as relates to the jurisdiction of the Surrogate's Court over proceedings to discover property withheld. A similar measure, chapter 222 of the Session Laws of 1956 amends the Civil Practice Act by adding thereto section 1377-b, which makes available to the committee of an incompetent discovery proceedings heretofore restricted to the personal representative of a decedent.

The discovery proceeding employed by the personal representative of a decedent and now also at the disposal of the committee of an incompetent is a statutory proceeding as distinguished from the more common "Bill of Discovery" found in equity. Statutory discovery is a method for gaining control of the assets of an estate which are in the hands of a third party, or of acquiring information concerning the status of personal property which the representative has reason to believe properly belongs to the estate.[1] It is a special proceeding[2], in rem in nature[3], and summary in form.[4] Although similar in many respects to the action of replevin, it permits of much greater latitude, being considered essentially inquisitorial.[5] However, a representative may not employ this proceeding merely to adduce evidence to be used in another action.[6]

32. See note 22 supra.

33. The article cited in note 4 supra attests to the fact that there are some legitimate operators in this field. See also the report of the American Association of Creditor Counsellors at a meeting of the Retail Credit Association held in Des Moines, Iowa, Sept. 13, 1955. But see a recent article which stated, "It is interesting to note that the bill [Budget Planning] . . . places the task of helping the unfortunate debtor in the hands of those who can perhaps effectively accomplish results for the debtor,—the lawyers." 20 Albany L. Rev. 267, 269 (1956).

1. 12 Carmody—Wait, Cyclopedia of New York Practice 74 (1954); 4 Jessup-Redfield, Surrogates' Law and Practice §§ 3049-51 (rev. ed. 1949).

2. In re Spreen's Estate, 1 Civ. Proc. Rep. (N.Y.) 375 (Surr. Ct. 1881).

3. In re Hossan's Estate, 162 Misc. 333, 294 N.Y. Supp. 516 (Surr. Ct. 1937).

4. In re Stewart's Estate, 77 Hun 564 (N.Y. Sup. Ct., Gen. T. 1894).

5. Matter of Heinze, 224 N.Y. 1, 120 N.E. 63 (1918); In re Hawkin's Estate, 37 N.Y.S. 2d 338 (Surr. Ct. 1942).

6. In re Katz' Estate, 63 N.Y.S.2d 298 (Surr. Ct. 1946); In re Lowe's Estate, 148 Misc. 107, 265 N.Y. Supp. 420 (Surr. Ct. 1933).

The amendment to section 205 of the Surrogate's Court Act seeks to resolve the confusion that has existed as to the jurisdiction of that court to issue an order to a bank for the delivery to the decedent's personal representative of a bank deposit in the name of the decedent.[7] This enactment was recommended by the Surrogate's Association of the State of New York as a direct result of the decision by the New York Court of Appeals in *Matter of Trevor*.[8] In that case the court ruled that the Surrogate had no jurisdiction to order a bank to deliver the proceeds of an ordinary bank account to the representative of a decedent's estate. The new amendment defines the term "money or other personal property" to include "money deposited and all property rights of the depositor consequent upon the deposit of money",[9] thereby allowing the discovery proceeding to reach such deposits.

The jurisdiction of the Surrogate's Court is entirely statutory.[10] The general powers and jurisdiction of the Surrogate are set out in section 40 of the Surrogate's Court Act, while sections 205 and 206 particularize on the court's jurisdiction in regard to proceedings to discover withheld property.[11] Prior to 1923 it was held that a third person proceeded against could defeat such a proceeding by filing a verified answer setting up as affirmative defenses ownership or the right to possession of the property withheld.[12] In *Matter of Hyams*,[13] it was decided that the Surrogate's Court had jurisdiction to determine the right to possession of specific money or personal property which belonged to the deceased in his lifetime. The court was still denied authority to follow the proceeds of property wrongfully sold or disposed of.[14] The year after the *Hyams* case was decided section 206 was amended to permit the court to follow and

7. For cases holding there is jurisdiction see Matter of Akin, 248 N.Y. 202, 161 N.E. 471 (1928); In re Hirsch's Estate, 202 Misc. 561, 116 N.Y.S.2d 213 (Surr. Ct. 1952); In re Bloch's Estate, 48 N.Y.S.2d 823 (Surr. Ct. 1944); Matter of Jacobsen, 178 Misc. 479, 35 N.Y.S.2d 40 (Surr. Ct. 1942). For decisions denying such jurisdiction see Matter of Trevor, 309 N.Y. 389, 131 N.E.2d 561 (1955); Matter of Brazil, 219 App. Div. 594, 220 N.Y. Supp. 331 (1st Dep't 1927); Matter of White, 119 App. Div. 140, 103 N.Y.Supp. 863 (2d Dep't 1907).

8. 309 N.Y. 389, 131 N.E.2d 561 (1955).

9. The complete change reads: "The term 'money or other personal property', as used in this section, shall include money deposited and all property rights of the depositor consequent upon the deposit of money by the decedent or to his credit or for his account with a bank, trust company, savings bank, savings and loan association, private banker or other person in respect of which the depositary claims no beneficial interest other than his or its proper costs, fees or expenses."

10. Matter of Runk, 200 N.Y. 447, 94 N.E. 363 (1911); see also Matter of Work, 76 Misc. 403, 137 N.Y. Supp. 97 (Surr. Ct. 1912), aff'd 151 App. Div. 707, 136 N.Y. Supp. 218 (1st Dep't 1912).

11. These sections were initially based on chapter 394 of the Laws of 1870 and were restricted to New York County. Subsequently sections 2707 and 2710 of the Code of Civil Procedure extended the provisions of this chapter to apply statewide.

12. Matter of Walker, 136 N.Y. 20, 32 N.E. 633 (1892); Matter of Scott, 34 Misc. 446, 70 N.Y. Supp. 425 (Surr. Ct. 1901).

13. 237 N.Y. 211, 142 N.E. 589 (1923).

14. Id. at 217, 142 N.E. at 590.

issue an order to recover or to direct payment of the proceeds or value of such property.[15]

More recent pronouncements upon the scope of jurisdiction have held that generally the Surrogate has jurisdiction over all matters, legal and equitable, which are necessary to settle the question before the court.[16] While the Surrogate's Court has jurisdiction to dispose of every claim for or against a decedent's estate,[17] it has no power to compel the payment of common debts or the enforcement of contract obligations.[18] "The Surrogate's Court is not a court of general jurisdiction."[19] It can exercise its power only under some statutory provision and in one of the particular cases authorized by the legislature. The courts have held that the legislature has conferred jurisdiction on the Surrogate to entertain discovery proceedings pertaining to the following subject matters: shares of stock,[20] proceeds of an insurance policy,[21] documents relating to the financial affairs of decedents,[22] death benefits from a labor organization,[23] an interest of the decedent in a mortgage,[24] a deposit of foreign money,[25] secret commissions,[26] money of a client held in trust by an attorney,[27] the proceeds of sale of personal property,[28] and securities or money commingled with trust funds.[29]

It has been consistently held, however, by the New York appellate courts that the Surrogate's Court has no jurisdiction to direct a person, not entitled to share in the distribution of a decedent's estate, to pay a contractual obligation to the estate.[30] Likewise it has been held that the Surrogate has no jurisdiction to order a bank to deliver the proceeds of an account when the relationship between the bank and the deceased is deemed to be merely that of debtor and

15. N.Y. Sess. Laws 1924, c. 100.

16. McLean v. Hart, 228 App. Div. 379, 239 N.Y. Supp. 1 (3d Dep't 1930), aff'd 262 N.Y. 552, 188 N.E. 60 (1933).

17. Matter of Grossman, 233 App. Div. 887, 251 N.Y. Supp. 670 (4th Dep't 1931).

18. Matter of Hammer, 237 App. Div. 497, 261 N.Y. Supp. 478 (4th Dep't 1933), aff'd, 261 N.Y. 677, 185 N.E. 789 (1933); Matter of Forrest, 234 App. Div. 890, 254 N.Y. Supp. 1012 (2d Dep't 1931), aff'd, 259 N.Y. 553, 182 N.E. 177 (1932); Matter of Thoms, 165 Misc. 398, 300 N.Y. Supp. 872 (Surr. Ct. 1937).

19. In re Wilson's Will, 284 App. Div. 1018, 134 N.Y.S.2d 818 (4th Dep't 1954).

20. Matter of Babcock, 85 Misc. 256, 147 N.Y. Supp. 168 (Surr. Ct. 1914), aff'd, 169 App. Div. 903, 153 N.Y. Supp. 1105 (3d Dep't 1915), aff'd, 216 N.Y. 717, 111 N.E. 1084 (1915).

21. Matter of Howley, 133 Misc. 34, 231 N.Y. Supp. 95 (Surr. Ct. 1928).

22. Matter of Ryan, 115 Misc. 472, 188 N.Y. Supp. 387 (Surr. Ct. 1921).

23. Matter of Reilly, 111 Misc. 66, 182 N.Y. Supp. 221 (Surr. Ct. 1920).

24. Matter of Hauber, 136 Misc. 798, 244 N.Y. Supp. 343 (Surr. Ct. 1930).

25. Matter of Gruen, 1 Misc. 2d 41, 80 N.Y.S.2d 890 (Surr. Ct. 1948).

26. Matter of Browning, 177 Misc. 328, 30 N.Y.S.2d 604 (Surr. Ct. 1941).

27. Matter of Ostrow, 162 Misc. 783, 295 N.Y. Supp. 610 (Surr. Ct. 1937).

28. Matter of Fraley, 129 Misc. 803, 221 N.Y. Supp. 461 (Surr. Ct. 1927).

29. Matter of Rubin, 168 Misc. 81, 5 N.Y.S.2d 129 (Surr. Ct. 1938).

30. Matter of Schaefer, 294 N.Y. 24, 60 N.E.2d 193 (1945); In re Hitchings' Estate, 281 App. Div. 202, 119 N.Y.S.2d 138 (4th Dep't 1953); In re Jastrzewski's Estate, 252 App. Div. 384, 300 N.Y. Supp. 145 (4th Dep't 1937).

creditor.[31] The object of the proceeding authorized by section 205 is "specific property or the value or proceeds thereof," and not merely a general claim against a party purely in personam.[32] While recognizing the limitation on the Surrogate's Court as to the adjudication of common debts, some lower court decisions have tried to consider an uncontested bank account sui generis.[33]

In *Matter of Trevor*,[34] a decedent's administrator brought discovery proceedings to recover the balance of two bank accounts opened by the decedent under fictitious names. The bank did not deny the existence of the accounts nor claim any beneficial interest therein. It merely sought the protection of a court order before paying the money. The Court of Appeals held: " . . . the Surrogate's Court does not have jurisdiction to direct payment of the balance in a decedent's bank account to his estate representative."[35] In explaining its position the court said: "The debt from the trust company here to its depositors . . . is not different in essence from any other debt arising on a contract. The chose in action possessed by the estate of decedent is not property withheld by the trust company. Nor can it be said that the trust company holds proceeds or value arising from diversion or other disposition of property which belonged to the decedent."[36] It reasoned that: "The 1939 amendments to sections 205 and 206 did not add to the power of the Surrogate with respect to directing payment of a bank deposit. According to the Bill Notes to chapter 343 of the Laws of 1939, the amendments had a two-fold purpose: (1) authorizing a testamentary trustee to bring discovery proceedings, and (2) permitting the bringing in of a third party claiming the right to possession of the property."[37]

This decision seemed to rule out the use of discovery proceedings to recover the proceeds of a bank account when no claim of beneficial interest is made by the bank. In effect, it would appear to place an unnecessary burden on the executor or administrator in the fulfillment of his duty to marshal the assets of an estate by forcing him to resort to plenary proceedings. Prior to the *Trevor* decision, section 205 had been utilized in proceedings against banks to recover the amount of a decedent's account. Not infrequently, the bank did *not* interpose the defense of lack of jurisdiction since it did not desire to retain the money but merely to have the protection of a court order identifying the rightful owner of the deposit.[38] In light of the clear language of the court in the *Trevor* case, it seems probable that the banks would have been less likely to run the risk of having such an order, upon which they depended for protection against subsequent claims, declared void for lack of jurisdiction. "The trust company

31. Matter of Trevor, 309 N.Y. 389, 131 N.E.2d 561 (1955); Matter of Hammer, 237 App. Div. 497, 261 N.Y. Supp. 478 (4th Dep't 1933), aff'd, 261 N.Y. 677, 185 N.E. 789 (1933); Matter of Brazil, 219 App. Div. 594, 220 N.Y. Supp. 331 (1st Dep't 1927); Matter of White, 119 App. Div. 140, 103 N.Y. Supp. 868 (2d Dep't 1907).

32. Matter of Lusher, 159 Misc. 387, 287 N.Y. Supp. 1000 (Surr. Ct. 1936).

33. Matter of Jacobsen, 178 Misc. 479, 35 N.Y.S.2d 40 (Surr. Ct. 1942).

34. 309 N.Y. 389, 131 N.E.2d 561 (1955).

35. Id. at 394, 131 N.E.2d at 563.

36. Id. at 393, 131 N.E.2d at 563.

37. Id. at 394, 131 N.E.2d at 564.

38. 3 Warren's Heaton, Surrogates' Courts 235 (6th ed. 1941).

may not be asked to content itself with the Surrogate's decree or be told that the Surrogate's decree will protect it against a possible later claim as much as a judgment in an action, for the decree of a court lacking jurisdiction of the subject matter is a nullity which affords no protection since it can be overturned at any time."[39] Voluntary submission to jurisdiction by the bank would not be sufficient to remedy the deficiency and could add nothing to the decree. "And although jurisdiction of the person may be conferred by consent, the parties may not consent to confer upon the court jurisdiction over the subject matter."[40] The legislature, in the form of the new amendment, has offered a simple and effective solution to a problem which has not only worked inequities on the parties concerned but has also added a cumbersome burden to the judicial process. As Judge Cardozo wrote: "To remit the claimant to another forum after all these advances and retreats . . . would be a postponement of justice equivalent to a denial. If anything is due him, he should get it in the forum whose aid he has envoked."[41]

In an effort to make available to the committee of an incompetent summary proceedings to discover withheld property such as are available to executors, administrators, testamentary trustees, and guardians under sections 205 and 206 of the Surrogate's Court Act, the legislature in the present session amended the Civil Practice Act by adding section 1377-b. The new section is similar to and closely parallels sections 205 and 206 of the Surrogate's Court Act as they read prior to the amendment effected by chapter 270 of the 1956 Session Laws.

The discovery proceeding established by section 1377-b provides that a committee may petition the court appointing him for an inquiry. He must show in his petition that personal property to which he is entitled is being withheld from him, or that knowledge concerning said property is being withheld. As with section 205, he may set forth the facts on information and belief. The court may make appropriate decrees directing delivery of the property to the committee.[42]

The section does not make provision for the summary disposition of all claims to property withheld nor does it deny to either party the right to demand a trial by jury. The interposition, however, of a verified answer in writing, stating any claim of title to, or right to possession of, any subject matter is permitted. The section further states, "If any such answer be interposed, the issues raised thereby shall be tried according to the usual practice of the court as a litigated issue."[43] Due to the broad language of this provision it is probable that any constitutional question as to the denial of the right to trial by jury is forestalled.[44]

With the present state of court calendars it seems only logical to extend the scope of discovery and other summary proceedings commensurate with the demands of justice. The instant legislation is in keeping with the recommendation

39. 309 N.Y. at 394, 131 N.E.2d at 563.
40. In re Ripley's Will, Misc. , 148 N.Y.S.2d 535, 538 (Surr. Ct. 1956).
41. Raymond v. Davis, 248 N.Y. 67, 72, 161 N.E. 421, 423 (1928).
42. Ass'n of the Bar of the City of N.Y., Comm. on State Legis. at 49 (Feb. 6, 1956).
43. N.Y. Sess. Laws 1956, c. 222.
44. See note 42 supra.

of the Temporary Commission on the Courts, that the expanded use of discovery proceedings be effected.[45] Both new sections will expedite the handling of matters pertaining to incompetents and to decedent's estates and contribute in some measure to the reduction of the great volume of litigated matters before the courts.

JOINDER OF ISSUE BY STIPULATION WHERE FACTS ARE DISPUTED

Chapter 219 of the New York Session Laws of 1956 amends the Civil Practice Act by adding a new section, 218-a, providing for a simplified alternative procedure for commencement of an action by eliminating the necessity for the service of a summons and pleadings and permitting joinder of issue by the filing of a stipulated statement of claims and defenses, together with a note of issue.[1]

The first New York civil practice code was enacted in 1848 and 1849. To keep pace with the rapid development of the state and consequently of its law, the Code of Procedure was constantly in the process of piecemeal amendment. Its resultant complexity demanded and brought about, after almost thirty-two years, a complete revision in 1876. The revised code, known as the Code of Civil Procedure, underwent, for similar reasons, the same process of amendment with the same resulting complexity and demand for revision.

In 1920 the last revision, the current Civil Practice Act, was enacted. The familiar pattern of state industrial and economic growth was paralleled by that of the law. In 1934 the Judicial Council was created to assist the legislature in dealing with the problem thus created and that body's efforts have resulted in many improvements.[2] Nevertheless, the process of gradual amendment has

45. Temporary Comm. on the Courts, 1956 Report at 146.

1. The complete text of the new section is as follows: "Section 218-a. Action without summons or pleadings. Any other statute or rule to the contrary notwithstanding, a civil action may be commenced without the service of a summons, or may be continued after the service of a summons, without pleadings, by the filing of a statement, signed and acknowledged by all the parties to the action, specifying the claims and defenses between the parties and the relief requested. Such a filing, together with a note of issue, to be filed at the same time, shall constitute the joinder of issues in the action. Rules may be made regulating the requisites and form of such statement." N.Y. Civ. Prac. Act § 218-a. Two of the aforementioned rules of procedure were announced on November 3, 1956 by the Appellate Division to be effective immediately throughout New York State. They provide:
1. A requirement for a certificate that both sides have completed all necessary pre-trial proceedings—such as furnishing bills of particulars, completing examinations before trial and locating witnesses—before the cases can go on a court calendar.
2. A permission for the parties to submit a joint simple statement of their controversy—avoiding the complication of opposing complaints and replies—and then to get an appointment with the court to arrange an early trial date. N.Y. Times, Nov. 5, 1956, p. 33, col. 1.

2. See N.Y. Sess. Laws 1934, c. 128. This body was supplanted by the Judicial Conference of the State of New York, created by N.Y. Sess. Laws 1955, c. 869. It is com-

again rendered New York's civil procedure so complex as to be an unreasonable burden upon the bench, the bar and the public. In addition to the needless consumption of time and money, the fact is that today some cases are still being decided upon the basis of procedure rather than substantive merit.[3]

Unlike cases in tort awaiting trial by jury, the courts are up to date in handling commercial litigation. Thus, once the issue in a commercial action has been joined, it may be resolved with dispatch. From the point of view of the citizen however, the period between the time he takes his problem to his lawyer and the time that it is resolved is far too often viewed as anything but "dispatch".

The source of the trouble has been the time consuming process of pleading, considered by some to be necessary in arriving at a joinder of issues in many complex types of actions,[4] but which frequently is not essential in simple commercial conflicts. The present method whereby litigants reach a joinder of issue may entail, in addition to a complaint and answer, a reply, a bill of particulars and a number of motions directed to the pleadings.[5] The possibility of an

posed of the Chief Judge of the Court of Appeals, the four presiding justices of the Appellate Divisions of the Supreme Court and one justice of the Supreme Court from each judicial department not assigned to the Appellate Division thereof.

3. Temporary Commission on the Courts of the State of New York, Annual Report 21 (1955).

4. The necessity of formal pleading to arrive at a joinder of issues is disputed. Opponents of the formal procedure cite the comparative ease with which issues are joined under the Federal Rules of Civil Procedure, particularly under the general provisions laid down in Rule 8, the provisions for depositions pending action in rule 26 and the discovery procedure governed by rule 34.

5. More fully stated, to commence a lawsuit prior to the present amendment, it was necessary to serve a summons upon the defendant, N.Y. Civ. Prac. Act § 218. The drawing of the issues between the parties was, and still may be, accomplished by pleading. The first pleading is the complaint, stating the claims of the plaintiff, N.Y. Civ. Prac. Act § 254. If the complaint is not served at the time of the summons, the defendant may at any time within twenty days serve a demand for it which must be answered within twenty days thereafter. If the demand is not so answered the defendant may apply to the court for dismissal. N.Y. Civ. Prac. Act § 257. Defendant's defenses and possible counterclaims form his answer, N.Y. Civ. Prac. Act § 260, which must be served upon the plaintiff within twenty days after receipt of the complaint, N.Y. Civ. Prac. Act § 263. If the defendant asserts a counterclaim, the plaintiff may set up a defense of his own or reply, N.Y. Civ. Prac. Act § 272, which he must serve upon the defendant within twenty days, N.Y. Civ. Prac. Act § 273. In addition, motions directed to the pleadings may be made. Under N.Y. Civ. Prac. Act § 244, a party may amend his pleading once without application to the court provided he acts within the time specified in the statute. If a party fails to exercise his right under section 244 to "amend of course," then leave to amend must be obtained from the court by moving under N.Y. Civ. Prac. Act § 105.

A party may move to compel his adversary to serve an amended pleading to separately number and state causes, N.Y. Rule Civ. Prac. 90; to make the pleadings more definite and certain, N.Y. Rule Civ. Prac. 102 (1); to correct a defect of parties, N.Y. Rule Civ. Prac. 102 (2) or to strike out improper matter, N.Y. Rule Civ. Prac. 103. A party faced with a complaint or a counterclaim may demand a bill of particulars as to the allegations contained therein, N.Y. Civ. Prac. Act § 247. After issue shall have been first joined, or subsequent to forty days after service of a summons initiating the action shall have been completed,

opponent's use of dilatory, but statutory, procedures is frequently enough to dissuade a citizen from making use of his courts and thereby to force upon him an inequitable compromise of his just claims.

The present amendment dispenses with the necessity of a summons and complaint. The parties have merely to submit their claims and defenses in a single statement which, when signed and acknowledged by all the parties to the action and filed with a note of issue[6] constitutes a joinder of issue. No other pleadings or motions directed to the pleadings are permitted. The Judicial Conference in announcing its recommendation of the alternative procedure, stated that "to further expedite trials all courts would undertake to hear commercial cases submitted under the simplified procedure by appointment with the parties."[7]

The idea of commencing an action without summons or pleadings is not new. Submission of a controversy upon agreed facts is provided for in section 546 through section 548 of the Civil Practice Act and may be traced from them through the Code of Civil Procedure of 1876[8] back to the Code of Procedure of 1849.[9] The use of this method of joinder has always been restricted to cases where there is no dispute as to the facts but only as to the law, a restriction which has been strictly construed by the courts in dealing with cases submitted under the aforementioned sections.[10] In spite of this, these sections have been frequently resorted to, which fact may well have prompted their extension to comparable cases involving disputed facts.

The provisions of the new section also invite comparison to the process of arbitration. Both procedures provide for speedy commencement and a prompt hearing, facets which are popular with businessmen for whom time is money. There is however, one feature of arbitration, considered undesirable by many, which is not found in section 218-a, the fact that the decision of an arbiter is final and binding upon all the parties. Under the procedure of the new section, however, both parties retain the protection of the right to an appellate review. Furthermore, the proceedings are conducted under the rules of evidence and the

irrespective of joinder of issue, any party may place a cause upon the court calendar for trial by filing a note of issue and serving copies thereof. N.Y. Civ. Prac. Act § 433. A note of issue consists of a simple written statement informing the court wherein the case is to be tried that the issues have been joined. The statement is subscribed by one of the attorneys, usually that of the plaintiff, and filed by him with the clerk of the court.

6. See note 5 supra.

7. Judicial Conference of the State of New York, Press Release, Feb. 27, 1956.

8. N.Y. Code Civ. Proc. § 1279.

9. N.Y. Code Proc. § 372.

10. N.Y. Civ Prac. Act §§ 546, 547, 548. In Cohen v. Manufacturers Safe Deposit Co., 297 N.Y. 266, 78 N.E. 2d 604 (1948) the court held that under section 546 of the Civil Practice Act, the effect of agreed facts, as a matter of law, is the only question to be considered: the court has no power to find any additional fact. The Appellate Division held in Matter of Gorman's Restaurant v. O'Connell, 275 App. Div. 166, 88 N.Y.S.2d 230 (1st Dep't 1949), that under section 546 the court may not find any facts by inference in addition to those stipulated. Where conflicting inferences may be drawn from the stipulated facts, dismissal of the submission without prejudice was required. See Graham v. East 88th Street Corp., 282 App. Div. 754, 122 N.Y.S. 2d 634 (1st Dep't 1953).

parties may elect either a trial by jury or the court. As a result of this combination of the advantages of both the court and arbitration systems, it is quite possible that we shall see the inclusion in an increasing number of commercial contracts, of clauses calling for the resolution of conflicts by the courts under the simplified procedures described rather than by arbitration.

It is, however, most important to remember that this legislation, no matter how apt, is still but another of the multitude of constant piecemeal amendments to the Civil Practice Act that in the aggregate have rendered the Act itself grossly unwieldy. The problem of procedural delays and congested calendars may well be resolved only by an over-all study and a complete revision of civil procedure.

RECONVEYANCE BY NEW YORK CITY OF PROPERTY ACQUIRED BY IN REM PROCEEDING

Chapter 481 of the New York Session Laws of 1956 adds a new section to the Administrative Code of the City of New York, providing that under certain circumstances the City may reconvey to former owners, or others having a valid interest therein, real property which the City acquired by virtue of an in rem foreclosure of a tax lien.[1]

The section provides that the Board of Estimate may, in its discretion,[2] reconvey the City's interest acquired in such an action to any person, association, or corporation which had title thereto at the time the list of delinquent taxes was filed in the foreclosure action. Property which the City has already assigned to municipal agencies is excepted from the operation of the statute.

An application for such a grant, conveyance, or release must be in writing and verified.[3] It must be made within four months after the date of acquisition in cases where the property was acquired subsequent to the date on which the section became effective and within two months after the date of acquisition in cases where the property was acquired prior to that date.[4]

The Board of Estimate is also authorized to consider timely applications from persons who had a lien of record on such property, or who had entered into a written agreement to insure such property prior to the commencement of the

1. Administrative Code of the City of New York, § D17-25.0.

2. Ass'n of the Bar of the City of N.Y., Comm. on State Legis., at 284 (Feb. 27, 1956): "The proposed law while permissive in form probably will be treated as mandatory by the Board of Estimate. In the case of section D41-43.0 of the Administrative Code, under which tax exempt owners are given similar relief, the Board has honored all proper applications".

3. Administrative Code of the City of New York, § D17-25.0. The application must contain: (1) the identity of the applicant and the interest which he has in the property in question, (2) a statement that the applicant is acting solely in his own interest and has not accepted or agreed to accept any consideration for making the application in return for a promise to transfer, assign or convey the property subsequently to be conveyed to him by the City, (3) proof that the applicant had the interest claimed on the date of the filing of the list of delinquent taxes.

4. This section became effective on April 9, 1956.

foreclosure proceeding. The application of the owner, however, if made within the specified time, will be given priority.

It is specifically provided that the title which the City is empowered to grant under the terms of this act is the title which was vested in the owner at the time the list of deliquent taxes was filed. In this way the equities of all parties having liens on the property as of that time would be protected despite the subsequent foreclosure sale and release.

The conveyance or release is conditioned upon payment of all the charges due together with interest and the foreclosure costs, the latter not to exceed $505. While all repair, maintenance, and operational costs must also be paid, credit is allowed for income received.

Prescinding from section D17-25.0 the Code provides that if a tax lien has been outstanding for a period of four or more years from the date upon which it arose, such lien may be summarily foreclosed.[5] The filing of the list of delinquent taxes with the county clerk begins the action of foreclosure and has the same force and effect as the filing and recording of a lis pendens.[6] Notice is required to be given by publication in two newspapers for six consecutive weeks and by either mailing of notice to the taxpayer if his name and address are known by the City Treasurer's office or by conspicuous posting if his name and address are not known.[7] Any person having an interest or claim in such property may redeem the same within seven weeks after the date of first publication or may file an answer at any time after the date of first publication but within twenty days after the last day for redemption.[8]

Provision for in rem tax foreclosure was introduced into the Administrative Code in order to avoid the expensive and time consuming method of foreclosure in personam.[9] The constitutionality of the in rem foreclosure, particularly with reference to the sufficiency of the notice permitted, was upheld in *City of New York v. Feit*.[10]

5. Administrative Code of the City of New York, § D17-4.0.

6. Id. § D17-5.0.

7. Id. § D17-6.0.

8. Id. § D17-6.0.

9. City of New York v. Ernst, 202 Misc. 911, 108 N.Y.S.2d 202 (Sup. Ct. 1951).

10. 200 Misc. 998, 110 N.Y.S.2d 425 (Sup. Ct. 1951). Prior to this decision, the Appellate Division, ruling on an almost identical provision in Art. 7-A tit. 3 of the New York Tax Law, declared the notice there required sufficient to satisfy due process. City of New York v. Echo Bay Waterfront Corp., 268 App. Div. 182, 49 N.Y.S.2d 673 (2d Dep't 1944), aff'd without opinion, 294 N.Y. 678, 60 N.E.2d 838 (1945). In its Echo Bay decision the Appellate Division referred to earlier analogous decisions of the United States Supreme Court and the courts of New York State. See North Laramie Land Co. v. Hoffman, 268 U.S. 276 (1925); Longyear v. Toolan, 209 U.S. 414 (1908); Ballard v. Hunter, 204 U.S. 241 (1907); Leigh v. Green, 193 U.S. 79 (1904); Winos & St. Peter Land Co. v. Minnesota, 159 U.S. 526 (1895); Huling v. Kaw Valley Ry., 130 U.S. 559 (1889); Utica v. Proite, 178 Misc. 925, 30 N.Y.S.2d 79 (Sup. Ct. 1941), aff'd, 288 N.Y. 477, 41 N.E.2d 174 (1942); Buffalo v. Hawks, 226 App. Div. 480, 236 N.Y. Supp. 89 (4th Dep't 1929), aff'd without opinion, 251 N.Y. 588, 168 N.E. 438 (1929). But see Lynbrook Gardens, Inc. v. Ullmann, 291 N.Y. 472, 53 N.E.2d 353 (1943). There the lower court had held that a judgment of foreclosure, rendered without personal service of process in an in rem proceeding against

Inequities were soon found, however, in the application of the statute. Constructive notice is not equivalent to actual notice and many an owner found his property taken without his knowledge. While it is true that owners of property are " . . . bound to keep themselves informed as to what was transpiring with reference to their property,"[11] there were instances where the owner's failure to keep himself informed was at least excusable. *Town of Somers v. Covey*[12] is illustrative. There the taxpayer was feeble-minded and for many years had been unable to handle her own affairs. Town officials with knowledge of her condition commenced foreclosure. Immediately after foreclosure the taxpayer was adjudicated incompetent. Her committee offered to redeem but the town refused to accept the offered payments. The committee's action to open the default resulted in a holding that the court was without power to grant relief, and that the rights of the parties became fixed and unalterable upon the expiration of the time for redemption and answer.

In *Hawley v. City of New York*,[13] the City Treasurer, not having the name and address of the taxpayer, used the alternate method of notice, i.e., conspicuous posting in a public place. Immediately after the foreclosure the plaintiff offered to pay the arrears. At the trial it was pointed out that the name and address of the taxpayer were on file in the City tax department. In light of this fact the plaintiff contended that the City was required to mail him notice of the foreclosure proceeding. It was held that the court did not have the power to open a default in such a case even though plaintiff's name and address were on file in the tax department, knowledge by the tax department being held not to be equivalent to knowledge by the City Treasurer.

In *City of New York v. Nelson*[14] relief had been denied a plaintiff whose property, assessed for $52,000, the City had acquired for the failure of the plaintiff's bookkeeper to pay taxes amounting to $887. The Court of Appeals, in affirming, held that it was without the power to open the default or to provide any other relief. The court recognized the hardship inflicted upon the plaintiff but reiterated its inability to remedy the situation in the absence of legislative enactment.

Insofar as it provides relief from such inequities, the new law is commendable, but it is to be remembered that the ultimate purpose of in rem foreclosure

property upon which taxes were in default, did not deprive delinquent taxpayers of their property without due process. However, the Court of Appeals ruled that, in light of the fact that the action was brought to enforce specific performance in a contract for sale of the foreclosed property, the ultimate question was not whether the foreclosure was constitutional but whether the title was marketable. The court said that the latter question would depend upon whether the foreclosure was constitutional under the Federal Constitution and that, since they could not decide this, there was still a possibility that the foreclosure was unconstitutional. Therefore, there was a possibility that the title was not good and so it was not marketable.

11. City of New York v. Lynch, 281 App. Div. 1038, 121 N.Y.S.2d 392 (2d Dep't 1953), aff'd, 306 N.Y. 809, 118 N.E.2d 821 (1954).

12. 283 App. Div. 883, 129 N.Y.S.2d 537 (2d Dep't 1954), aff'd, 308 N.Y. 798, 125 N.E.2d 862 (1955).

13. 283 App. Div. 882, 131 N.Y.S.2d 591 (2d Dep't 1954).

14. 309 N.Y. 94, 127 N.E.2d 827 (1955).

proceedings is to enforce the payment of taxes. Insofar as it fails that purpose the method of foreclosure provided by the Administrative Code, even with the addition of the new section, is open to criticism. Granting that the new section does secure the collection of taxes which were not collected before, i.e., the taxes of those who were willing to redeem their property by paying their arrears, nevertheless, a rather indirect and budensome method of compelling tax payments is provided. It would certainly be more desirable to collect taxes without the aid of a foreclosure proceeding. To this effect a provision for either actual notice or at least notice that would more probably reach the owner would be feasible; certainly those persons who are willing to pay their arrears within four months after a foreclosure action would, in most cases, be willing to pay them prior to a foreclosure. The new section, moreover, provides no relief for a taxpayer whose foreclosed property has been assigned to a City agency. The City's power thus to assign foreclosed property subjects the taxpayer to the very inequities which the new section was intended to cure.

Despite these weaknesses and the preferential status retained by a City agency assignee, the over-all purpose to attenuate the inequities heretofore existing, where an in rem foreclosure worked an injustice, is generally accomplished.

REGULATION OF RETAIL INSTALLMENT SALES OF MOTOR VEHICLES

Chapter 633 of the New York Session Laws of 1956 adds a new article to the New York Personal Property Law which regulates the retail installment sale of motor vehicles with a cash sale price of $3,000 or less.[1] Chapter 635 amends the New York Banking Law relative to the licensing and regulation of sales finance companies with particular references to the sales of motor vehicles.[2] Effective October 1, 1956 the form of the contract and the amount of the credit charge for the sale of a motor vehicle must conform to the provisions of new article IX of the Personal Property Law.[3] Effective January 1, 1957 all persons and organizations which engage in the business of a sales finance company and which are not organized under the state Banking Law, must apply for a license under provisions of article 11-b of the Banking Law.[4]

The passage of these two articles is an attempt by the Legislature to regulate more stringently a phase of modern consumer buying which the courts were almost powerless to control under previously existing statutes. Prior to the passage of these acts the only statutory control of retail installment sales was contained in sections 64-a of the Personal Property Law[5] and 239-i of the Lien

1. N.Y. Personal Property Law §§ 301-11.

2. N.Y. Banking Law §§ 491-501.

3. N.Y. Personal Property Law §§ 302-03.

4. N.Y. Banking Law § 492. Banks, trust companies, private bankers, industrial banks, and investment companies organized under the State Banking Law and authorized to accept deposits need not apply for a license.

5. N.Y. Personal Property Law § 64-a.

Law.[6] These sections respectively set out the required forms for conditional sales contracts and chattel mortgages referring to a sale of goods for $1,500 or less. In both the aforementioned sections it was required that separate disclosures be made of the different charges in the contract. No provision was made further to protect the buyer from the unethical practices of retail sellers and finance companies in regard to what is termed the "credit charge" or "credit differential" which have arisen with the growth of installment buying. In many instances the "credit charge" in installment sales contracts is much higher than the legal rate of interest prescribed by statute for a loan or forebearance of money.[7] Yet the usury laws, as the courts have consistently interpreted them, have never been an effective curb to these practices.[8]

The New York courts, in a line of cases since 1850, have played "hands off" in regard to credit charges in installment contracts as long as a loan or forebearance of money is *not* involved.[9] In so deciding they have almost uniformly refused to use their power to declare such contracts void as falling within the usury statute. The most emphatic statement of this position may be found in the words of Judge Andrew's opinion in *Meaker v. Fiero*.[10] "It is" he said, "a fundamental principal governing the law of usury that it must be founded on a loan or forebearance of money. If neither exists, there can be no usury however unconscionable the contract may be."[11] A review of the cases shows that the installment contract with a credit charge contained therein is usually interpreted as not involving a loan or forebearance of money, the courts considering the credit charge to be an additional sum received by the seller in consideration for the deferred payment of the buyer, at most resembling, but not in the least in the nature of interest on a loan of money.[12] There being no possibility of a valid installment sales contract being deemed usurious, the only limit on the credit charge is the buyer's desire to purchase the article and the seller's sense of justice in setting a value for his deferring payment. Left to their own devices in such transactions the seller has more often than not taken unfair advantage of the

6. N.Y. Lien Law § 239-i.

7. N.Y. General Business Law § 370.

8. In Dry Dock Bank v. The American Life Ins. & Trust Co., 3 N.Y. 344 (1850), the court held that if the value secured to the owner was the bona fide price of the thing sold, there can be no usury, whatever the price may be. Brooks v. Avery, 4 N.Y. 225 (1850), decided that when the owner of property receives a surplus over the price of the property because a sale is on time and not for cash, the transaction cannot be tainted with usury. Morris Plan Industrial Bank v. Faulds, 269 App. Div. 238, 55 N.Y.S.2d 372 (3d Dep't 1945), also held that the increase in the form of a credit charge was not interest for the seller's forebearance on the note but rather consideration for the installment payments. See also Jackson v. Westchester Auto Credit Corp., 267 App. Div. 890, 47 N.Y.S.2d 591 (1st Dep't 1944), aff'd, 293 N.Y. 840, 59 N.E.2d 436 (1944); Tierney v. Bajowski, 233 App. Div. 766, 250 N.Y.S. 189 (2d Dep't 1931), aff'd, 258 N.Y. 563, 180 N.E. 333 (1932); McAnsh v. Blauner, 222 App. Div. 381, 226 N.Y.S. 379 (1st Dep't 1928), aff'd, 248 N.Y. 537, 162 N.E. 516 (1928); Archer Motor Co. v. Relin, 255 App. Div. 333, 8 N.Y.S.2d 469 (4th Dep't 1938).

9. Ibid.

10. 145 N.Y. 165, 39 N.E. 714 (1895).

11. Id. at 169.

12. See note 8 supra.

buyer's ignorance of the intricate provisions of a contract and accomplished a usurious end which the courts, in their prejudice for the usury laws and by a strict interpretation of them, have let stand.[13] However narrowly the courts have construed the usury laws where a valid sale is involved, they have been vigilant in protecting those who secure a loan at a usurious rate of interest behind the mask of a supposed sale.[14]

The need for stricter regulation of the activities of finance companies and dealers was emphasized by Governor Harriman in his 1956 Annual Message to the New York Legislature. At that time the Governor recommended legislation to regulate installment sales both as to form and interest rates. In so doing he pointed out that the consumer, when buying on time, has no protection against usury and becomes subject very often to unfair and unreasonable penalties when the payments are not met.[15]

To meet the problem partially as outlined by the Governor, the Legislature passed chapters 633 and 635 of the New York Session Laws. Chapter 633 regulates retail installment sale contracts for the sale of motor vehicles with a cash sale price of $3,000 or less where the vehicle is purchased for other than commercial or business purposes or for purposes of resale.[16] The contract for such sale is prescribed and must contain a notice to the buyer of his rights under the contract and separate disclosures of each amount comprising the total amount payable as the time sale price. The time sale price is defined as the difference between the cash sale price and the down payment plus the amount, if any, for insurance and other benefits, the amount of official fees and the amount of the credit charge. The credit charge is limited to from $7 to $13 per $100 of the cash sale price depending upon the model of the vehicle and whether a new or used car is being sold. Since the cash sale price determines the credit charge and one of the most important purposes of the act is to limit this charge, the definition of the cash sale price is of paramount importance. It is defined in the act as the price the seller would charge if it were a cash sale and it may include charges for accessories and their installation, charges for delivery, servicing, repairing or improving the motor vehicle.[17] In reference to the provision for insurance in the

13. For an extended discussion of this problem see 2 Law & Contemp. Prob. 139-288, in particular, Raoul Berger, Usury in Installment Sales at 148-72. See also 19 Rocky Mt. L. Rev. 135; 49 Harv. L. Rev. 128 (1935); Holz, The Regulation of Consumer Credit, Wis. L. Rev. 449, 529-50 (1943); Comment 39 Yale L.J. 403 (1930).

14. Quackenbos v. Sayer, 62 N.Y. 344, 346 (1875) where the court quoted Lord Mansfield: ". . . the most usual form of usury was a pretended sale of goods." Here, a sale of securities was used to cover up a usurious loan. For a recent case see Benton v. Sun Industries, 277 App. Div. 46, 97 N.Y.S.2d 739 (1st Dep't 1950).

15. New York State Legis. Annual 362 (1956). The Governor said, "one of the most serious problems arises from the excessive finance and service charges in the field of installment sales. There is no protection whatever for the consumer who is buying on time. Legislation is needed to control such improper practices and to provide reasonable regulation of the total rates which may be exacted from the installment buying public."

16. The Chapter specifically excludes a sale of a motor vehicle as described in the new article from the provisions of § 64-a of the Personal Property Law and § 239-i of the Lien Law which set forth form requirements of conditional sales contracts and chattel mortgages.

17. N.Y. Personal Property Law § 301(6).

contract it is provided that "The buyer . . . shall have the privilege of purchasing such insurance from an agent or broker of his own selection and of selecting an insurance company acceptable to the seller. . . . "[18]

The act also provides that certain provisions commonly found in installment contracts shall be unenforceable. Among these unenforceable provisions are those which provide for acceleration of maturity of the balance without cause, for confession of judgment and wage assignment, those which authorize a breach of the peace in the repossession of a motor vehicle and those by which the seller is relieved of any liability for legal remedies the buyer may have against him under the contract.[19] The provisions for refinancing of retail installment contracts in the act apply to the sale of a motor vehicle for any use or with a cash value of $3,000 or more. Such charge is limited to a flat $5 fee plus 1% interest on descending balances.[20]

A wilful violation of the provisions of this article constitutes a misdeameanor punishable by a fine not exceeding $500. In addition, a wilful violation of the provisions of the article regarding the form of the contract and the maximum credit charge shall bar recovery of any credit charge of the installment contract involved. However any failure to conform with these provisions may be corrected within ten days after the holder of the contract is informed in writing by the buyer of such violation and if corrected, neither seller nor holder is subject to any penalty.[21]

In conjunction with chapter 633, and to implement its enforcement, the Legislature enacted chapter 635 which employs the state's licensing power to further regulate finance companies. It provides, in substance, that organizations which engage in the business of a sales finance company and which are not organized under the Banking Law, must apply for a license from the State Banking Superintendent.[22] The process for application is described and a basis for action by the Superintendent on such application is laid down.

Once the license has been issued the Superintendent has the power to investigate violations of the law relating to retail installment sales by the licensee and for the causes set out in section 495 of the article, he may revoke or suspend the license. Such action is authorized only after a hearing has been held, or without a hearing if the licensee refuses to comply with the order of the Superintendent to appear at the hearing. Punishment for contempt of court is authorized for failure to comply with the order of the Superintendent. Violation of the article is a misdemeanor and is punishable by not more than a $500 fine and imprisonment for not more than 6 months, in the discretion of the court.

New York was preceded in the enactment of the type of legislation contained in chapter 633 by Michigan, Pennsylvania, Wisconsin, Ohio, and Indiana.[23] The

18. N.Y. Personal Property Law § 302(6).

19. N.Y. Personal Property Law § 302(13)-(16).

20. N.Y. Personal Property Law § 306.

21. N.Y. Personal Property Law § 307(3).

22. N.Y. Banking Law § 492.

23. Michigan Public Acts 1950 (Ex. Sess.), No. 27, p. 43; Pa. Stat. Ann. tit. 69, § 601-37 (1947); Wisc. Stat. § 218.01 (1939); Ohio Gen. Code Ann. §§ 6346-15 to 6346-27 (1945 Replacement); Ind. Stat. §§ 58-901 to 58-934 (1935).

statutes of the latter two states embrace all retail installment sales and not merely the sales of motor vehicles. That New York failed to extend the protection of the new articles to the sale of all personalty seems to be their main fault. Although the sale of motor vehicles is undoubtedly one of the largest fields of consumer installment buying, certainly the sale of home appliances, furniture and television sets on the installment plan are numerous enough to warrant the application of this or a similar law. In view of the rising cost of new automobiles the $3,000 ceiling imposed on the provisions of the law seems to be undesirably low. A more realistic limit in keeping with these rising costs would better protect the automobile buying public. Another weakness in the law, as pointed out by the Committee on State Legislation of The Association of the Bar of the City of New York, is in its provision that the buyer's signature on the contract is conclusive proof that there were no blank spaces at the time of signature and that a copy of the contract was delivered to him.[24]

While the act represents a "giant step" in the direction of bringing the protection of the courts to the consumer who has had to resort to installment buying it is felt that it falls far short of the optimum result in that great segments of the public are still denied its provisions.

SUMMARY PROCEEDINGS NOW AVAILABLE TO REMOVE DEFAULTING VENDEE IN POSSESSION

Chapter 807 of the New York Session Laws of 1956 adds subdivision 10 to section 1411 of the Civil Practice Act. This amendment expands the number of situations in which summary proceedings may be utilized to recover possession of real property by making these proceedings available to an owner-vendor of real property against a vendee in possession holding over after default in his contract to purchase.

At common law the usual remedy invoked by one entitled to possession of real property against one in wrongful possession was an action in ejectment. But since an action in ejectment was " . . . an expensive and dilatory proceeding which in many instances amounted to a denial of justice,"[1] the New York State legislature, in 1820,[2] provided an additional remedy, summary proceedings,[3] by which, in the prescribed instances, possession of real property could be regained quickly and inexpensively.

Because of the statutory origin and summary nature of these special proceedings, the New York courts have tended to construe the statutes narrowly. For example, in *Beach v. McGovern*[4] the court declared that an order entered by the lower court was void for want of jurisdiction because of the failure of the

24. Ass'n of the Bar of the City of N.Y., Comm. on State Legis. at 509 (April 9, 1956).

1. Reich v. Cochran, 201 N.Y. 450, 453, 94 N.E. 1080, 1081 (1911).

2. N.Y. Sess. Laws 1820, c. 194.

3. For a discussion of the history of summary proceedings see Reich v. Cochran, note 1 supra.

4. 41 App. Div. 381, 58 N.Y. Supp. 493 (2d Dep't 1899).

petition to allege service of the notice in the prescribed language of the statute. A more lenient approach to the application of the statutes was taken by the New York Court of Appeals in *Reich v. Cochran*.[5] While admitting here that the statutes must be rather closely followed, the court said that " . . . they should not be so hypercritically restricted as to destroy the very remedy which they are designed to afford."[6] In contrast to the generally restrictive policy of the judiciary, the legislature has continually sought to enlarge the scope of the statutes' applicability by repeated additions and amendments.[7] This legislative program has created two general categories of cases in which summary proceedings may be maintained.[8] Section 1410 of the New York Civil Practice Act is applicable where the relationship of landlord and tenant, created by the express or implied agreement of the parties, exists.[9] Section 1411 has been construed as permitting the use of summary proceedings in certain additional situations, even in the absence of the aforementioned relationship.[10]

As a positive requirement for the application of section 1410 of the Civil Practice Act and its predecessor, section 2231 of the Code of Civil Procedure, the courts have demanded that the petitioner prove that the relationship of landlord and tenant was created by the *conduct or agreement* of the parties. The statutory remedy in favor of a landlord could not be resorted to in those cases in which the relationship arose by *operation of law*.[11]

The courts, therefore, when faced with the numerous attempts to remove the vendee under section 1410, have consistently denied to the vendor the use of this expeditious remedy.[12] In *Smith v. Keech*,[13] for example, the court held that " . . . the conventional relation of landlord and tenant does not exist in the case of a contract of sale of real estate where the purchaser makes default in payment, and having possession, holds over after notice and demand, but that the relation must be established by a lease or demise of the property."[14] In-

5. 201 N.Y. 450, 94 N.E. 1080 (1911).

6. Id. at 455, 94 N.E. 1080 at 1082.

7. See 2 Rasch, New York Law of Landlord and Tenant and Summary Proceedings §§ 993-94 (1950).

8. N.Y. Civ. Prac. Act §§ 1410-11. Note that the statutory law with regard to summary proceedings is not exclusive to the Civil Practice Act. Other statutes provide situations in which the proceedings may be used: N.Y. Labor Law §§ 316 (3), 361; N.Y. Multiple Dwelling Laws §§ 352-53; N.Y. Penal Law §§ 976, 1146.

9. People ex rel. Ainslee v. Howlett, 76 N.Y. 574 (1879).

10. DeVita v. Pianisani, 127 Misc. 611, 217 N.Y. Supp. 438 (Sup. Ct., App. T. 1926); Lawyers' Title & Guaranty Co. v. Tausig, 149 Misc. 594, 268 N.Y. Supp. 815 (N.Y. Munic. Ct. 1933).

11. Kashner v. Kapilow, 283 App. Div. 929, 130 N.Y.S.2d 427 (1st Dep't 1954), aff'd, 308 N.Y. 887, 126 N.E.2d 565 (1955); Benjamin v. Benjamin, 5 N.Y. 383 (1851); Coffman v. Gale, 248 App. Div. 25, 289 N.Y. Supp. 713 (3d Dep't 1936).

12. Norton v. Norton, 212 App. Div. 845, 207 N.Y. Supp. 886 (3d Dep't 1925); Babcock v. Dean, 140 Misc. 800, 252 N.Y. Supp. 419 (County Ct. 1931); Burkhart v. Tucker, 27 Misc. 724, 59 N.Y. Supp. 711 (County Ct. 1899); 502 Park Avenue Corp. v. Delmonico Hotel, 132 Misc. 502, 230 N.Y. Supp. 262 (N.Y. Munic. Ct. 1928).

13. 112 N.Y.S.2d 803 (County Ct. 1952).

14. Id. at 805.

stead, said the court, " . . . the petitioner must resort to an action in ejectment or a foreclosure of the contract in order to secure possession."[15]

Although the consent of the parties is ineffective to confer jurisdiction on a court if the situation is not within the wording of the statute,[16] the parties may by express provision in the contract of sale create the relation of landlord and tenant, thus supplying the court in advance with jurisdiction of the subject matter.[17] In *Stevens v. Nye*[18] the contract provided that possession was given to the purchaser as a tenant at sufferance, and that the purchaser would not be deemed a vendee in possession. The Appellate Division held that, while a landlord-tenant relationship does not generally arise in such case, a contract for the sale of real property could *by express provision* create the relationship of landlord and tenant between the parties pending the consummation of the contract. The court concluded that in such case the vendor could maintain summary proceedings for the recovery of possession should the purchaser refuse to consummate the purchase.[19] However, in the absence of the rare factual situation in which such an express agreement had been effected, summary proceedings have not been available to recover possession from a defaulting vendee.[20]

The present amendment[21] provides an alternative remedy whereby a vendor may recover possession of his real property in the case of a default by a vendee in possession. In view of the cumbersome processes heretofore available, this simple and expeditious remedy will no longer require the vendor to resort to extensive litigation including a possible appeal. It should be noted, however, that the statute is self-restrictive, applicable only to contracts which are to be performed within ninety days after execution.[22]

In view of the possible demand by vendees for possession in advance of the transfer of title, this amendment seems to be a legislative recognition of the difficulties which sometimes are met in the present realty field. In 1955 the legislature had amended this section,[23] making summary proceedings available to a vendee against a vendor who remained in possession after having conveyed title.[24] The

15. Ibid.

16. Beach v. Nixon, 9 N.Y. 35 (1853); Riesenfeld, Inc. v. R-W Realty Co., 223 App. Div. 140, 228 N.Y. Supp. 145 (1st Dep't 1928).

17. Millbrook Co. v. Gambier, 176 App. Div. 870, 163 N.Y. Supp. 1025 (1st Dep't 1917), aff'd, 226 N.Y. 661, 123 N.E. 878 (1919); New York Bldg. Loan Banking Co. v. Keeney, 56 App. Div. 538, 67 N.Y. Supp. 505 (2d Dep't 1900); Murphy v. Hasselbach, 171 N.Y. Supp. 287 (Sup. Ct., App. T. 1918).

18. 283 App. Div. 666, 127 N.Y.S.2d 4 (2d Dep't 1954).

19. Id. at 666, 127 N.Y.S.2d at 5.

20. See note 13 supra.

21. N.Y. Sess. Laws 1956, c. 807.

22. " . . . the bill is limited to those contracts which are to be completed within ninety days. The purpose is not to conflict with the practice that exists Up-State whereby farms are sold under long term contracts totalling as many as twenty years. It was for that reason, at the request of Up-State members of the Codes Committee, that the bill was amended to include a ninety day provision." New York State Legislative Annual (1956) p. 34.

23. N.Y. Sess. Laws 1955, c. 151.

24. N.Y. Civ. Prac. Act § 1411 (9).

present amendment balances the remedies of the parties engaged in the sale of realty. Further, the 1956 amendment is in line with the rationale underlying the passage of the initial statute relating to summary proceedings[25] and is another step in the trend of supplementing legal formalism with more practical and modern procedure.

25. Reich v. Cochran, 201 N.Y. 450, 453, 94 N.E. 1080, 1081 (1911).