

## Special Legislation--Optional Amendment to Uniform Up-State Jury Law Upheld (Farrington v. Pinckney, 1 N.Y.2d 74 (1956))

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privilege"<sup>23</sup> granted by the legislature. To reap the benefits of this privilege, the plaintiff must comply strictly with its requirements. "If the terms imposed are not met, the privilege is at an end."<sup>24</sup> The Court also, on the facts, extends the decision of the *Ratkowsky* case. Where, in that case, the court cancelled a second notice in the same action, here the Court has said that a second notice may not be filed where the plaintiff abandons all prior proceedings and begins anew in a different court.

This result, however, would seem to be necessary, since, without it, the law as expressed in the *Ratkowsky* case could be easily circumvented. Although the plaintiff in this case apparently failed to make service solely through his own neglect, the penalty seems harsh. Justice might better be served by amending the *lis pendens* statutes to require filing of a bond, similar in purpose and effect to the bond necessary for issuance of warrants of attachment.<sup>25</sup> Then the plaintiff would be penalized for his neglect by forfeiture of the bond, but would not lose the privilege of filing a *lis pendens*.



SPECIAL LEGISLATION — OPTIONAL AMENDMENT TO UNIFORM UP-STATE JURY LAW UPHOLD.—Plaintiff brought a tax-payer's suit to restrain defendant-officers of Albany County from applying the provisions of the so-called 1954 "Uniform Up-State Jury Law," as amended in 1955.<sup>1</sup> The amendment made the uniform regulations of the 1954 statute optional with counties of less than 100,000 population. The plaintiff contended that the statute, as amended, violates New York constitutional provisions which (1) forbid local or private laws in establishing juries<sup>2</sup> and (2) restrict them when related to county

<sup>23</sup> *Israelson v. Bradley*, 308 N.Y. 511, 516, 127 N.E.2d 313, 315 (1955).

<sup>24</sup> *Ibid.*

<sup>25</sup> Section 819 of the New York Civil Practice Act provides in part that "Except where security is expressly dispensed with by statute, such an order or warrant shall not be granted unless the party applying therefor gives security for the protection of the party against whom or whose property the order or warrant is to be directed." N.Y. CIV. PRAC. ACT § 819.

Section 907 provides in part that "The undertaking to be given on the part of the plaintiff, before the granting of the warrant [of attachment], shall be to the effect that if the defendant recovers judgment, or if the warrant is vacated, the plaintiff will pay all costs which may be awarded to the defendant and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking." *Id.* § 907.

<sup>1</sup> N.Y. JUD. LAW §§ 650-85 (Supp. 1955), as amended, N.Y. JUD. LAW §§ 500-31 (Supp. 1956).

<sup>2</sup> "The legislature shall not pass a private or local bill in any of the following cases:

"Selecting, drawing, summoning or empanelling grand or petit jurors." N.Y. CONST. art. III, § 17.

government.<sup>3</sup> Sustaining the lower court, the Court of Appeals found that the amendment is not a local but a general law, reasonably classifying the subject matter, and therefore *held* that the statute did not conflict with the constitution. *Farrington v. Pinckney*, 1 N.Y.2d 74, 133 N.E.2d 817 (1956).

Since 1846, the abuses of special legislation have necessitated constitutional prohibitions and limitations.<sup>4</sup> However, it is difficult to determine whether a statute is general or whether it relates to particular persons or places. At first the courts construed Article III, Section 17,<sup>5</sup> as allowing laws general *in terms*, to form a class which may be very small.<sup>6</sup> The courts also declined to inquire into the actual *effect* of the statute,<sup>7</sup> thus apparently authorizing legislation with such restricted application that it failed only to mention names.

In 1898, the decision in *Matter of Henneberger*<sup>8</sup> struck down a road improvement law, which required seven conditions to enter the class affected. The court laid down the principles that conditions must be "common to a class"<sup>9</sup> and the court will act "when a willful and impolitic . . . purpose to evade the constitutional mandate is to be seen through the transparent device."<sup>10</sup> That such judicial perspicacity was not to be widely employed was soon evidenced in *People v. Dunn*<sup>11</sup> upholding a jury law applicable only to counties over 500,000, where the facts in *Henneberger* were described as

<sup>3</sup> "No law which shall be special or local in its terms or in its effect, or which shall relate specially to one county only, shall be enacted by the legislature unless (a) upon the request of the board of supervisors or other elective governing body of each county to be affected, or, in any county having an alternative form of government providing for an elective county executive officer [with such officers' concurrence or a two-thirds majority of the board of supervisors] . . . or (b) upon a certificate of necessity by the governor [reciting the facts with concurrence of two-thirds of both houses of the legislature]. . . ." N.Y. CONST. art. IX, § 1(b).

<sup>4</sup> See N.Y. CONST. art. III, §§ 15, 17; art. IX, §§ 1(b), 11, 16.

The greatest evil was the inability of the legislators to examine and evaluate the vast numbers of special bills. See Governor John T. Hoffman, Annual Message to The Legislature, January 2, 1872, 6 MESSAGES FROM THE GOVERNORS 399, 400, 402 (1909); 2 LINCOLN, CONSTITUTIONAL HISTORY OF NEW YORK 493-501. (1905).

<sup>5</sup> See note 2 *supra*.

<sup>6</sup> See *Matter of Church*, 92 N.Y. 1, 4-5 (1883), where the class affected consisted of ". . . every county in the State, having within its boundaries a city of one hundred thousand inhabitants, and territory beyond the city limits mapped into streets and avenues." *Id.* at 5. See also *Matter of N.Y. Elevated Ry.*, 70 N.Y. 327, 353 (1877).

<sup>7</sup> See *Matter of Church*, *supra* note 6, at 5; *Matter of N.Y. Elevated Ry.*, *supra* note 6, at 351.

<sup>8</sup> 155 N.Y. 420, 50 N.E. 61 (1898).

<sup>9</sup> *Id.* at 426, 50 N.E. at 62.

<sup>10</sup> *Id.* at 430, 50 N.E. at 64.

<sup>11</sup> 157 N.Y. 528, 52 N.E. 572 (1899). ". . . [T]he exception [*Henneberger*] was so narrowed by distinctions that it became of negligible value." *Matter of Mayor of New York (Elm St.)*, 246 N.Y. 72, 76, 158 N.E. 24, 25 (1927).

"remarkable"<sup>12</sup> and decided "upon its special circumstances."<sup>13</sup> The prospective nature of population requirements allowing counties to enter the class on attaining a certain size was also stressed in justifying the classification.<sup>14</sup> In the same year concerning another statute with very limited application,<sup>15</sup> it was said "this statute is general in form . . . and, hence, on its face, it is a general bill within the meaning . . . as used in the Constitution. . . ."<sup>16</sup> *Henneberger* was said to have found evidence in the statute itself without ". . . going outside of the statute to inquire into the motives inducing legislation."<sup>17</sup> Since then statutes have been sustained, applying only to cities of over one million<sup>18</sup> or enlarging extension privileges to New York corporations which for five years previous have owned and operated stage lines in cities of the first class (New York and Buffalo at that time).<sup>19</sup>

However, with the passage of City Home Rule,<sup>20</sup> in *Matter of the Mayor of New York (Elm St.)*<sup>21</sup> the doctrine of the earlier cases was criticized. Calling *Henneberger* "the germ of a doctrine more adapted to realities,"<sup>22</sup> the court relied on the language of this new amendment, as requiring inquiry into the actual *effect* of the law reviving city condemnation awards, which had been barred within the year previous. In invalidating it, it was set forth that the classification must have a reasonable basis, and not be an arbitrary selection.

Seventeen years later in *Stapleton v. Pinckney*,<sup>23</sup> the court passed on a jury law which classified counties by population. *Henneberger* and the *Elm St.* case were rephrased by coupling a strong presumption of constitutionality with the need for a reasonable connection between the class restrictions and local conditions. The court did not find ". . . that such local conditions are in any way related to the circum-

<sup>12</sup> *People v. Dunn*, 157 N.Y. 528, 540, 52 N.E. 572, 576 (1899).

<sup>13</sup> *Ibid.*

<sup>14</sup> *Id.* at 541, 52 N.E. at 576.

<sup>15</sup> See *Kittinger v. Buffalo Traction Co.*, 160 N.Y. 377, 54 N.E. 1081 (1899), upholding a statute validating consents given by 1st and 2d class cities, *between December 1, 1895 and February 1, 1896*, to street railway companies which have failed to obtain certain certificates.

<sup>16</sup> *Id.* at 395-96, 54 N.E. at 1087.

<sup>17</sup> *Id.* at 397, 54 N.E. at 1088.

<sup>18</sup> See *Ahern v. Elder*, 195 N.Y. 493, 88 N.E. 1059 (1909); *Stapleton v. Pinckney*, 293 N.Y. 330, 335, 57 N.E.2d 38, 40 (1944) (dictum). *But see Osborne v. Cohen*, 272 N.Y. 55, 4 N.E.2d 289 (1936).

<sup>19</sup> *City of New York v. Fifth Avenue Coach Co.*, 237 App. Div. 383, 262 N.Y. Supp. 228, *aff'd per curiam*, 262 N.Y. 481, 188 N.E. 29 (1933).

<sup>20</sup> "The legislature shall act in relation to the property, affairs or government of any city only by general laws which shall *in terms* and *in effect* apply alike to all cities . . . [except for special circumstances]." N.Y. CONSR. art. IX, § 11 (emphasis added). The original provision (1924) was negative in form prohibiting special or local laws on similar terms.

<sup>21</sup> 246 N.Y. 72, 158 N.E. 24 (1927).

<sup>22</sup> *Id.* at 76, 158 N.E. 25.

<sup>23</sup> 293 N.Y. 330, 57 N.E.2d 38 (1944).

stance that Albany County has a population of more than 200,000 and less than 250,000 and contains a city with a population of 125,000." <sup>24</sup> By holding the law unconstitutional it was strongly intimated that inquiry into the actual effect of the statute was authorized under Article III, Section 17, as well as the Home Rule provisions.

The "Uniform Up-State Jury Law," passed after years of effort and documentation,<sup>25</sup> proposed to cure certain deficiencies including (1) inadequate jury lists with only assessment rolls as a mandatory source of names, (2) divided and uncertain responsibility and (3) confusingly large numbers of local laws.<sup>26</sup> In the instant case, the dissent found the amendment's classification unreasonable, observing that it allows a revival of two of these deficiencies,<sup>27</sup> at the instance of dubious suggestions of increased costs.<sup>28</sup> That six of the forty-two counties affected have populations between 85,000 and 100,000 was also pointed out as evidence of the capriciousness of the classification.

<sup>24</sup> Stapleton v. Pinckney, 293 N.Y. 330, 336, 57 N.E.2d 38, 40 (1944).

<sup>25</sup> See 20 REP. N.Y. JUDICIAL COUNCIL 60-65, 153-216 (1954); 9 REP. N.Y. JUDICIAL COUNCIL 46 (1943); 8 REP. N.Y. JUDICIAL COUNCIL 191-242 (1942); 7 REP. N.Y. JUDICIAL COUNCIL 151-200 (1941); N.Y. STATE CRIME COMMISSION, 3d REPORT 11-12 (May 4, 1953); Governor Thomas E. Dewey, Annual Message to The Legislature, January 6, 1954, 1954 N.Y. LEGIS. ANNUAL 312, 318; Governor Thomas E. Dewey, Memorandum Approving Uniform Up-State Jury System, 1954 N.Y. LEGIS. ANNUAL 388.

<sup>26</sup> See 20 REP. N.Y. JUDICIAL COUNCIL 62 (1954); Governor Thomas E. Dewey, *supra* note 25.

<sup>27</sup> The amendment leaves the Uniform Act mandatory on only 15 counties and makes it optional with 42 counties. Farrington v. Pinckney, 1 N.Y.2d 74, 96, 133 N.E.2d 817, 832 (1956) (dissenting opinion).

The original Uniform Act provided: "The commissioner . . . may consult the latest census enumeration, the latest published . . . [directories, assessment rolls, voters registry] and any other general source of names. There shall be continuous search for persons qualified . . . in order to obtain as many prospective jurors as necessary and in order to limit as much as possible repetition of jury service.

"Each public officer of the county [and cities, towns and villages] . . . shall . . . at all times furnish to the commissioner [of Jurors] . . . all the information within his control to enable the commissioner to procure the names. . . ." N.Y. JUD. LAW art. 18, § 658 (Supp. 1956) (emphasis added).

The difference between the above and the corresponding portion of the amendment is apparent.

". . . [T]he town officers described in section five hundred two [mayors, assessors etc.] shall consult the last assessment roll of the town, and may consult the latest census enumeration [further enumerating directories, voters' registry etc.] . . . ." N.Y. JUD. LAW art. 16, § 503 (Supp. 1956) (emphasis added).

<sup>28</sup> "[The Uniform Law] . . . mandat[es] increase [sic] costs (estimated in my county Wayne, ten to fifteen thousand to establish Commissioner of Juror Division)." Hon. Mildred Taylor, Memorandum Accompanying The Amendment to Uniform Up-State Jury Law, 1955 N.Y. LEGIS. ANNUAL 53, 54.

"In small counties which are not financially able to provide for a full time commissioner, any county official may be designated commissioner on a part time basis." Governor Thomas E. Dewey, Memorandum Approving Uniform Up-State Jury Law, *supra* note 25.

The majority answered this by citing a great deal of statute and case law, to show that classification by population is valid and well entrenched by precedent. Following the test in the *Stapleton* case, the Court did find a reasonable connection, in that the legislature was apparently segregating the smaller counties according to varying economic resources, based on population. But it was also emphasized that "... where the reference to population serves *only* to designate and identify the place . . . it will be deemed a local act."<sup>29</sup>

By inquiring into the actual *effect* of the law to hold it valid under Article III, Section 17, thus apparently abolishing the significance of the old distinction between the *terms* and the *effect*, the scope of judicial investigation was extended and the rationale of the *Stapleton* case clarified. However, although the ban against designation as opposed to classification gives some criteria, the Court's insistence that only "some *reasonable* and *possible* basis"<sup>30</sup> need be found, leaves a very difficult test. The fine line of distinction between the presumed possible basis and the results of a vivid imagination is, and will be, very difficult for the courts to apply.



TORTS—LIBEL AND SLANDER—ORAL ACCUSATION OF COMMUNISM NOT SLANDER PER SE.—An engineer brought an action for slander against his employer, a corporation engaged in the manufacture of implements for the United States Government. The complaint alleged that the defendant's president spoke words falsely accusing the plaintiff of being a communist. The Court of Appeals held that the words spoken are not slanderous per se and absent a sufficient allegation of special damages, the complaint failed to state a cause of action. *Gurtler v. Union Parts Mfg. Co.*, 1 N.Y.2d 5, 132 N.E.2d 889 (1956).

It has generally been held that a falsely written accusation of communism is libelous<sup>1</sup> and actionable per se.<sup>2</sup> Courts have reached this decision by taking judicial notice of the current climate of opinion,<sup>3</sup> while others have sustained the action on statutes making party membership a bar to governmental employment.<sup>4</sup> However, the

<sup>29</sup> *Farrington v. Pinckney*, 1 N.Y.2d 74, 81, 133 N.E.2d 817, 822 (1956).

<sup>30</sup> *Id.* at 89, 133 N.E.2d at 828.

<sup>1</sup> Libel is actionable without proof of special damages if it tends to expose a person to hatred, contempt or aversion, or to induce an evil or unsavory opinion of him in the minds of a substantial number of the community or to disparage him in the way of his office, trade or profession. See *Mencher v. Chesley*, 297 N.Y. 94, 75 N.E.2d 257 (1947); *Nichols v. Item Publishers, Inc.*, 309 N.Y. 596, 132 N.E.2d 860 (1956).

<sup>2</sup> See, e.g., *Wright v. Farm Journal, Inc.*, 158 F.2d 976 (2d Cir. 1947); *Grant v. Reader's Digest Ass'n, Inc.*, 151 F.2d 733 (2d Cir. 1945).

<sup>3</sup> See *Mencher v. Chesley*, 297 N.Y. 94, 75 N.E.2d 257 (1947).

<sup>4</sup> *Levy v. Gelber*, 175 Misc. 746, 25 N.Y.S.2d 148 (Sup. Ct. 1941).