IN THE

Supreme Court of the United States

October Term, 1962

No. 606 39

THE NEW YORK TIMES COMPANY,
A Corporation,
Petitioner,

v.

L. B. SULLIVAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Alabama entered in the above-entitled case on August 30, 1962.

Opinions Below

The opinion of the Supreme Court of Alabama (Appendix B, *infra,* pp. 37-78) is reported in 144 So. 2d 25. The opinion of the Circuit Court, Montgomery County, denying petitioner's motion to quash service of process (Appendix B, *infra,* pp. 80-89) is unreported. The charge to the jury of the Circuit Court (Appendix B, *infra,* pp. 89-104) appears at R. 1947-1954, 1957A-1957J.

Jurisdiction

The judgment of the Supreme Court of Alabama (Appendix B, *infra,* pp. 78, 79) was entered on August 30, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

Questions Presented

1. Whether, consistently with the guarantee of freedom of the press in the First Amendment as embodied in the Fourteenth, a state may hold libelous *per se* and actionable by an elected City Commissioner, without proof of special damage, statements critical of the conduct of a department of the City Government under his jurisdiction which are inaccurate in some particulars.

2. Whether there was sufficient evidence to justify, consistently with the guarantee of freedom of the press, the determination that statements, naming no individual but critical of the Police Department under the jurisdiction of the respondent as an elected City Commissioner, were defamatory as to him and punishable as libelous *per se*.

3. Whether an award of $500,000 as "presumed" and punitive damages for libel constituted, in the circumstances of this case, an abridgement of the freedom of the press.

4. Whether the assumption of jurisdiction in a libel action against a foreign corporation publishing a newspaper in another state, based upon sporadic newsgathering activities by correspondents, occasional solicitation of advertising and minuscule distribution of the newspaper within the forum state, transcended the territorial limitations of due process, imposed a forbidden burden on interstate commerce or abridged the freedom of the press.

Constitutional and Statutory Provisions Involved

The constitutional and statutory provisions involved are set forth in Appendix A, *infra,* pp. 33-36.

Statement

The judgment of the Supreme Court of Alabama in this cause affirmed a judgment of the Circuit Court of Montgomery County, entered on the verdict of a jury, against the petitioner and four co-defendants, Ralph D. Abernathy, Fred L. Shuttlesworth, S. S. Seay, Sr., and J. E. Lowery, awarding respondent $500,000, the full amount claimed as damages for libel (R. 1958). Respondent, one of three elected Commissioners of the City of Montgomery, Alabama, instituted the action on April 19, 1960, alleging that he had been libeled by two paragraphs of an advertisement published in *The New York Times* on March 29, 1960. Service of process was made on petitioner by delivery to an alleged agent in Alabama and by substituted service pursuant to the "long-arm" statute of the State (Title 7, Section 199 (1), Code of Alabama, Appendix A, *infra,* p. 34). A motion to quash asserting constitutional objections to the jurisdiction of the Circuit Court under the due process clause of the Fourteenth Amendment and the Commerce Clause (R. 33, 39, 350) was denied (R. 47). In the ensuing trial, petitioner contended by demurrer (R. 58-9), objection to instructions to the jury (R. 1951-2), request for a directed verdict (R. 1957M) and motion for a new trial (R. 2011) that the publication could not be held to libel the respondent without abridging the freedom of the press guaranteed by the First and Fourteenth Amendments. The contention was rejected by the Circuit Court. The Supreme Court of Alabama sustained these rulings on appeal.

1. **The nature and circumstances of the alleged libel.**— The advertisement (R. 1698-1702), a copy of which was attached to the complaint (R. 2-10) and is set forth below in Appendix C, *infra,* p. 105, was placed through a New York advertising agency by an organization named the "Com-

mittee to Defend Martin Luther King and the Struggle for Freedom in the South." It named approximately 80 individuals as officers and members of the Committee, including many of national and world fame for humanitarian work and for achievement in religion, political affairs, trade unions and the arts. Under the title "Heed Their Rising Voices", taken from a *New York Times* editorial of March 19, 1960, the advertisement portrayed the activities and struggles of students and others engaged in nonviolent demonstrations against the practices of racial segregation. As indicated by the Committee's title, the advertisement centered mainly on the problems of Dr. Martin Luther King, Jr., founder and president of the Southern Christian Leadership Conference, and concluded with an appeal for funds to support the legal defense of Dr. King, who had been indicted shortly before for perjury.*

Of the advertisement's ten paragraphs of text, the third and part of the sixth were the basis of respondent's libel claim. The first paragraph of the advertisement, not complained of by respondent, described generally the actions and goals of Southern Negro students demonstrating "in positive affirmation of the right to live in human dignity as guaranteed by the U. S. Constitution and the Bill of Rights." It went on to charge that these students were "being met by an unprecedented wave of terror . . . ."

The second paragraph told of a student effort in Orangeburg, South Carolina, to obtain lunch-counter service, and reported that the students had been forcibly ejected, teargassed and arrested en masse under physically trying conditions.

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* Dr. King was later acquitted on this charge (R. 1803).

The third paragraph, the first of the two alleged to have libeled respondent, read as follows:

> "In Montgomery, Alabama, after students sang 'My Country, 'Tis of Thee' on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shot-guns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission."

Respondent's evidence showed that the only part of this statement thought to refer to him was the assertion that "truckloads of police" had "ringed" the campus (R. 1837), and that this assertion was incorrect "although on three occasions they [the police] were deployed near the campus in large numbers" (R. 1712). It also appeared that less than the "entire student body" protested and that the dining hall was not "padlocked", but, as respondent testified, these were matters relating in any event to the State Education Department, not to him (R. 1840-41).

The fourth and fifth paragraphs of the advertisement, not claimed to be false or libelous in any respect, spoke of student activity in "Tallahassee, Atlanta, Nashville, Savannah, Greensboro, Memphis, Richmond, Charlotte, and a host of other cities in the South"; charged hostility by police and other officials; and went on to portray the leadership role of Dr. King.

The sixth paragraph began with the following sentences, comprising the second extract charged to be libelous and the remainder of the basis for the lower court's characterization of the advertisement as "false and malicious" (Appendix B, *infra,* p. 77):

> "Again and again the Southern violators have answered Dr. King's peaceful protests with intimida-

> tion and violence. They have bombed his home, almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for 'speeding,' 'loitering' and similar 'offenses.' And now they have charged him with 'perjury'—a *felony* under which they could imprison him for *ten* years."

As to this paragraph, respondent's evidence showed:

> (1) That Dr. King's home had in fact been bombed twice, although one of the bombs failed to explode, with Dr. King's wife and child at home, and that both occasions preceded respondent's tenure as Commissioner (R. 1713, 1808, 1811).
>
> (2) That Dr. King had been arrested only four times, not seven as the advertisement said, three of the arrests antedating respondent's tenure as Commissioner (R. 1711, 1713, 1827).
>
> (3) That Dr. King had in fact been indicted on two perjury counts, carrying potential sentences of five years each (R. 1713).
>
> (4) That there was a dispute as to whether Dr. King had been assaulted on the occasion of an arrest, but this occasion had occurred, in any event, long before respondent became a Commissioner (R. 1713, 1816, 1817).

The remainder of the advertisement, praising Dr. King's efforts and urging financial support for his defense, was not claimed to be false or libelous.

2. **The evidence of allegedly libelous impact upon respondent.**—The condemned advertisement contained no mention of respondent, or of the Montgomery Commissioners, or any of them. As stated in respondent's testimony, the basis for his role as aggrieved plaintiff was the "feeling" that the advertisement reflected upon him, "the other Commissioners and the community" (R. 1849).

Specifically, the evidence showed that respondent, in his capacity as Commissioner, had supervision over the Montgomery Police Department, Fire Department, Department of Cemetery and Department of Scales (R. 1827). He was normally not responsible, however, for day-to-day police operations, including those during the Alabama State College episode referred to in the advertisement, these being under the supervision of Montgomery's Chief of Police (R. 1844).

To establish the allegedly libelous effect of the advertisement upon respondent, six witnesses and respondent himself were permitted over objection to announce their views that the allegedly libelous statements would tend to be associated with the City Government, with the Commissioners generally, and with respondent "a little more", or with respondent more specifically and particularly (R. 1722, 1724, 1728, 1736, 1755-6, 1759, 1766-7, 1771, 1785, 1837). Three of these witnesses had first seen the advertisement when they were called to the office of respondent's counsel and shown it in order to equip them as witnesses (R. 1738-40, 1757, 1763-4, 1768-9).* The six witnesses said that *if* they had believed the statements about the police in the advertisements, they would have thought less of respondent, would have considered that the police had been guilty of serious misbehavior and would have thought respondent was carrying out the duties of his office incompetently and improperly (R. 1725, 1736-7, 1743, 1756, 1766, 1771, 1786-7). However, none of the witnesses testified that he believed the advertisement; five specifically testified that they dis-

* It may be noted here that approximately 394 copies of the issue of *The Times* containing the advertisement in question were circulated in the State of Alabama; of these, approximately 35 were distributed in Montgomery County (R. 1720).

believed it; and none was actually led to think less kindly of respondent because of it (R. 1743, 1745-6, 1757-9, 1764, 1768, 1772, 1789).

3. **The demand for a retraction.**—On April 8, 1960, respondent wrote to petitioner and to the four individual defendants demanding a retraction of the statements in the advertisement which are the basis for the libel action (R. 1706-7). On April 15, 1960, counsel for petitioner replied, saying they were "puzzled as to how" respondent considered the disputed statements to reflect upon him, assuring him that the assertions in the advertisement were still being checked, and suggesting that respondent might explain further to them how these assertions were deemed reflections upon him (R. 1708). Respondent made no further reply, but filed this suit, recovering the full $500,000 demanded by the complaint.

4. **The rulings below on the merits.**—As previously noted (p. 3), petitioner contended throughout that the facts alleged and proved could not support a judgment in respondent's favor for libel consistently with the freedom of the press guaranteed by the First Amendment as made applicable to the States by the Fourteenth Amendment. Specifically, petitioner contended that the constitutional safeguard was infringed by holding the publication libelous and actionable without proof of special damage, by permitting and sustaining a finding that the statements were "of and pertaining to" respondent and in sustaining the award of damages embodied in the verdict (R. 58-9, 2012, 2048-9, 2050). Rejecting these claims at every stage, the trial court charged that the portions of the advertisement in issue were "libelous *per se*", that "[g]eneral damages need not be alleged or proved but are presumed", that

respondent was entitled to recover both such "presumed" and punitive damages if the jury decided that the words related to and concerned him and that the damages awarded were not excessive (R. 86, 1951-4, 2057D).

In its opinion affirming the judgment, the court below agreed with these rulings. It held that where "the words published tend to injure a person libeled by them in his reputation, profession, trade or business, or charge him with an indictable offense, or tends to bring the individual into public contempt," they are "libelous *per se*"; and that the "matter complained of is, under the above doctrine, libelous *per se,* if it was published of and concerning the plaintiff". Appendix B, *infra,* p. 53. It held, further, that since it is "common knowledge" that a city's "governing body" controls such groups as police and firemen, and since "praise or criticism [of such employees] is usually attached to the official in complete control of the body", the trial court had correctly sustained the complaint as alleging a libel "of and concerning" respondent and the verdict so finding in his favor (*id.,* pp. 55-56, 59, 77). It also rejected petitioner's arguments under the First and Fourteenth Amendments (assignments of error 289-291, 296, 298, 306-308, 310), holding that (a) these were answered by the libelous character of the advertisement and that (b) in any event, the "Fourteenth Amendment is directed against State action and not private action." *Id.,* pp. 58-59.

5. **The jurisdiction of the Circuit Court**—Petitioner is a New York corporation which has not qualified to do business in Alabama or designated anyone to accept service of process there. It has no office, property or employees resident in Alabama (R. 435-6). Its staff correspondents do, however, visit the State as the occasion may arise for purposes of newsgathering. In the years 1956 through

April 1960, nine correspondents made such visits, totaling, in the view of the courts below, 153 days.* In the first five months of 1960 there were three such visits, two by Claude Sitton, the staff correspondent stationed in Atlanta, and one by Harrison Salisbury (R. 117). *The Times* also had an arrangement with newspapermen employed by Alabama journals to act as "stringers", paying them for stories they sent in that were accepted at the rate of a cent a word. The effort was to have three such stringers in the State, including one in Montgomery (R. 122, 300) but only two sold stories to *The Times* in 1960, Chadwick of South Magazine, who was paid $155 to July 26, and McKee of the Montgomery Advertiser, who was paid $90 for dispatches in that time (R. 111, 112, 297-303, 438). McKee also was asked to investigate the facts relating to respondent's claim of libel, which he did (R. 180, 698).

The advertisement complained of in this action was prepared, submitted and accepted in New York, where the newspaper is published (R. 384-386, 434). The national daily circulation of *The Times* was 650,000, of which the total sent to Alabama was 394. The Sunday circulation of *The Times* was 1,300,000, of which the Alabama shipments totaled 2,440 (R. 396-7). These papers were either mailed to subscribers or shipped prepaid by rail or air to Alabama news-dealers, whose orders were unsolicited (R. 399, 402-3, 441). *The Times* would credit these dealers for papers which were unsold or which arrived late, damaged or incom-

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* The finding that "correspondents of The Times spent 153 days in Alabama" during these years (Appendix B, *infra,* pp. 38, 84) must be based, we believe, on the petitioner's records of the correspondents' expense accounts, which were introduced in evidence and covered 115 days (R. 753-779) and on 50 published stories by such correspondents having Alabama date-lines, which were separately offered in evidence (R. 783-1025). If so, we think it plain that the two sets of figures involve a duplication as to dates and that the total number of days is 115, not 153. See also R. 303-310.

plete, the latter being certified by a local baggage man upon a form provided by *The Times* (R. 403, 406). Gross revenue from this Alabama circulation was approximately $20,000 in the first five months of 1960 of a total circulation revenue of $8,500,000 (R. 442).

The Times accepted advertising from Alabama sources, principally advertising agencies which sent their copy to New York, where any contract for its publication was made (R. 336-8, 344-6). The New York Times Sales, Inc., a subsidiary corporation, also solicited advertisements in Alabama, though it has no office or resident employees in the State. Four employees spent a total of 26 days in Alabama for this purpose in 1959 and one spent one day there before the end of May in 1960 (R. 330). Alabama advertising linage, including that volunteered and solicited, amounted to 5,471 in 1959 of a total of 60,000,000 published (R. 334, 336); it amounted to 13,254 through May of 1960 (R. 334) of a total of 20,000,000 lines (R. 335). Revenue from an Alabama supplement published in 1958 was $26,801.64 (R. 374). For the first five months of 1960 gross revenue from Alabama advertising was $17,000 to $18,000 of a total advertising revenue of $37,500,000 (R. 440). Gross revenue from Alabama advertising and circulation during this period was $37,300 of a national total of $46,000,000 (R. 443).

On these facts, the courts below held that petitioner was subject to the jurisdiction of the Circuit Court in this action, sustaining both the service of process on McKee as a purported agent and the substituted service on the Secretary of State, against objections based on the territorial limitations of due process, the Commerce Clause and the constitutional protection of the freedom of the press (R. 33, 39, 350, Appendix B, *infra*, pp. 37-49, 82-88). They also held that though petitioner had raised these questions by

motion to quash, appearing specially for that purpose as permitted by the Alabama practice, the fact that the prayer for relief asked for dismissal for "lack of jurisdiction of the subject matter" of the action, as well as want of jurisdiction of the person of defendant, constituted a general appearance and submission to the jurisdiction of the Court (R. 41-42, Appendix B, *infra,* pp. 49-52, 80-82).

REASONS FOR GRANTING THE WRIT

I

The decision of the Supreme Court of Alabama gives a scope and application to the law of libel so restrictive of the right to protest and to criticize official conduct that it abridges the freedom of the press, as that freedom has been defined by the decisions of this Court. It transforms the action for defamation from a method of protecting private reputation to a device for insulating government against attack. If the judgment stands, its impact will be grave—not only upon the press but also upon those whose welfare may depend on the ability and willingness of publications to give voice to grievances against the agencies of governmental power. The issues are momentous and call urgently for the consideration and determination of this Court.

First: The doctrine espoused by the court below is that a public official is entitled to recover "presumed" and punitive damages for a publication critical of the official conduct of a governmental agency under his general supervision, if that publication tends to "injure" him "in his reputation" or to "bring" him "into public contempt" as an official—unless a jury is persuaded that it is entirely true.

This principle of liability, resting as it does on a "common law concept of the most general and undefined nature" (*Cantwell* v. *Connecticut,* 310 U. S. 296, 308), is indis-

tinguishable in its function and effect from the proscription of seditious libel, which the verdict of history has long deemed inconsistent with the First Amendment. See Holmes, J. in *Abrams* v. *United States,* 250 U. S. 616, 630; Chafee, *Free Speech in the United States* (1941), pp. 27-29. In place of fine and imprisonment as the repressive sanction, damages are authorized "not alone to punish the wrongdoer, but as a deterrent to others similarly minded" and the damages are fettered by "no legal measure" of amount (Appendix B, *infra,* pp. 74, 76). Such damages are no less apt than criminal conviction to stifle that "free political discussion" which this Court has deemed "the security of the Republic, the very foundation of constitutional government" (*De Jonge* v. *Oregon,* 299 U. S. 353, 365).

There are, indeed, respects in which the private action brought by the aggrieved official may be more repressive than a prosecution for seditious libel. There is no requirement of an indictment and the case need not be proved beyond a reasonable doubt. It need not be shown, as the Sedition Act required, that the defendant's purpose was to bring the official "into contempt or disrepute" (Act of July 14, 1798, 1 Stat. 596); a statement adjudged libelous *per se* is *presumed* to be "false and malicious", as the trial court instructed here (R. 1952). Nor is it necessary, on the other hand, that there be proof of injury in fact to the official's reputation. It is enough that *if* the criticism were believed, it would "tend" to diminish his repute with members of the public (Appendix B, *infra,* pp. 61, 53).

We submit that such a rule of liability can not be reconciled with this Court's rulings on the scope of freedom of the press safeguarded by the Constitution. Those rulings start with the assumption that one of the prime objectives of the First Amendment is to protect the right to criticize

"all public institutions" (*Bridges* v. *California,* 314 U. S. 252, 270). As Mr. Justice Roberts said in *Cantwell* v. *Connecticut,* 310 U. S. 296, 310:

> "In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his point of view, the pleader, as we know, at times resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of citizens of a democracy."

Thus concern for the dignity and reputation of the bench does not sustain the punishment as a contempt of criticism of the judge or his decision (*Bridges* v. *California, supra,* at 270), though the utterance contains "half-truths" and "misinformation" (*Pennekamp* v. *Florida,* 328 U. S. 331, 342, 345); there must be clear and present danger of perversion of the course of justice. See also *Craig* v. *Harney,* 331 U. S. 367, 370, 374-375; *Wood* v. *Georgia,* 370 U. S. 375. We do not see how comparable criticism of an elected, political official may consistently be punished as a libel on the ground that it diminishes his reputation. The supposition that judges are "men of fortitude, able to thrive in a hardy climate" (*Craig* v. *Harney, supra,* at 376) must extend to commissioners as well.

The court below thought this submission answered by the proposition that the "Constitution does not protect libelous publications", relying on statements to that effect made in opinions of this Court. See *Konigsberg* v. *State Bar of California,* 366 U. S. 36, 49; *Times Film Corporation*

v. *City of Chicago,* 365 U. S. 43, 48; *Roth* v. *United States,* 354 U. S. 476, 486; *Beauharnais* v. *Illinois,* 343 U. S. 250, 266; *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 572; *Near* v. *Minnesota,* 283 U. S. 697, 715. The reliance surely is misplaced. Except for *Beauharnais,* the statements merely affirmed that the freedom of speech and press is not an absolute; they did not signify advance approval of whatever standards state courts might employ in the repression of expression as a libel. And *Beauharnais,* while it sustained conviction for a statement deemed to constitute a libel of a racial group, found by the state court to be "liable to cause violence and disorder," took pains to reserve this Court's "authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel", adding that "discussion cannot be denied and the right, as well as the duty, of criticism must not be stifled." 343 U. S. at 264.

Hence libel, like obscenity, contempt, advocacy of violence, disorderly conduct or any other possibly defensible basis for suppressing speech or publication, must be defined and judged by standards which are not repugnant to the Constitution. The criterion employed below does not survive that test because it stifles criticism of official conduct no less potently than did seditious libel. If there is room for the protection of official reputation against criticism of official conduct, despite the fact that "public men are, as it were, public property" (*Beauharnais* v. *Illinois, supra,* at 263, note 18), measures less destructive of the freedom of expression are available and adequate to serve that end. See Edgerton, J. in *Sweeney* v. *Patterson,* 128 F. 2d 457, 458-9 (D. C. Cir. 1942), *cert. denied,* 317 U. S. 678 (1942). *Cf. Shelton* v. *Tucker,* 364 U. S. 479, 488; *Smith* v. *California,* 361 U. S. 147, 155; *Dean Milk* v. *City of Madison,* 340 U. S. 349.

Twenty-one years ago this Court embraced the opportunity to review a decision of the Court of Appeals for the Second Circuit which sustained, Judge Clark dissenting, the sufficiency of a complaint alleging libel in a syndicated column charging a Congressman by name with anti-Semitism in opposing an appointment. *Sweeney* v. *Schenectady Union Publishing Co.* 122 F. 2d 288. One of the questions presented was whether the ruling involved an abridgment of the freedom of the press. An equal division in this Court led to affirmance of the judgment. 316 U. S. 642. The considerations which favored review in *Sweeney* are, in our submission, more compellingly presented here.

Second: Assuming *arguendo* that the freedom of the press may constitutionally be subordinated to protection of official reputation, as it would be by the rule of law declared below, we contend that the rule as applied to the facts of this case infringes the federal rights of the petitioner. For nothing in the evidence establishes the type of injury or threat to the respondent's reputation that might provide an interest to which First Amendment freedom may be made to yield. *Cf. Konigsberg* v. *State Bar*, 366 U. S. 36, 50, n. 11.

The publication did not name respondent or the Commission of which he is a member and plainly was not meant as an attack on him or any other individual. Its protests and its targets were impersonal: "the police", the "state authorities", "the Southern violators". Neither respondent's passion to perceive in these collective generalities allusion to his personal identity nor the opinions of his witnesses provided evidence sufficient to sustain a finding that the statements were made "of and concerning" him. Moreover, statements which were accurate according to respondent's evidence surely cannot be relied on to establish injury to his official or his private reputation. It is,

therefore, significant to note how far the undisputed evidence showed that the statements made were false, an exercise the court below cannot have deemed material, since it is not attempted in the court's opinion.

We have summarized the evidence above (pp. 3-8) and we shall not repeat it *in extenso* here. It will suffice to say that if the reference to "the police" can validly be taken to refer to the respondent as Commissioner with jurisdiction over that department, as he and his witnesses testified and the court and jury found, the whole libel rests on two discrepancies between the statements and the facts. Where the advertisement said that "truckloads" of armed police "ringed the Alabama State College Campus", the fact was that only "large numbers" of police "were deployed near the campus" on three occasions, without ringing it on any. And where the advertisement said "They have arrested him [Dr. King] seven times", the fact was that he had been arrested only four times. Three of the arrests had occurred, moreover, before the respondent came to office some six months before the suit was filed.

That the exaggerations or inaccuracies in these statements cannot rationally be regarded as tending to injure the respondent's reputation is, we submit, entirely clear.

None of the other statements in the paragraphs relied on by respondent even makes a colorable case. The advertisement was wrong in saying that the college dining hall was "padlocked" but, as the respondent testified (R. 1840), it was the State Education Department, with which he has no connection, that had jurisdiction of this matter, not the City Commissioners or the police. The "Southern violators", said to "have answered Dr. King's peaceful protests with intimidation and violence", were not even read by the respondent to include a reference to him (R. 1849-50). No

more so does the statement that "they" bombed his home, assaulted him and charged him with perjury point to the respondent as the antecedent of the pronoun. And while there was disputed evidence respecting a police assault before respondent was elected a Commissioner (R. 1713, 1816, 1817), there was beyond dispute a bombing of King's home and he was charged with perjury. Indeed, to raise funds to defend him on that charge was the main purpose of the publication.

Since the state court's denial of the claim that the publication was protected by the Constitution turned on the determination that it was defamatory as to the respondent, its finding on that issue must pass muster in this Court. There must be a sufficient basis in the evidence for the conclusion that the statements contained falsehood injurious to the respondent's reputation and the nature of the injury must justify the challenged limitation of expression. *Cf. Bridges* v. *California,* 314 U. S. 252, 263, 271. In passing on these questions this Court's duty is not only to assure that constitutional protections are respected in the standards by which judgment has been rendered but also "to analyze the facts in order that the appropriate enforcement of the federal right may be assured." *Norris* v. *Alabama,* 294 U. S. 587, 590. See also, *e.g., Wood* v. *Georgia,* 370 U. S. 375, 386; *Craig* v. *Harney,* 331 U. S. 367, 373-4; *Pennekamp* v. *Florida,* 328 U. S. 331, 335; *Kingsley Pictures Corp.* v. *Regents,* 360 U. S. 684, 708 (concurring opinion); *cf. Thompson* v. *Louisville,* 362 U. S. 199; *Garner* v. *Louisiana,* 368 U. S. 157.

We submit that an appraisal of this record in these terms leaves no room for a determination that the publication sued on by respondent made a statement as to him, or that, if such a statement may be found by implication, it injured or jeopardized his reputation in a way that forfeits

constitutional protection, sanctioning its punitive repression by the judgment of the courts below.

Third: The magnitude of the punishment imposed on the petitioner gives emphasis to the importance of the questions posed by this and its companion cases in the courts of Alabama;* it also is, in our view, an independent reason why the judgment has abridged the freedom of the press.

As Mr. Justice Brandeis said, concurring in *Whitney* v. *California,* 274 U. S. 357, 377, a "police measure may be unconstitutional merely because the remedy, although effective as means of protection, is unduly harsh or oppressive". The proposition must apply with special force when the "harsh" remedy has been explicitly designed as a deterrent to expression. It is, indeed, the underlying basis of the principle that "the power to regulate must be so exercised as not, in attaining a permissible end, unduly

* Libel actions based on the publication of the advertisement here involved, were also instituted by Governor Patterson of Alabama, Mayor James of Montgomery, Commissioner Parks and former Commissioner Sellers. The James case is pending on motion for new trial after a verdict of $500,000. The Patterson, Parks and Sellers cases, in which the damages demanded total $2,000,000, were removed by petitioner to the District Court but the Court of Appeals for the Fifth Circuit has held that they should be remanded. *Parks and Patterson* v. *New York Times Company,* 195 F. Supp. 919, rev'd, September 18, 1962. Another group of cases instituted by Birmingham officials, based on articles on racial tensions by Harrison Salisbury in *The Times,* were dismissed on jurisdictional grounds pursuant to the decision in *New York Times Company* v. *Connor,* 291 F. 2d 492 but the Court of Appeals reversed the judgment on November 16, 1962, bowing to the Alabama Supreme Court's interpretation of the jurisdictional statute in the instant case and reserving constitutional questions for decision "upon a full record after a trial on the merits." Alabama officials have also filed libel actions against the Columbia Broadcasting System based on television coverage of racial conflict in the State. *Morgan, Connor and Waggoner* v. *Columbia Broadcasting System, Inc.,* U.S. D.C. N.D. Ala. (So. Div.) Civil Actions No. 10067-S, 10068-S, 10069-S; *Willis and Penton* v. *Columbia Broadcasting System, Inc.,* U.S. D.C. M.D. Ala. (No. Div.) Civil Actions No. 1790-N, 1791-N (pending on removal).

to infringe the protected freedom." *Cantwell* v. *Connecticut,* 310 U. S. 296, 304, 308. See also, *e.g., Grosjean* v. *American Press Co.,* 297 U. S. 233; *N. A. A. C. P.* v. *Alabama,* 357 U. S. 449; *Speiser* v. *Randall,* 357 U. S. 513; *Smith* v. *California,* 361 U. S. 147; *Bates* v. *City of Little Rock,* 361 U. S. 516; *Shelton* v. *Tucker,* 364 U. S. 479.

We think this principle requires the reversal of this judgment as oppressive, even if it otherwise could be sustained. Viewing the publication as an offense to respondent's reputation, there was no rational relationship between the gravity of the offense and the size of the penalty imposed in his behalf. The court below declined, indeed, to weigh the elements of truth embodied in the publication, treating petitioner's assertion of belief in its substantial truth, so far as it might conceivably affect the respondent, as evidence of malice and support for the size of the award. Appendix B, *infra,* p. 77. No less important, any judgment of this magnitude, imposed routinely on these facts and sustained no less routinely on appeal, will necessarily have a repressive influence which extends far beyond preventing such inaccuracies of assertion as have been established here. This is not a time when it would serve the values enshrined in the Constitution to force the press to curtail its attention to the racial tensions of the country or to forego dissemination of its publications in the areas where tension is extreme. Here, too, the law of libel must confront and be subordinated to the Constitution. The occasion for that confrontation is at hand.

Fourth: The court below gave as a further reason for dismissing these constitutional contentions that "[t]he Fourteenth Amendment is directed against State action and not private action". Appendix B, *infra,* p. 59. This accepted proposition obviously has no application to this case. The petitioner has challenged a State rule of law applied by a

State court to render judgment carrying the full coercive power of the State, claiming full faith and credit through the Union solely on that ground. The rule and judgment are, of course, State action in the classic sense of the subject of the Amendment's limitations. See *N. A. A. C. P.* v. *Alabama,* 357 U. S. 449, 463; *Barrows* v. *Jackson,* 346 U. S. 249, 253; *Shelley* v. *Kraemer,* 334 U. S. 1, 14.

II

In holding that the assumption of jurisdiction in this action by the Circuit Court, based on service of process on McKee and substituted service on the Secretary of State, did not transcend the territorial limits of due process, impose a forbidden burden upon interstate commerce or abridge the freedom of the press, the Supreme Court of Alabama has decided federal questions of substance which have not been and should be settled by this Court.

First: We note *in limine* that while the courts below considered and rejected the asserted federal objections to the jurisdiction, they also held that the petitioner had appeared generally in the action and submitted to the jurisdiction of the Court. This conclusion was based upon the ground that, while petitioner appeared specially in moving to quash the attempted service for want of jurisdiction of its person, as permitted by the Alabama practice, the prayer for relief concluded with a further request for dismissal for "lack of jurisdiction of the subject matter of said action." Such a prayer, the courts held, converted the special appearance into a general appearance by operation of the law of Alabama (R. 41-42; Appendix B, *infra,* pp. 49-52, 80-82).

The ruling lacks that "fair or substantial support" in prior Alabama holdings which alone suffices to defeat this

Court's review. *N. A. A. C. P.* v. *Alabama,* 357 U. S. 449, 455-6. The basic principle was declared thirty years ago by the court below, in holding that a request for "further time to answer or demur or file other motions" did not constitute a general appearance waiving constitutional objections later made by a motion to quash. The question, it was said, is one "of consent or a voluntary submission to the jurisdiction of the court", an issue of "intent as evidenced by conduct", as to which "the intent and purpose of the context as a whole must control". *Ex parte Cullinan,* 224 Ala. 263, 266, 267. See also *Ex parte Haisten,* 227 Ala. 183, 187. Under this standard, it is plain that nothing in petitioner's motion disclosed an intent to invoke a ruling as to any matter other than petitioner's personal amenability to Alabama's jurisdiction in this action.

The teaching of *Ex parte Cullinan* has not been qualified by any other holding of the court below before the instant case. On the contrary, a motion to quash for inadequate service has been joined with a plea in abatement challenging the venue of the action without the suggestion that the plea amounted to a general appearance, though the question that it raised was characterized by the court below as whether "the circuit court of Talladega County had jurisdiction of the subject matter". *St. Mary's Oil Engine Co.* v. *Jackson Ice & Fuel Co.,* 224 Ala. 152, 157. Indeed, the precise equivalent of the prayer of the motion in this case was used in *Harrub* v. *Hy-Trous Corporation,* 249 Ala. 414, 416, and posed no obstacle to the adjudication of the issue as to jurisdiction of the person, raised on the special appearance. See also *Orange Crush Grapico Bottling Co.* v. *Seven-Up Company,* 128 F. Supp. 174 (N. D. Ala.) (on removal).

Against these indicia of Alabama law, ignored in the decisions of the courts below, the authorities that were

relied on are quite simply totally irrelevant. In *Blankenship* v. *Blankenship,* 263 Ala. 297, the court specifically declined to consider whether the appearance had been general or special, deeming the issue immaterial upon the question there involved. In *Thompson* v. *Wilson,* 224 Ala. 299, the defendant, a resident of Alabama, had not even purported to appear specially or attempted to question the court's jurisdiction of his person; his sole objection, taken by demurrer, was to the court's competence to deal with the subject matter of the action and to grant relief of the type asked. The California and North Carolina cases, cited and quoted below (*Olcese* v. *Justice's Court,* 156 Cal. 82; *Roberts* v. *Superior Court,* 30 Cal. App. 714; *Dailey Motor Co.* v. *Reaves,* 184 N. C. 260) and the similar decisions referred to in the annotation cited (25 A. L. R. 2d 838-842) all involved situations where the defendant's objection raised "the question whether considering the nature of the cause of action asserted and the relief prayed by plaintiff, the court had power to adjudicate concerning the subject matter of the class of cases to which plaintiff's claim belonged". *Davis* v. *O'Hara,* 266 U. S. 314, 318. That no such question was presented here the motion makes entirely clear.

For the foregoing reasons, we submit that the court's holding that petitioner made an involuntary general appearance does not constitute an adequate state ground, barring consideration of the question whether Alabama has transcended the due process limitations on the territorial extension of the process of her courts. *Cf. N. A. A. C. P.* v. *Alabama, supra; Staub* v. *City of Baxley,* 355 U. S. 313; *Davis* v. *Wechsler,* 263 U. S. 22; *Ward* v. *Love County,* 253 U. S. 17.

Moreover, even if petitioner could validly be taken to have made a general appearance, that appearance would not bar the claim that in assuming jurisdiction of this action

the state court has cast a burden upon interstate commerce forbidden by the Commerce Clause. That point is independent of the question of the defendant's amenability to process, as this Court has expressly held in ruling that the issue remains open, if presented on "a seasonable motion", notwithstanding presence of the corporation in the State or its appearance generally in the cause. *Davis* v. *Farmers Co-operative Co.,* 262 U. S. 312; *Michigan Central Railroad Company* v. *Mix,* 278 U. S. 492, 496. See also *Denver & R.G.W.R. Co.* v. *Terte,* 284 U. S. 284, 287 (attachment); *Canadian Pacific Ry. Co.* v. *Sullivan,* 126 F. 2d 433, 437 (1st Cir.), *cert. den.* 316 U. S. 696 (agent designated to accept service); *Zuber* v. *Pennsylvania R. Co.,* 82 F. Supp. 670, 674 (N. D. Ga). For the same reason, we submit, a general appearance would not bar the litigation of petitioner's contention that by taking jurisdiction in this action, the courts below denied due process by abridging freedom of the press; that also is an issue independent of the "presence" of petitioner before the Circuit Court.

Second: The decisions of this Court do not, in our view, support the power of the State to render judgment *in personam* based on the service of process in this cause. We recognize, of course, that there has been in recent years a relaxation in the limitations of due process on the territorial authority of the state courts. But neither what this Court in *Hanson* v. *Denckla,* 357 U. S. 235, 251 called the "flexible standard" of *International Shoe Co.* v. *Washington,* 326 U. S. 310, nor any of its later applications, sustains, in our submission, the determination here.

To begin, it is plain that the petitioner's peripheral relationship to Alabama does not involve "continuous corporate operations" which are "so substantial and of such

a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities". *International Shoe Co.* v. *Washington, supra,* at 318. The case bears no resemblance to *Perkins* v. *Benguet Consol. Mining Co.,* 342 U. S. 437, where the central base of operations of the corporation, including its top management, was in the state where suit was brought. Hence, if the jurisdiction is sustained, it must be on the ground that the liability asserted was so "connected with" petitioner's "activities within the state" as to "make it reasonable in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there." *International Shoe Co.* v. *Washington, supra,* at 319, 317.

No such connection has been shown. Here, as in *Hanson* v. *Denckla, supra,* at 252, the "suit cannot be said to be one to enforce an obligation that arose from a privilege the defendant exercised in" the State. The liability alleged by the respondent certainly does not arise from the activities of correspondents of *The Times* in covering the news in Alabama; and such reporting surely does not rest upon a privilege the State confers, but on a right, importing a high moral duty, conferred by the Constitution of the Nation. Nor is this liability connected with the occasional solicitation of advertisements in Alabama; the advertisement in suit was not solicited and did not reach *The Times* from anyone within the State. There remains, therefore, only the negligible circulation of *The Times* in Alabama to relate this action to the exercise by the petitioner of "the privilege of conducting activities within" the State. *International Shoe Co.* v. *Washington, supra,* at 319.

We contend that this circulation was not the exercise of such a privilege, since it was not effected by activity of

the petitioner *in* Alabama. Copies of the paper were mailed to subscribers from New York or shipped from there to dealers who were purchasers, not agents of *The Times*. On these facts there is, of course, a question whether Alabama, as a matter of the choice-of-law, may impose liability on the petitioner for causing or contributing to the dissemination of those papers in the State, treating it *pro tanto* as an Alabama "publication".* That question is, however, wholly different from the issue here presented: whether shipment of the papers from New York involved the exercise by the petitioner of any privilege to act in Alabama. *Hanson* v. *Denckla* (*supra,* at 253) is explicit that a State may justifiably apply its law to a transaction upon grounds quite insufficient to establish "personal jurisdiction over a non-resident defendant". See also *International Shoe Co.* v. *Washington, supra,* at 318. It "is essential" for such jurisdiction "that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson* v. *Denckla, supra,* at 253. Shipment in and from New York was not, in our submission, such an act. Nor was the judgment based, in any case, merely upon the 394 copies comprising the Alabama circulation of

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* Courts have been no less perplexed than commentators by the conflicts problems incident to multi-state dissemination of an alleged libel; and some have sought to solve them by a "single publication" rule, fixing the time and place of the entire publication when and where the first and primary dissemination has occurred. See, *e.g., Hartman* v. *Time, Inc.,* 166 F. 2d 127 (3d Cir.), *cert. denied* 338 U. S. 858; *Insull* v. *New York World Tel. Corp.,* 273 F. 2d 166, 171 (7th Cir.), *cert. denied* 362 U. S. 942; *cf. Mattox* v. *News Syndicate Co.,* 176 F. 2d 897, 900, 904-05 (2d Cir.), *cert. denied* 334 U. S. 838. See also, *e.g.,* Prosser, *Interstate Publication,* 51 Mich. L. Rev. 959 (1953); Leflar, *The Single Publication Rule,* 25 Rocky Mt. L. Rev. 263 (1953); Note, 29 U. of Chi. L. Rev. 569 (1962).

The Times; the entire circulation of 650,000 was regarded as relevant to the verdict (R. 1720) and offered as a reason for sustaining the award. Appendix B, *infra,* pp. 75, 77.

In rejecting these arguments against the jurisdiction, the court below relied especially on the decision in *McGee* v. *International Life Ins. Co.,* 355 U. S. 220, where suit on an insurance contract was sustained in California against a non-resident insurer, based on the solicitation and the consummation of the contract in the State by mail. The contract was, however, a continuing relationship between the insurer and the insured within the State and one which the states traditionally have considered to require special regulation. See *Hanson* v. *Denckla, supra,* at 252; *Travelers Health Assn.* v. *Virginia,* 339 U. S. 643. No such continuing relationship gives rise to the liability asserted here; and newspaper publication certainly is not exceptionally subject to state regulation.

Moreover, even if the shipment of *The Times* to Alabama is regarded as an act of the petitioner within that State, we do not think the jurisdiction here affirmed can be sustained. In *International Shoe* this Court made clear that the new standard there laid down was not "simply mechanical or quantitative" and that its application "must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure" (326 U. S. at 319). See also *Hanson* v. *Denckla, supra,* at 253. The opinion left no doubt that, as Judge Learned Hand had previously pointed out (*Hutchinson* v. *Chase & Gilbert,* 45 F. 2d 139, 141), an " 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business is rele-

vant in this connection'' (326 U. S. at 317). Measured by this standard, a principle which would require, in effect, that almost every newspaper defend a libel suit in almost any jurisdiction of the country, however trivial its circulation there may be, would not further the ''fair and orderly administration of the laws''. The special ''inconvenience'' of the foreign publisher in libel actions brought in a community with which its ties are tenuous need not be elaborated. It was perspicuously noted by the court below in a landmark decision more than forty years ago, confining venue to the county where the newspaper is ''primarily published''. *Age-Herald Publishing Co.* v. *Huddleston,* 207 Ala. 40, 45. This record surely makes the ''inconvenience'' clear.

A different question might be posed if it were shown that the petitioner had engaged in activities of substance in the forum state, designed to build its circulation there. *Cf.* Mr. Justice Black, dissenting in part in *Polizzi* v. *Cowles Magazines, Inc.,* 345 U. S. 663, 667, 670. That would, at least, involve a possible analogy to other situations where a foreign enterprise attempts the exploitation of the forum as a market and the cause of action is connected with such effort (*Hanson* v. *Denckla, supra,* at 251-2), though there are differences as well as similarities that must be weighed. It also would confine the possibilities of litigation to those areas in which the publisher has had the opportunity to build some local standing with the public. It is enough to say that such activities, effort and opportunity are not presented here.

A federated nation could not long endure unless the power of the States to exert jurisdiction over men and institutions not within their borders were subjected to

reciprocal restraints on each in the interest of all. *Cf.* Learned Hand, J. in *Kilpatrick* v. *Texas & P. Ry. Co.,* 166 F. 2d 788, 791-2 (2d Cir.). The need for those restraints is clear, since when state jurisdiction does obtain, the Constitution obligates all other states to give full faith and credit to the judgment rendered, including those which may provide the only forum where the judgment can in practice be enforced. Thus jurisdictional delineations must be based on grounds that command general assent throughout the Union; were they not, full faith and credit would become a burden that the system could not bear.

Whether these demands of our federalism have been met by this decision is, we submit, an issue of great importance which calls for the judgment of this Court.

Third: In forcing petitioner to its defense in Alabama on this cause, the courts below have cast a burden upon interstate commerce which the Commerce Clause forbids.

The reasons are no different from those previously stated in contending that the court's assumption of jurisdiction *in personam* worked a deprivation of due process. It takes no gift of prophecy to know that if minuscule state circulation of a paper published in another state suffices to establish jurisdiction of a suit for libel, threatening the type of judgment rendered here, such distribution interstate cannot continue. So, too, if the movement of correspondents inter-state provides a factor tending to sustain such jurisdiction, as the court below declared, a strong barrier to such movement has been erected. *Cf. Edwards* v. *California,* 314 U. S. 160. These, like other burdens upon commerce, must be carried only when there is fair basis for their imposition to protect a local interest that the State may validly prefer to guard. But if, as we have urged, it

was not "reasonable in the context of our federal system of government" to require that petitioner defend this suit in Alabama, it follows that fair basis for the burden upon commerce has not been established. That inter-state communication is a form of commerce is, of course, accepted (see, *e.g., Fisher's Blend Station* v. *Tax Commission,* 297 U. S. 650, 654-5); and that state judicial jurisdiction may impose a forbidden burden also is entirely clear. See, *e.g., Michigan Central Railroad Company* v. *Mix,* 278 U. S. 492; *Denver & R.G.W. R. Co.* v. *Terte,* 284 U. S. 284; *Erlanger Mills, Inc.,* v. *Cohoes Fibre Mills, Inc.,* 239 F. 2d 502 (4th Cir.).

Fourth: We have argued that the jurisdictional determination violates the Constitution, judged by standards that apply to enterprise in general under the constitutional provisions limiting state power in the interest of our federalism as a whole. Even if we are wrong in these submissions, we contend that the decision on this issue calls for re-examination and reversal because it abridges the protected freedom of the press.

That state action which otherwise would be defensible may contravene the First Amendment as embodied in the Fourteenth when it has "the collateral effect of inhibiting the freedom of expression", was expressly held in *Smith* v. *California,* 361 U. S. 147, 151. See also pp. 19-20, *supra.* Such collateral effect on what is published and distributed throughout the Nation is plainly presented here, as we have previously shown.

Fifth: The decision below on the jurisdictional issue is in clear conflict with that of the Supreme Court of North Carolina in *Putnam* v. *Triangle Publications, Inc.,* 245 N.C. 432. This, in itself, is a substantial reason for review.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX A

APPENDIX A

Constitutional and Statutory Provisions Involved

CONSTITUTION OF THE UNITED STATES

ARTICLE I, SECTION 8:

The Congress shall have power * * *

To regulate Commerce with foreign Nations, and among the several States * * *.

* * * * *

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

* * * * *

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ALABAMA CODE OF 1940 TITLE 7

§ 188. How corporation served.—When an action at law is against a corporation the summons may be executed by the delivery of a copy of the summons and complaint to the president, or other head thereof, secretary, cashier, station agent or any other agent thereof. The return of the officer executing the summons that the person to whom delivered is

the agent of the corporation shall be prima facie evidence of such fact and authorize judgment by default or otherwise without further proof of such agency and this fact need not be recited in the judgment entry. (1915, p. 607.)

* * * * *

§ 199(1). Service on non-resident doing business or performing work or service in state.—Any non-resident person, firm, partnership, general or limited, or any corporation not qualified under the Constitution and laws of this state as to doing business herein, who shall do any business or perform any character of work or service in this state shall, by the doing of such business or the performing of such work, or services, be deemed to have appointed the secretary of state, or his successor or successors in office, to be the true and lawful attorney or agent of such non-resident, upon whom process may be served [in any action accrued or accruing from the doing of such business, or the performing of such work, or service, or as an incident thereto by any such non-resident, or his, its or their agent, servant or employee.]* Service of such process shall be made by serving three copies of the process on the said secretary of state, and such service shall be sufficient service upon the said non-resident of the state of Alabama, provided that notice of such service and a copy of the process are forthwith sent by registered mail by the secretary of the state to the defendant at his last known address, which shall be stated in the affidavit of the plaintiff or complainant hereinafter mentioned, marked "Deliver to Addressee Only" and "Return Receipt Requested", and provided further that such return receipt shall be received by the secretary of state purporting to have been signed by said non-resident,

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* Following the decision in *New York Times Company* v. *Conner* 291 F. 2d 492 (5th Cir. 1962) the statute was amended by substituting the following language for the bracketed portion: [in any action accrued, accruing, or resulting from the doing of such business, or the performing of such work or service, or relating to or on an incident thereof, by any such non-resident, or his, its or their agent, servant or employee. And such service shall be valid whether or not the acts done in Alabama shall of and within themselves constitute a complete cause of action.] The amendment applied "only to causes of action arising after the date of the enactment" and therefore has no bearing on this case.

or the secretary of state shall be advised by the postal authority that delivery of said registered mail was refused by said non-resident; and the date on which the secretary of state receives said return receipt, or advice by the postal authority that delivery of said registered mail was refused, shall be treated and considered as the date of service of process on said non-resident. The secretary of state shall make an affidavit as to the service of said process on him, and as to his mailing a copy of the same and notice of such service to the non-resident, and as to the receipt of said return receipt, or advice of the refusal of said registered mail, and the respective dates thereof, and shall attach said affidavit, return receipt, or advice from the postal authority, to a copy of the process and shall return the same to the clerk or register who issued the same, and all of the same shall be filed in the cause by the clerk or register. The party to a cause filed or pending, or his agent or attorney, desiring to obtain service upon a non-resident under the provisions of this section shall make and file in the cause, an affidavit stating facts showing that this section is applicable, and stating the residence and last known post-office address of the non-resident, and the clerk or register of the court in which the action is filed shall attach a copy of the affidavit to the writ or process, and a copy of the affidavit to each copy of the writ or process, and forward the original writ or process and three copies thereof to the sheriff of Montgomery county for service on the secretary of state and it shall be the duty of the sheriff to serve the same on the secretary of state and to make due return of such service. The court in which the cause is pending may order such continuance of the cause as may be necessary to afford the defendant or defendants reasonable opportunity to make defense. Any person who was a resident of this state at the time of the doing of business, or performing work or service in this state, but who is a non-resident at the time of the pendency of a cause involving the doing of said business or performance of said work or service, and any corporation which was qualified to do business in this state at the time of doing business herein and which is not qualified at the time of the pendency of a cause involving the doing of such

business, shall be deemed a non-resident within the meaning of this section, and service of process under such circumstances may be had as herein provided.

The secretary of state of the state of Alabama, or his successor in office, may give such non-resident defendant notice of such service upon the secretary of state of the state of Alabama in lieu of the notice of service hereinabove provided to be given, by registered mail, in the following manner: By causing or having a notice of such service and a copy of the process served upon such non-resident defendant, if found within the state of Alabama, by any officer duly qualified to serve legal process within the state of Alabama, or if such non-resident defendant is found without the state of Alabama, by a sheriff, deputy sheriff, or United States marshal, or deputy United States marshal, or any duly constituted public officer qualified to serve like process in the state of the jurisdiction where such non-resident defendant is found; and the officer's return showing such service and when and where made, which shall be under oath, shall be filed in the office of the clerk or register of the court wherein such action is pending.

Service of summons when obtained upon any such non-resident as above provided for the service of process herein shall be deemed sufficient service of summons and process to give to any of the courts of this state jurisdiction over the cause of action and over such non-resident defendant, or defendants, and shall warrant and authorize personal judgment against such non-resident defendant, or defendants, in the event that the plaintiff prevails in the action.

The secretary of state shall refuse to receive and file or serve any process, pleading, or paper under this section unless three copies thereof are supplied to the secretary of state and a fee of three dollars is paid to the secretary of state; and no service shall be perfected hereunder unless there is on file in the office of the secretary of state a certificate or statement under oath by the plaintiff or his attorney that the provisions of this section are applicable to the case. (1949, p. 154, §§ 1, 2, appvd. June 23, 1949; 1951, p. 976, appvd. Aug. 28, 1951; 1953, p. 347, § 1, appvd. Aug. 5, 1953.)

APPENDIX B

APPENDIX B

The Decisions Below

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

SPECIAL TERM, 1962

3 Div. 961

THE NEW YORK TIMES COMPANY,
A Corporation,

v.

L. B. SULLIVAN,

Appeal from Montgomery Circuit Court.

HARWOOD, *Justice*

This is an appeal from a judgment in the amount of $500,000.00 awarded as damages in a libel suit. The plaintiff below was L. B. Sullivan, a member of the Board of Commissioners of the City of Montgomery, where he served as Police Commissioner. The defendants below were The New York Times, a corporation, and four individuals, Ralph D. Abernathy, Fred L. Shuttlesworth, S. S. Seay, Sr., and J. E. Lowery.

Service of the complaint upon The New York Times was by personal service upon Dan McKee as an agent of the defendant, and also by publication pursuant to the provisions of Sec. 199(1) of Tit. 7, Code of Alabama 1940.

The Times moved to quash service upon it upon the grounds that McKee was not its agent, and The Times, a foreign corporation, was not doing business in Alabama, and that service under Sec. 199(1) was improper, and to sustain either of the services upon it would be unconstitutional.

After hearing upon the motion to quash, the lower court denied such motion.

In this connection the plaintiff presented evidence tending to show The Times gathers news from national press services, from its staff correspondents, and from string correspondents, sometimes called "stringers."

The Times maintained a staff correspondent in Atlanta, Claude Sitton, who covered eleven southern states, including Alabama.

During the period from 1956 through April 1960, regular staff correspondents of The Times spent 153 days in Alabama to gather news articles for submission to The Times. Forty-nine staff news articles so gathered were introduced in evidence.

Sitton himself was assigned to cover in Alabama, at various times, the so-called "demonstrations," the hearings of the Civil Rights Commission in Montgomery, and proceedings in the United States District Court in Montgomery. During his work in Alabama, he also conducted investigations and interviews in such places as Clayton and Union Springs. On some of his visits to Alabama, Sitton would stay as long as a week or ten days.

In May of 1960, he came to Alabama for the purpose of covering the Martin Luther King trial. After his arrival in Montgomery, he "understood" an attempt would be made to serve him. He contacted Mr. Roderick McLeod, Jr., an attorney representing The Times, and was advised to leave Alabama. Shortly after this he called McKee, the "stringer" in Montgomery, and talked generally about the King trial with him.

In addition, The Times made an active effort to keep a resident "stringer" in Montgomery at all times, and as a matter of policy wanted to have three "stringers" in Alabama at all times.

The work of "stringers" was outlined by Sitton as follows: "When The Times feels there is a news story of note going on in an area where a particular stringer lives, * * * The Times calls on a stringer for a story."

"Stringers" fill out blank cards required by The Times, which refer to them as "our correspondents." Detailed instructions are also given to "stringers" by The Times.

"Stringers" also on occasions initiate stories to The Times by telephone recordation. If these stories were not accepted, The Times pays the telephone tolls.

A "stringer" is usually employed by another newspaper, or news agency and is called upon for stories occasionally, or offers stories upon his own. A "stringer" is paid at about the rate of a penny a word. No deductions are made from these payments for such things as income tax, social security, insurance contributions, etc., and "stringers" are not carried on the payroll of The Times. Up to July 26 for the year 1960, The Times had paid Chadwick, the "stringer" in Birmingham, $135.00 for stories accepted, and paid McKee $90.00.

It further appears that upon receipt of a letter from the plaintiff Sullivan demanding a retraction and apology for the statements appearing in the advertisement, which is the basis of this suit, the general counsel of The Times in New York requested the Assistant Managing Editor of The Times to have an investigation made of the correctness of the facts set forth in the advertisement in question. The Times thereupon communicated with McKee and asked for a report. After his investigation, McKee sent a lengthy wire to The Times setting forth facts which demonstrated with clarity the utter falsity of the allegations contained in the advertisement. McKee was also paid $25.00 by The Times for help given Harrison Salisbury, a staff correspondent of The Times when he was in Alabama on an assignment in the spring of 1960.

The Times also has a news service and sells to other papers stories sent it by its staff correspondents, "stringers," and local reporters. In this connection the lower court observed:

> "Obviously, The Times considered the news gathering activities of these staff correspondents and 'stringers' a valuable and unique complement to the news

gathering facilities of the Associated Press and other wire services of which The Times is a member. The stories of the 'stringers' appear under the 'slug' 'Special to The New York Times,' and there were 59 such 'specials' in the period from January 1, 1956, through April of 1960."

ADVERTISING

About three quarters of the revenue of The Times comes from advertisements. In 1956, The New York Times Sales, Inc., was set up. This is a wholly owned subsidiary of The Times and its sole function is to solicit advertising for The Times only.

All of the officials of "Sales" are also officials of The Times.

Two solicitors for "Sales," as well as two employees of The Times have at various times come into Alabama seeking advertising for The Times. Between July 1959 and June 3, 1960, one representative spent over a week in this State, another spent a week and a third spent three days. Advertising business was solicited in Birmingham, Montgomery, Mobile, and Selma. Between January 1, 1960 and May 1960, inclusive, approximately seventeen to eighteen thousand dollars worth of advertising was thus sold in Alabama, while in the period of 1956 through April 1960, revenues of $26,801.64 were realized by The Times from Alabama advertisers.

CIRCULATION

The Times sends about 390 daily, and 2,500 Sunday editions into Alabama.

Shipments are made by mail, rail, and air, with transportation charges being prepaid by The Times. Dealers are charged for the papers.

Credit is given for unsold papers and any loss in transit is paid by The Times.

Claims for losses are handled by baggagemen in Alabama, and The Times furnishes claim cards to dealers who

bring them to the baggagemen, The Times paying for losses or incomplete copies upon substantiation by the local Alabama baggagemen.

Account cards of various Alabama Times dealers show that credit was thus given for unsold merchandise.

We are here confronted with the question of in personam jurisdiction acquired by service upon an alleged representative of a foreign corporation.

The severe limitations of the doctrine of *Bank of Augusta* v. *Earle* (1839) 13 Pet. (U. S.) 519, that a corporation "must dwell in the place of its creation, and cannot migrate to another sovereignty," proving unsatisfactory, the courts, by resort to fictions of "presence," "consent," and "doing business," attempted to find answers compatible with social and economic needs. Until comparatively recent years these bases of jurisdictions have tended only to confuse rather than clarify, leading the late Judge Learned Hand to remark that it was impossible to determine any established rule, but that "we must step from tuft to tuft across the morass." *Hutchinson* v. *Chase and Gilbert,* (2nd Cir.) 45 F. 2d 139.

In *Pennoyer* v. *Neff,* 95 U. S. 714, the court held that the Fourteenth Amendment to the Federal Constitution required a relationship between the State and the person upon whom the State seeks to exercise personal jurisdiction, and there must be a reasonable notification to the person upon whom the State seeks to exercise its jurisdiction. The required relationship between the State and the person was held to be presence within the State, and as a corollary, no state could "extend its process beyond that territory so as to subject either persons or property to its decisions."

In *Hess* v. *Pawloski,* 274 U. S. 352 (1927), the United States Supreme Court sustained the validity of a nonresident motorist statute which provided that the mere act of driving an automobile in a state should be deemed an appointment of a named state official as agent to receive service in a suit arising out of the operation of the motor

vehicle on the highway of such State. The dangerous nature of a motor vehicle was deemed to justify the statute as a reasonable exercise of police power to preserve the safety of the citizens of the state, and the consent for service exacted by the State for use of its highways was reasonable.

In 1935 the same reasoning was applied in upholding a state statute permitting service on an agent of a non-resident individual engaged in the sale of corporate securities in the state in claims arising out of such business. *Henry L. Doherty and Co.* v. *Goodman,* 294 U. S. 623.

Corporations being mere legal entities and incapable of having physical presence as such in a foreign state, and its agents being limited by the scope of their employment, neither the "presence" theory nor the "consent" theory could satisfactorily be applied as a basis for personal jurisdiction.

As to personal jurisdiction over non-resident corporations, the rule therefore evolved that such jurisdiction could be based upon the act of such corporations "doing business" in a state, though echoes of the "presence" and "consent" doctrines may be found in some decisions purportedly applying the "doing business" doctrine in suits against foreign corporations. See *Green* v. *Chicago Burlington and Quincy Ry.,* 205 U. S. 530, when "presence" of a corporation was found to exist from business done in a state, and *Old Wayne Mutual Life Ass'n. of Indianapolis* v. *McDonough,* 204 U. S. 8, where implied consent to jurisdiction was said to arise from business done in the state of the forum.

The term "doing business" carries no inherent criteria. It is a concept dependent upon each court's reaction to facts. These reactions were varied, and the conflicting decisions evoked the observation of Judge Learned Hand, then fully justified, but no longer apt since the "morass" has been considerably firmed up by subsequent decisions of the United States Supreme Court.

In *International Shoe Co.* v. *State of Washington, et al.,* 326 U. S. 310, the old bases of personal jurisdiction were recast, the court saying:

> "To say that the corporation is so far 'present' there as to satisfy due process requirements . . . is to beg the question to be decided. For the terms 'present' or 'presence' are used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process . . . Those demands may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there. An 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business is relevant in this connection."

That the new test enunciated is dependent upon the degree of contacts and activities exercised in the forum state is made clear, the court saying:

> ". . . due process requires only that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "

In accord with the above doctrine is our case of *Boyd* v. *Warren Paint and Color Co.,* 254 Ala. 687, 49 So. 2d 559.

In 1957 the United States Supreme Court handed down its opinion in *McGee* v. *International Life Insurance Co.,* 355 U. S. 220. This case involved the validity of a California judgment rendered in a proceeding where service was had upon the defendant company by registered mail addressed to the respondent at its principal place of business in Texas. A California statute subjecting foreign corporations to suit in California on insurance contracts with California residents even though such corporations could not be served with process within its borders.

The facts show that petitioner's son, a resident of California, bought a life insurance policy from an Arizona corporation, naming petitioner as beneficiary. Later, respondent, a Texas corporation, agreed to assume the insurance obligations of the Arizona company, and mailed a re-insurance certificate to the son in California, offering to insure him in accordance with his policy. He accepted the offer and paid premiums by mail from California to the company's office in Texas. Neither corporation ever had any office in California, nor any agent therein, nor had solicited or done any other business in that state. Petitioner sent proofs of her son's death to respondent, but it refused to pay the claim.

The Texas court refused to enforce the California judgment holding it void under the Fourteenth Amendment because of lack of valid service. *McGee* v. *International Life Insurance Company,* 288 S. W. 2d 579.

In reversing the Texas court, the United States Supreme Court wrote:

> "Since *Pennoyer* v. *Neff,* 95 U. S. 714, this Court has held that the Due Process Clause of the Fourteenth Amendment places some limit on the power of state courts to enter binding judgments against persons not served with process within their boundaries. But just where this line of limitation falls has been the subject of prolific controversy, particularly with respect to foreign corporations. In a continuing process of evolution this Court accepted and then abandoned 'consent,' 'doing business,' and 'presence' as the standard for measuring the extent of state judicial power over such corporations. See Henderson, The Position of Foreign Corporations in American Constitutional Law, c. V. More recently in *International Shoe Co.* v. *Washington,* 326 U. S. 310, the Court decided that 'due process requires only that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' *Id.,* at 316.

> "Looking back over this long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity."

Under the above and more recent doctrines, we are clear to the conclusion that the activities of The New York Times, as heretofore set out, are amply sufficient to more than meet the minimal standards required for service upon its representative McKee.

The adjective "string" in McKee's designation is redundant, and in no wise lessens his status as a correspondent and agent of The New York Times in Alabama. Justice demands that Alabama be permitted to protect its citizens from tortious libels, the effects of such libels certainly occurring to a substantial degree in this State.

SUBSTITUTED SERVICE

By Act No. 282, approved 5 August 1953 (Acts of Alabama, Reg. Sess. 1953, page 347) amending a prior Act of 1949, it was provided that any non-resident person, firm, partnership or corporation, not qualified to do business in this State, who shall do any business or perform any character of work or service in this State shall by so doing, be deemed to have appointed the Secretary of State to be his lawful attorney or agent of such non-resident, upon whom process may be served in any action accruing from the acts in this State, or incident thereto, by any non-resident, or his or its agent, servant or employee.

The act further provides that service of process may be made by service of three copies of the process on the Secretary of State, and such service shall be sufficient service upon the non-resident, provided that notice of such service and a copy of the process are forthwith sent by registered mail by the Secretary of State to the defendant, at his last known address, which shall be stated in the affidavit of the plaintiff, said matter so mailed shall be marked "Deliver to Addressee Only" and "Return Receipt Requested," and provided further that such return receipt shall be received by the Secretary of State purporting to have been signed by the said non-resident.

It is further provided in the Act that any party desiring to obtain service under the Act shall make and file in the cause an affidavit stating facts showing that this Act is applicable.

A mere reading of the above Act demonstrates the sufficiency of the provisions for notice to the non-resident defendant, and that service under the provisions of the Act fully meet the requirements of due process.

Counsel for appellant argues however that the service attempted under Act 282, *supra,* is defective in two aspects. First, that the affidavit accompanying the complaint is conclusionary and does not show facts bringing the Act into operation, and second, that the Act complained of did not accrue from acts done in Alabama.

The affidavit filed by the plaintiff avers that the defendant "* * * has actually done and is doing business or performing work or services in the State of Alabama; that this cause of action has arisen out of the doing of such business or as an incident thereof by said defendant in the State of Alabama."

The affidavit does state facts essential to the invocation of Act 282, *supra.* We do not think the legislative purpose in requiring the affidavit was to require a detailed *quo modo* of the business done, but rather was to furnish the Secretary of State with information sufficient upon which to perform the duties imposed upon that official. The ultimate determination of whether the non-resident has done busi-

ness or performed work or services in this State, and whether the cause of action accrues from such acts, is judicial, and not ministerial, as demonstrated by appellant's motion to quash.

As to appellant's second contention that the cause did not accrue from any acts of The Times in Alabama, it is our conclusion that this contention is without merit.

Equally applicable to newspaper publishing are the observations made in *Consolidated Cosmetics* v. *D-A Pub. Co., Inc., et al.,* 186 F. 2d 906 at 908, relative to the functions of a magazine publishing company:

> "The functions of a magazine publishing company, obviously, include gathering material to be printed, obtaining advertisers and subscribers, printing, selling and delivering the magazines for sale. Each of these, we think, constitutes an essential factor of the magazine publication business. Consequently if a non-resident corporation sees fit to perform any one of those essential functions in a given jurisdiction, it necessarily follows that it is conducting its activities in such a manner as to be subject to jurisdiction."

It is clear under our decisions that when a non-resident prints a libel beyond the boundaries of the State, and distributes and publishes the libel in Alabama, a cause of action arises in Alabama, as well as in the State of the printing or publishing of the libel. *Johnson Publishing Co.* v. *Davis,* 271 Ala. 474, 124 So. 2d 441; *Weir* v. *Brotherhood of Railroad Trainmen,* 221 Ala. 494, 129 So. 267; *Bridwell* v. *Brotherhood of Railroad Trainmen,* 227 Ala. 443, 150 So. 338; *Collins* v. *Brotherhood of Railroad Trainmen,* 226 Ala. 659, 148 So. 133.

The scope of substituted service is as broad as the permissible limits of due process. *Boyd* v. *Warren Paint & Color Co.,* 254 Ala. 687, 49 So. 2d 559; *Ex parte Emerson,* 270 Ala. 697, 121 So. 2d 914.

The evidence shows that The Times sent its papers into Alabama with its carrier as its agent, freight prepaid, with title passing on delivery to the consignee. See Tit. 57, Sec.

25, Code of Alabama 1940; *2 Williston on Sales,* Sec. 279(b), p. 90. Thence the issue went to newsstands for sale to the public in Alabama, in accordance with a long standing business practice.

The Times or its wholly owned advertising subsidiary, on several occasions, had agents in Alabama for substantial periods of time soliciting, and procuring in substantial amounts advertising to appear in The Times.

Furthermore, upon the receipt of the letter from the plaintiff demanding a retraction of the matter appearing in the advertisement, The Times had its string correspondent in Montgomery, Mr. McKee, investigate the truthfulness of the assertions in the advertisement. The fact that McKee was not devoting his full time to the service of The Times is "without constitutional significance." *Scripto Inc.* v. *Carson, Sheriff, et al.,* 362 U. S. 207.

In *WSAZ, Inc.* v. *Lyons,* 254 F. 2d 242 (6th Cir.), the defendant television corporation was located in West Virginia. Its broadcasts covered several counties in Kentucky, and the defendant contracted for advertising in the Kentucky counties, all contracts for such advertising being sent to the corporation in West Virginia for acceptance.

The alleged libel sued upon occurred during a news broadcast.

Service was obtained by serving the Kentucky Secretary of State under the provisions of a Kentucky statute providing for such service upon a foreign corporation doing business in Kentucky where the action arose out of or was "connected" with the business done by such corporation in Kentucky.

In sustaining the judgment awarded the plaintiff, the court wrote in connection with the validity of the service to support the judgment:

> "All that is necessary here is that the cause of action asserted shall be 'connected' with the business done. Defendant asserts that the alleged libel has no connection with its business done in Kentucky. But in view of its admission that its usual business was the

business of telecasting and that this included news programs, and in view of the undisputed fact that the alleged libel was part of news programs regularly broadcast by defendant, this contention has no merit.

"The question of due process would seem to be settled by the case of *McGee* v. *International Life Insurance Co.* (citation), as well as by *International Shoe Co.* v. *State of Washington,* supra. While defendant was not present in the territory of the forum, it certainly had substantial contacts with it. It sought and executed contracts for the sale of advertising service to be performed and actually performed by its own act within the territory of the forum. We conclude that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'."

In the present case the evidence shows that the publishing of advertisements was a substantial part of the business of The Times, and its newspapers were regularly sent into Alabama. Advertising was solicited in Alabama. Its correspondent McKee was called upon by The Times to investigate the truthfulness or falsity of the matters contained in the advertisement after the letter from the plaintiff. The acts therefore disclose not only certain general conditions with reference to newspaper publishing, but also specific acts directly connected with, and directly incident to the business of The Times done in Alabama.

The service acquired under the provisions of Act No. 282, *supra,* was valid.

GENERAL APPEARANCE BY THE TIMES

The trial court also found that The Times, by including as a ground of the prayer in its motion to quash, the following, "* * * that this court dismiss this action as to The New York Times Company, A Corporation, for lack of jurisdiction of the subject matter of said action * * *" did thereby go beyond the question of jurisdiction over the corporate person of The Times, and made a general appearance, thereby waiving any defects in service of process, and

thus submitted its corporate person to the jurisdiction of the court.

The conclusions of the trial court in this aspect are in accord with the doctrines of a majority of our sister states, and the doctrines of our own decisions.

Pleadings based upon lack of jurisdiction of the person are in their nature pleas in abatement, and find no special favor in the law. They are purely dilatory and amount to no more than a declaration by a defendant that he is in court in a proper action, after actual notice, but because of a defect in service, he is not legally before the court. See *Olcese* v. *Justice's Court,* 156 Cal. 82, 103 P. 317.

In *Roberts* v. *Superior Court,* 30 Cal. App. 714, 159 P. 465, the court observed:

> "The motion to dismiss the complaint on the ground that the court was without jurisdiction of the subject-matter of the action amounted, substantially or in legal effect, to a demurrer to the complaint on that ground. At all events, a motion to dismiss on the ground of want of jurisdiction of the subject-matter of the action necessarily calls for relief which may be demanded only by a party to the record. It has been uniformly so held, as logically it could not otherwise be held, and, furthermore, that where a party appears and asks for such relief, although expressly characterizing his appearance as special and for the special purpose of objecting to the jurisdiction of the court over his person, he as effectually submits himself to the jurisdiction of the court as though he had legally been served with process."

The reason dicting such conclusion is stated by the Supreme Court of North Carolina, in *Dailey Motor Co.* v. *Reaves,* 184 N. C., 260, 114 S. E. 175, to be:

> "Any course that, in substance, is the equivalent of an effort by the defendants to try the matter and obtain a judgment on the merits, in any material aspect of the case, while standing just outside the threshold of the court, cannot be permitted to avail them. A party will not be allowed to occupy so ambiguous a

position. He cannot deny the authority of the court to take cognizance of his action for want of jurisdiction of the person or proceeding, and at the same time seek a judgment in his favor on the ground that there is no jurisdiction of the cause of action.

* * * * *

"We might cite cases and authorities indefinitely to the same purpose and effect, but those to which we have briefly referred will suffice to show how firmly and unquestionably it is established, that it is not only dangerous, but fatal to couple with a demurrer, or other form of objection based on the ground that the court does not have jurisdiction of the person, an objection in the form of a demurrer, answer, or otherwise, which substantially pleads to the merits, and, as we have seen, such an objection is presented when the defendant unites with his demurrer for lack of jurisdiction of the person a cause of demurrer for want of jurisdiction of the cause or subject of the action, and that is exactly what was done in this case."

We will not excerpt further from the decisions from other jurisdictions in accord with the doctrine of the above cases, but point out that innumerable authorities from a large number of states may be found set forth in an annotation to be found in 25 A. L. R. 2d, pages 838 through 842.

In *Thompson* v. *Wilson,* 224 Ala. 299, 140 So. 439, this court stated:

"If there was a general appearance made in this case, the lower court had jurisdiction of the person of the appellant. (Authorities cited.)

"The filing of a demurrer, unless based solely on the ground of lack of jurisdiction of the person, constitutes a general appearance."

Again, in *Blankenship* v. *Blankenship,* 263 Ala. 297, 82 So. 2d 335, the court reiterated the above doctrine.

Thus the doctrine of our cases is in accord with that of a majority of our sister states that despite an allegation in a special appearance that it is for the sole purpose of ques-

tioning the jurisdiction of the court, if matters going beyond the question of jurisdiction of the person are set forth, then the appearance is deemed general, and defects in the service are to be deemed waived.

We deem the lower court's conclusions correct, that The Times, by questioning the jurisdiction of the lower court over the subject matter of this suit, made a general appearance, and thereby submitted itself to the jurisdiction of the lower court.

Appellant's assignment No. 9 is to the effect that the lower court erred in overruling defendant's demurrers as last amended to plaintiff's complaint.

The defendant's demurrers contain a large number of grounds, and the argument of the appellant is directed toward the propositions that:

1. As a matter of law, the advertisement was not published of and concerning the plaintiff, as appears in the face of the complaint.

2. The publication was not libelous per se.

3. The complaint was defective in failing to allege special damages.

4. The complaint was defective in failing to allege facts or innuendo showing how plaintiff claimed the article had defamed him.

5. The complaint was bad because it stated two causes of action.

Both counts of the complaint aver among other things that "* * * defendants falsely and maliciously published in the City of New York, State of New York, and in the City of Montgomery, Alabama, and throughout the State of Alabama, of and concerning the plaintiff, in a paper entitled The New York Times, in the issue of March 29, 1960, on page 25, in an advertisement entitled 'Heed Their Rising Voices' (a copy of said advertisement being attached hereto and made a part hereof as Exhibit 'A'), false and defamatory matter or charges reflecting upon the conduct of the plaintiff as a member of the Board of Commissioners of the

City of Montgomery, Alabama, and imputing improper conduct to him, and subjecting him to public contempt, ridicule and shame, and prejudicing the plaintiff in his office, profession, trade or business, with an intent to defame the plaintiff, and particularly the following false and defamatory matter contained therein:

> 'In Montgomery, Alabama, after students sang "My Country 'Tis of Thee" on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission.
>
> * * * * *
>
> 'Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for "speeding," "loitering," and similar "offenses." And now they have charged him with "perjury"—a *felony* under which they could imprison him for *ten years.*' "

Where the words published tend to injure a person libeled by them in his reputation, profession, trade or business, or charge him with an indictable offense, or tends to bring the individual into public contempt are libelous per se. *White* v. *Birmingham Post Co.,* 233 Ala. 547, 172 So. 649; *Iron Age Pub. Co.* v. *Crudup,* 85 Ala. 519, 5 So. 332.

Further, "the publication is not to be measured by its effects when subjected to the critical analysis of a trained legal mind, but must be construed and determined by its natural and probable effect upon the mind of the average reader." *White* v. *Birmingham Post Co., supra.*

We hold that the matter complained of is, under the above doctrine, libelous per se, if it was published of and concerning the plaintiff.

In "Dangerous Words—A Guide to the Law of Libel," by Philip Wittenberg, we find the following observations, at pages 227 and 228:

> "There are groupings which may be finite enough so that a description of the body is a description of the members. Here the problem is merely one of evaluation. Is the description of the member implicit in the description of the body, or is there a possibility that a description of the body may consist of a variety of persons, those included within the charge, and those excluded from it?
>
> * * * * *
>
> "The groupings in society today are innumerable and varied. Chances of recovery for libel of the members of such groups diminish with increasing size, and increase as the class or group decreases. Whenever a class decreases so that the individuals become obvious, they may recover for a libel descriptive of the group. In cases where the group is such that it is definite in number; where its composition is easily recognizable and the forms of its organization are apparent, then recognition of individuals libeled by group defamation becomes clear."

The same principle is aptly stated in *Gross* v. *Cantor,* 270 N. Y. 93, as follows:

> "An action for defamation lies only in case the defendant has published the matter 'of and concerning the plaintiff.' . . . Consequently an impersonal reproach of an indeterminate class is not actionable. . . . 'But if the words may by any reasonable application, import a charge against several individuals, under some general description or general name, the plaintiff has the right to go on to trial, and it is for the jury to decide whether the charge has the personal application averred by the plaintiff.'
>
> "We cannot go beyond the face of this complaint. It does not there appear that the publication was so scattered a generality or described so large a class as such that no one could have been personally injured

> by it. Perhaps the plaintiff will be able to satisfy a jury of the reality of his position that the article was directed at him as an individual and did not miss the mark."

And in *Wofford* v. *Meeks,* 129 Ala. 349, 30 So. 625, we find this court saying:

> "Mr. Freeman, in his note to case of *Jones* v. *The State,* 70 Am. St. Rep. 756, after reviewing the cases, says: 'We apprehend the true rule is that, although the libelous publication is directed against a particular class of persons or a group, yet any one of that class or group may maintain an action upon showing that the words apply especially to him.' And, further, he cites the cases approvingly which hold that each of the persons composing the class may maintain the action. We think this the correct doctrine, and it is certainly supported by the great weight of authority.—13 Am. & Eng. Ency. Law, 392 and note 1; *Hardy* v. *Williamson,* 86 Ga. 551; s. c. 22 Am. St. Rep. 479."

We judicially know that the City of Montgomery operates under a commission form of government. (See Act 20, Gen. Acts of Alabama 1931, page 30.) We further judicially know that under the provisions of Sec. 51, Tit. 37, Code of Alabama 1940, that under this form of municipal government the executive and administrative powers are distributed into departments of (1) public health and public safety, (2) streets, parks and public property and improvements, and, (3) accounts, finances, and public affairs; and that the assignments of the commissioners may be changed at any time by a majority of the board.

The appellant contends that the word "police" encompasses too broad a group to permit the conclusion that the statement in the advertisement was of and concerning the plaintiff since he was not mentioned by name.

We think it common knowledge that the average person knows that municipal agents, such as police and firemen, and others, are under the control and direction of the city governing body, and more particularly under the direction

and control of a single commissioner. In measuring the performance or deficiencies of such groups, praise or criticism is usually attached to the official in complete control of the body. Such common knowledge and belief has its origin in established legal patterns as illustrated by Sec. 51, *supra.*

In *De Hoyos* v. *Thornton,* 259 N. Y. App. Div. 1, a resident of Monticello, New York, a town of 4,000 population, had published in a local newspaper an article in which she stated that a proposed acquisition of certain property by the municipality was "another scheme to bleed the taxpayers and force more families to lose their homes. * * * It seems to me it might be better to relieve the tension on the taxpayers right now and get ready for the golden age * * * and not be dictated to by gangsters and Chambers of Commerce."

The mayor and the three trustees of Monticello brought libel actions. The court originally considering the complaint dismissed the actions on the grounds that the plaintiffs were not mentioned in the article, and their connection with the municipality was not stated in the complaint. In reversing this decision the Appellate Division of the Supreme Court wrote: "There is no room for doubt as to who were the targets of her attack. Their identity is as clear to local readers from the article as if they were mentioned by name."

The court did not err in overruling the demurrer in the aspect that the libelous matter was not of and concerning the plaintiffs.

The advertisement being libelous per se, it was not necessary to allege special damages in the complaint. *Iron Age Pub. Co.* v. *Crudup,* 85 Ala. 519, 5 So. 332.

Where, as in this case, the matter published is libelous per se, then the complaint may be very simple and brief (*Penry* v. *Dozier,* 161 Ala. 292, 49 So. 909), and there is no need to set forth innuendo. *White* v. *Birmingham Post Co.,* 233 Ala. 547, 172 So. 649. Further, a complaint in all respects similar to the present was considered sufficient in

our recent case of *Johnson Publishing Co.* v. *Davis,* 271 Ala. 474, 124 So. 2d 441.

The *Johnson* case, *supra,* is also to the effect that where a newspaper publishes a libel in New York, and by distribution of the paper further publishes the libel in Alabama, a cause of action arises in Alabama, as well as in New York, and that the doctrine of *Age-Herald Pub. Co.* v. *Huddleston,* 207 Ala. 40, 92 So. 193, concerned venue, and venue statutes do not apply to a foreign corporation not qualified to do business in Alabama.

In view of the principles above set forth, we hold that the lower court did not err in overruling the demurrer to the complaint in the aspects contended for and argued in appellant's brief.

Assignments of error Nos. 14, 15, 16 and 17, relate to the court's refusal to permit certain questions to be put to the venire in qualifying the jurors.

The appellant contends that The Times was unlawfully deprived of its right to question the jury venire to ascertain the existence of bias or prejudice. The trial court refused to allow four questions which were in effect, (1) Do you have any conviction, opinion or pre-disposition which would compel you to render a verdict against The Times? (2) Have any of you been plaintiffs in litigation in this court? (3) If there is no evidence of malice, would you refuse to punish The Times? (4) Is there any reason which would cause you to hesitate to return a verdict in favor of The Times?

The prospective jurors had already indicated that they were unacquainted with any of the facts in the case, that they had not discussed the case with anyone nor had it been discussed in their presence nor were they familiar in any manner with the contentions of the parties. Appellant was permitted to propound at some length other questions designed to determine whether there was any opinion or predisposition which would influence the juror's judgment. The jurors indicated that there was no reason whatsoever which would cause them to hesitate to return a verdict for The Times.

Sec. 52, Tit. 30 Code of Alabama 1940, gives the parties a broad right to interrogate jurors as to interest or bias. This right is limited by propriety and pertinence. It is exercised within the sound discretion of the trial court. We cannot say that this discretion has been abused where similar questions have already been answered by the prospective jurors. *Dyer* v. *State,* 241 Ala. 679, 4 So. 2d 311.

Only the second question could have conceivably revealed anything which was not already brought out by appellant's interrogation of the prospective jurors. Considering the completeness of the qualification and the remoteness of the second question, the exclusion of that inquiry by the trial court will not be regarded as an abuse of discretion. *Noah* v. *State,* 38 Ala. App. 531, 89 So. 2d 231.

Appellant contends that without the right to adequately question the prospective jurors, a defendant cannot adequately ensure that his case is being tried before a jury which meets the federal constitutional standards laid down in such decisions as *Irvin* v. *Dowd,* 366 U. S. 717. It is sufficient to say that the jurors who tried this case were asked repeatedly, and in various forms, by counsel for The Times about their impartiality in every reasonable manner.

Appellant's assignment of error 306 pertains to the refusal of requested charge T. 22, which was affirmative in nature.

It is appellant's contention that refusal of said charge contravenes Amendment One of the United States Constitution and results in an improper restraint of freedom of the press, and further, that refusal of said charge is violative of the Fourteenth Amendment of the federal constitution.

In argument in support of this assignment, counsel for appellant asserts that the advertisement was only an appeal for support of King and "thousands of Southern Negro students" said to be "engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U. S. Constitution and the Bill of Rights."

The fallacy of such argument is that it overlooks the libelous portions of the advertisement which are the very crux of this suit.

The First Amendment of the U. S. Constitution does not protect libelous publications. *Near* v. *Minnesota,* 283 U. S. 697; *Konigsberg* v. *State Bar of California,* 366 U. S. 36; *Times Film Corporation* v. *City of Chicago,* 365 U. S. 43; *Chaplinsky* v. *New Hampshire,* 315 U. S. 568; *Beauharnais* v. *Illinois,* 343 U. S. 250.

The Fourteenth Amendment is directed against State action and not private action. *Collins* v. *Hardyman,* 341 U. S. 651.

Assignment of error No. 306 is without merit.

Appellant's assignment of error No. 94 also pertains to the court's refusal of its requested charge T. 22.

Appellant's argument under this assignment asserts it was entitled to have charge T. 22 given because of the plaintiff's failure to plead or prove special damages.

In libel action, where the words are actionable per se, the complaint need not specify damages (*Johnson* v. *Robertson,* 8 Port. 486), nor is proof of pecuniary injury required, such injury being implied. *Johnson Publishing Co.* v. *Davis, supra.*

Assignments 18, 19, 21, 23, 25, 27, 30, and 32, relate to the action of the court in overruling defendant's objections to questions propounded to six witnesses presented by the plaintiff as to whether they associated the statements in the advertisement with the plaintiff. All of the witnesses answered such questions in such manner as to indicate that they did so associate the advertisement.

Without such evidence the plaintiff's cause would of necessity fall, for that the libel was of or concerning the plaintiff is the essence of plaintiff's claim.

Section 910 of Title 7, Code of Alabama 1940, pertaining to libel, among other things, provides that "* * * and if the allegation be denied, the plaintiff must prove, on the trial, the facts showing that the defamatory matter was published or spoken of him." This statute would seem to require the proof here admitted. And in *Wofford* v. *Meeks,* 129 Ala. 349, 30 So. 625, the court stated that where the

libel is against a group, any one of that group may maintain an action "upon a showing that the words apply specially to him," and in *Chandler* v. *Birmingham News Co.,* 209 Ala. 208, 95 So. 886, this court said, "Any evidence which tended to show it was not 'of and concerning the plaintiff' was material and relevant to the issue."

In *Hope* v. *Hearst Consolidated Publications,* (2nd Cir. 1961), 294 Fed. 2d 681, the court said as to the admissibility of testimony that a witness believed the defamatory matter referred to the plaintiff:

> "In this regard it appears that the New York exclusionary rule represents a distinct, if not a lone, minority voice. The vast majority of reported cases, from both American and British courts, espouse the admission of such evidence; the text writers similarly advocate its admissibility.
>
> * * * * *
>
> "The plaintiff as a necessary element in obtaining relief, would have to prove that the coercive lies were understood by customers, to be aimed at him. In cases where the plaintiff was not specifically named, the exact issue now before us would be presented."

In accord with the doctrine that the instant evidence was admissible may be cited, among other authorities *Marr* v. *Putnam Oil Co.,* (Or.), 246 P. 2d 509; *Red River Valley Pub. Co., Inc.* v. *Bridges,* (Tex. Civ. App.) 254 S. W. 2d 854; *Colbert* v. *Journal Pub. Co.* (N. M.) 142 P. 146; *Prosser* v. *Callis et al.* (Ind.) 19 N. E. 735; *Martin County Bank* v. *Day* (Minn.) 75 N. W. 1115; *Ball* v. *Evening American Pub. Co.* (Ill.) 86 N. E. 1097; *Children* v. *Shinn* (Iowa) 150 N. W. 864.

Appellant's assignments of error 22, 26, 28, 31, 33, and 34, relate to the action of the court in overruling objections to certain questions propounded to plaintiff's witnesses Blackwell, Kaminsky, Price, Parker, and White, which questions were to the effect that if the witnesses believed the matter contained in the advertisement, would they have thought less of the plaintiff.

Counsel for appellant argues that the questions "* * * inescapably carried the implication that the witness thought the ad was published of and concerning the plaintiff." Each and every one of the above named witnesses had testified previous to the instant questions, that they had associated the City Commissioners, or the plaintiff, with the advertisement upon reading it. The questions were therefore based upon the witnesses' testimony that they associated the advertisement with the plaintiff, and not merely an implication that might be read into the question.

Counsel further argues that the question is hypothetical in that none of the witnesses testified they believed the advertisement, or that they thought less of the plaintiff.

While we think such evidence of small probative value, yet it would have relevancy not only as to its effect upon the recipient, but also as to the effect such publication may reasonably have had upon other recipients. See "Defamation," 69 Harv. L. R., 877, at 884.

This aside, we cannot see that the answers elicited were probably injurious to the substantial rights of the appellant. Sup. Court Rule 45. Proof of common knowledge is without injury, though it be unnecessary to offer such proof.

Clearly we think it common knowledge that publication of matter libelous *per se* would, if believed, lessen the person concerned in the eyes of any recipient of the libel. See *Tidmore* v. *Mills,* 33 Ala. App. 243, 32 So. 2d 769, and cases cited therein.

Assignment of error No. 63 asserts error arising out of the following instance during the cross-examination of Gershon Aronson, a witness for The Times, which matter, as shown by the record, had been preceded by numerous objections, and considerable colloquy between counsel and court:

> "Q. Would you state now sir, what that word means to you; whether it has only a time meaning or whether it also to your eye and mind has a cause and effect meaning?
>
> "Mr. Embry: Now, we object to that, Your Honor. That's a question for the jury to determine—
>
> "The Court: Well, of course, it probably will be a question for the jury, but this gentleman here is a very high

official of The Times and I should think he can testify—
"Mr. Daly: I object to that, Your Honor. He isn't a high official of The Times at all—
"Mr. Embry: He is just a man that has a routine job there, Your Honor. He is not—
"The Court: Let me give you an exception to the Court's ruling.
"Mr. Embry: We except."

We do not think it can be fairly said that the record discloses a ruling by the trial court on counsel's objection to the use of the term "very high official." The ruling made by the court is palpably to the question to which the objection was interposed. Counsel interrupted the court to object to the term "very high official," and second counsel added, "He is just a man that has a routine job there, Your Honor." Apparently this explanation satisfied counsel, as the court's use of the term was not pursued to the extent of obtaining a ruling upon this aspect, and the court's ruling was upon the first, and main objection.

Mr. Aronson testified that he had been with The Times for twenty-five years, and was Assistant Manager of the Advertising Acceptability Department of The Times, and was familiar with the company's policies regarding advertising in all its aspects, that is, sales, acceptability, etc., and that advertisements of organizations and committees that express a point of view comes within the witness's particular duties.

In view of the above background of Mr. Aronson, and the state of the record immediately above referred to, we are unwilling to cast error upon the lower court in the instance brought forth under assignment No. 63.

Assignment of error No. 81 is to the effect that the lower court erred in denying appellant's motion for a new trial. Such an assignment is an indirect assignment of all of the grounds of the motion for a new trial which appellant sees fit to bring forward and specify as error in his brief.

The appellant under this assignment has sought to argue several grounds of its motion for a new trial.

Counsel, in this connection, seeks to cast error on the

lower court because of an alleged prejudicial statement made by counsel for the appellee in his argument to the jury.

The record fails to show any objections were interposed to any argument by counsel for any of the litigants during the trial. There is therefore nothing presented to us for review in this regard. *Woodward Iron Co.* v. *Earley,* 247 Ala. 556, 25 So. 2d 267, and cases therein cited.

Counsel also argues two additional grounds contained in the motion for a new trial, (1) that the appellant was deprived of due process in the trial below because of hostile articles in Montgomery newspapers, and (2) because of the presence of photographers in the courtroom and the publication of the names and pictures of the jury prior to the rendition of the verdict.

As to the first point, the appellant sought to introduce in the hearing on the motion for a new trial newspaper articles dated prior to, and during, the trial. The court refused to admit these articles.

At no time during the course of the trial below did the appellant suggest a continuance, or a change of venue, or that it did not have knowledge of said articles.

Likewise, at no time was any objection interposed to the presence of photographers in the courtroom.

Newly discovered evidence was not the basis of the motion for a new trial. This being so, the court was confined upon the hearing on the motion to matters contained in the record of the trial. *Thomason* v. *Silvey,* 123 Ala. 694, 26 So. 644; *Alabama Gas Co.* v. *Jones,* 244 Ala. 413, 13 So. 2d 873.

Assignment of error 78 pertains to an alleged error occurring in the court's oral charge.

In this connection the record shows the following:

> "Mr. Embry: We except, your Honor. We except to the oral portions of Your Honor's Charge wherein Your Honor charged on libel per se. We object to that portion of Your Honor's Charge wherein Your Honor charged as follows: 'So, as I said, if you are reasonably satisfied from the evidence before you, considered in connection with the rules of law the Court

has stated to you, you would come to consider the question of damages and, where as here, the Court has ruled the matter complained of proved to your reasonable satisfaction and aimed at the plaintiff in this case, is libelous per se then punitive damages may be awarded by the jury even though the amount of actual damages is neither found nor shown.'

"The Court: Overruled and you have an exception."

Preceding the above exception the court had instructed the jury as follows:

"Now, as stated, the defendants say that the ad complained of does not name the plaintiff, Sullivan, by name and that the ad is not published of and concerning him. . . . The plaintiff, Sullivan, as a member of the group referred to must show by the evidence to your reasonable satisfaction that the words objected to were spoken of and concerning him. The reason for this being that while any one of a class or group may maintain an action because of alleged libelous words, he must show to the reasonable satisfaction of the jury that the words he complained of apply especially to him or are published of and concerning him.

* * * * *

"So, at the very outset of your deliberations you come to this question: Were the words complained of in counts 1 and 2 of this complaint spoken of and concerning the plaintiff, Sullivan? That's the burden he has. He must show that to your reasonable satisfaction and if the evidence in this case does not reasonably satisfy you that the words published were spoken of or concerning Sullivan or that they related to him, why then of course he would not be entitled to any damages and you would not go any further."

In addition, the court gave some eleven written charges at defendant's request, instructing the jury in substance that the burden was upon the plaintiff to establish to the reasonable satisfaction of the jury that the advertisement in question was of and concerning the plaintiff, and that without such proof the plaintiff could not recover.

It is to be noted that in the portion of the complained of instructions excerpted above, the court first cautioned the jury they were to consider the evidence in connection with the rules of law stated to them. The court had previously made it crystal clear that the jury were to determine to their reasonable satisfaction from the evidence that the words were spoken of and concerning the plaintiff.

Counsel for appellant contend that because of the words "and aimed at the plaintiff in this case," the instruction would be taken by the jury as a charge that the advertisement was of and concerning the plaintiff, and hence the instruction was invasive of the province of the jury.

Removed from the full context of the court's instructions the charge complained of, because of its inept mode of expression, might be criticized as confused and misleading.

However, it is basic that a court's oral charge must be considered as a whole and the part excepted to should be considered in the light of the entire instruction. If as a whole the instructions state the law correctly, there is no reversible error even though a part of the instructions, if considered alone, might be erroneous.

Innumerable authorities enunciating the above doctrines may be found in 18 Ala. Dig., Trial, Key Nos. 295(1) through 295(11).

Specifically, in reference to portions of oral instructions that might be criticized because tending to be invasive of the province of the jury, we find the following stated in 98 C. J. S., Trial, Sec. 438, the text being amply supported by citations:

> "A charge which, taken as a whole, correctly submits the issues to the jury will not be held objectionable because certain instructions taken in their severalty, may be subject to criticism on the ground they invade the province of the jury, * * *."

To this same effect, see *Abercrombie* v. *Martin and Hoyt Co.*, 227 Ala. 510, 150 So. 497; *Choctaw Coal and Mining Co.* v. *Dodd,* 201 Ala. 622, 79 So. 54.

We have carefully read the court's entire oral instruction to the jury. It is a fair, accurate, and clear expression of the governing legal principles. In light of the entire charge we consider that the portion of the charge complained of to be inconsequential, and unlikely to have affected the jury's conclusions. We do not consider it probable that this appellant was injured in any substantial right by this alleged misleading instruction in view of the court's repeated and clear exposition of the principles involved, and the numerous written charges given at defendant's request further correctly instructing the jury in the premises.

The individual appellants, Ralph D. Abernathy, Fred L. Shuttlesworth, S. S. Seay, Sr., and J. E. Lowery have also filed briefs and arguments in their respective appeals. Many of the assignments of error in these individual appeals are governed by our discussion of the principles relating to the appeal of The Times. We therefore will now confine our review in the individual appeals to those assignments that may present questions not already covered.

In their assignment of error No. 41, the individual appellants assert that the lower court erred in its oral instructions as to ratification of the use of their names in the publication of the advertisement. The instructions of the court in this regard run for a half a page or better. The record shows that an exception was attempted in the following language:

> "Lawyer Gray: Your Honor, we except to the court's charge dealing with ratification as well as the Court's charge in connection with the advertisement being libelous per se in behalf of each of the individual defendants."

The above attempted exception was descriptive of the subject matter only, and is too indefinite to invite our review. *Birmingham Ry. Light and Power Co.* v. *Friedman,* 187 Ala. 562, 65 So. 939; *Conway* v. *Robinson,* 216 Ala. 495, 113 So. 531; *Birmingham Ry. Light and Power Co.* v. *Jackson,* 198 Ala. 378, 73 So. 627.

The refusal of a large number of charges applicable only to the individual appellants are also made the bases of numerous assignments of error. We have read all such refused charges, and each and every one is faulty.

Several of the charges instruct the jury that if the jury "find" etc., while others use the term "find from the evidence." These charges were refused without error in that the predicate for the jury's determination in a civil suit is "reasonably satisfied from the evidence." A court cannot be reversed for its refusal of charges which are not expressed in the exact and appropriate terms of the law. *W. P. Brown and Sons Lumber Co.* v. *Rattray,* 238 Ala. 406, 192 So. 851.

Others of the refused charges, not affirmative in nature, are posited on "belief," or "belief from the evidence." A judgment will not be reversed or affirmed because of the refusal, or giving, of "belief" charges. *Sovereign Camp, W.O.W.* v. *Sirten,* 234 Ala. 421, 175 So. 539; *Pan American Petroleum Co.* v. *Byars,* 228 Ala. 372, 153 So. 616; *Casino Restaurant* v. *McWhorter,* 35 Ala. App. 332, 46 So. 2d 582.

Specification of error number 6 asserts error in the court's action in refusing to sustain the individual defendant's objection to the way one of the plaintiff's counsel pronounced the word "negro." When this objection was interposed, the court instructed plaintiff's counsel to "read it just like it is," and counsel replied, "I have been pronouncing it that way all my life." The court then instructed counsel to proceed. No further objections were interposed, nor exceptions reserved.

We consider this assignment mere quibbling, and certainly nothing is presented for our review in the state of the record.

Counsel have also argued assignments to the effect that error infects this record because, (1) the courtroom was segregated during the trial below, and (2) the trial judge was not duly and legally elected because of alleged deprivation of voting rights to negroes.

Neither of the above matters were presented in the trial below, and cannot now be presented for review.

Counsel further argues that the appellants were deprived of a fair trial in that the trial judge was, by virtue of Local Act No. 118, 1939 Local Acts of Alabama, p. 66, a member of the jury commission of Montgomery County. This act is constitutional. *Reeves* v. *State,* 260 Ala. 66, 68 So. 2d 14.

Without intimating that any merit attaches to this contention, it is sufficient to point out that this point was not raised in the trial below, and must be considered as having been waived. *De Moville* v. *Merchants & Farmers Bank of Greene County,* 237 Ala. 347, 186 So. 704.

Assignments 42, 121, 122, assert error in the court's refusal to hear the individual appellant's motions for new trials, and reference in brief is made to pages 2058-2105 of the record in this connection.

These pages of the record merely show that the individual appellants filed and presented to the court their respective motions for a new trial on 2 December 1960, and the same were continued until 16 December 1960. On 16 December 1960, the respective motions were continued to 14 January 1961. No further orders in reference to the motions of the individual appellants appear in the record, and no judgment on any of the motions of the individual appellants appears in the record.

The motions of the individual appellants therefore become discontinued after 14 January 1961.

There being no judgments on the motion for a new trial of the individual appellants, and they having become discontinued, those assignments by the individual appellants attempting to raise questions as to the weight of the evidence, and the excessiveness of the damages are ineffective and present nothing for review. Such matters can be presented only by a motion for a new trial. See 2 Ala. Dig., Appeal and Error, Key Nos. 294(1) and 295, for innumerable authorities.

Other matters are argued in the briefs of the individual appellants. We conclude they are without merit and do not invite discussion, though we observe that some of the

matters attempted to be brought forward are insufficiently presented to warrant review.

EVIDENCE ON THE MERITS

The plaintiff first introduced the depositorial testimony of Harding Bancroft, secretary of The Times.

Mr. Bancroft thus testified that one John Murray brought the original of the advertisement to The Times where it was delivered to Gershon Aronson, an employee of The Times. A Thermo-fax copy of the advertisement was turned over to Vincent Redding, manager of the advertising department, and Redding approved it for insertion in The Times. The actual insertion was done pursuant to an advertising insertion order issued by the Union Advertising Service of New York City.

Redding determined that the advertisement was endorsed by a large number of people whose reputation for truth he considered good.

Numerous news stories from its correspondents, published in The Times, relating to certain events which formed the basis of the advertisement and which had been published from time to time in The Times were identified. These news stories were later introduced in evidence as exhibits.

Also introduced through this witness was a letter from A. Philip Randolph certifying that the four individual defendants had all given permission to use their names in furthering the work of the "Committee to Defend Martin Luther King and the Struggle for Freedom in the South."

Mr. Bancroft further testified that The Times received a letter from the plaintiff dated 7 April 1960, demanding a retraction of the advertisement. They replied by letter dated 15 April 1960, in which they asked Mr. Sullivan what statements in the advertisement reflected on him.

After the receipt of the letter from the plaintiff, The Times had McKee, its "string" correspondent in Montgomery, and Sitton, its staff correspondent in Atlanta, investigate the truthfulness of the allegations in the ad-

vertisement. Their lengthy telegraphic reports, introduced in evidence showed that the Alabama College officials had informed them that the statement that the dining room at the College had been padlocked to starve the students into submission was absolutely false; that all but 28 of the 1900 students had re-registered and meal service was furnished all students on the campus and was available even to those who had not registered, upon payment for the meals; that the Montgomery police entered the campus upon request of the College officials, and then only after a mob of rowdy students had threatened the negro college custodian, and after a college policeman had fired his pistol in the air several times in an effort to control the mob. The city police had merely tried to see that the orders of the Alabama College officials were not violated.

Sitton's report contained the following pertinent statements:

> "* * * Paragraph 3 of the advertisement, which begins, 'In Montgomery, Alabama, after students sang' and so forth, appears to be virtually without any foundation. The students sang the National Anthem. Never at any time did police 'ring' the campus although on three occasions they were deployed near the campus in large numbers. Probably a majority of the student body was at one time or another involved in the protest but not the 'entire student body.' I have been unable to find anyone who has heard that the campus dining room was padlocked. * * * In reference to the 6th paragraph, beginning: 'Again and again the Southern violators' and so forth, Dr. King's home was bombed during the bus boycott some four years ago. His wife and child were there but were not (repeat not) injured in any way. King says that the only assault against his person took place when he was arrested some four years ago for loitering outside a courtroom. The arresting officer twisted King's arm behind the minister's back in taking him to be booked. * * *."

These reports further show that King had been arrested only twice by the Montgomery police. Once for speeding

on which charge he was convicted and paid a $10.00 fine, and once for "loitering" on which charge he was convicted and fined $14.00, this fine being paid by the then police commissioner whom the plaintiff succeeded in office.

Mr. Bancroft further testified that upon receipt of a letter from John Patterson, Governor of Alabama, The Times retracted the advertisement as to Patterson, although in The Times' judgment no statement in the advertisement referred to John Patterson either personally or as Governor of Alabama. However, The Times felt that since Patterson held the high office of Governor of Alabama and believed that he had been libeled, they should apologize.

Grover C. Hall, Jr., Arnold D. Blackwell, William H. MacDonald, Harry W. Kaminsky, H. M. Price, Sr., William M. Parker, Jr., and Horace W. White, all residents of the city of Montgomery, as well as the plaintiff, testified over the defendant's objections that upon reading the advertisement they associated it with the plaintiff, who was Police Commissioner.

E. Y. Lacy, Lieutenant of detectives for the city of Montgomery, testified that he had investigated the bombings of King's home in 1955. This was before the plaintiff assumed office as Commissioner of Police. One bomb failed to explode, and was dismantled by Lacy. In attempting to apprehend the bombers, "The Police Department did extensive research work with overtime and extra personnel and we did everything that we knew including inviting and working with other departments throughout the country."

O. M. Strickland, a police officer of the city of Montgomery, testified that he had arrested King on the loitering charge after King had attempted to force his way into an already overcrowded courtroom, Strickland having been instructed not to admit any additional persons to the courtroom unless they had been subpoenaed as a witness. At no time did he nor anyone else assault King in any manner, and King was permitted to make his own bond and was released.

In his own behalf the plaintiff, Sullivan, testified that he first read the advertisement in the Mayor's office in Mont-

gomery. He testified that he took office as a Commissioner of the City of Montgomery in October 1959, and had occupied that position since. Mr. Sullivan testified that upon reading the advertisement he associated it with himself, and in response to a question on cross-examination, stated that he felt that he had been greatly injured by it.

Mr. Sullivan gave further testimony as to the falsity of the assertions contained in the advertisement.

For the defense, Gershon Aronson, testified that the advertisement was brought to him by John Murray and he only scanned it hurriedly before the advertisement was sent to the Advertising Acceptability Department of The New York Times. As to whether the word "they" as used in the paragraph of the advertisement charging that "Southern violaters" had bombed King's home, assaulted his person, arrested him seven times, etc., referred to the same people as "they" in the paragraph wherein it was alleged that the Alabama College students were padlocked out of their dining room in an attempt to starve them into submission and that the campus was ringed with police, armed with shotguns, tear gas, etc., Aronson first stated, "Well, it may have referred to the same people. It is rather difficult to tell" and a short while later Aronson stated, "Well, I think now it probably refers to the same people."

The Times was paid in the vicinity of $4,800 for publishing the advertisement.

D. Vincent Redding, assistant to the manager of the Advertising Acceptability Department of The Times, testified that he examined the advertisement and approved it, seeing nothing in it to cause him to believe it was false, and further he placed reliance upon the endorsers "whose reputations I had no reason to question." On cross-examination Mr. Redding testified he had not checked with any of the endorsers as to their familiarity with the events in Montgomery to determine the accuracy of their statements, nor could he say whether he had read any news accounts concerning such events which had been published in The

Times. The following is an excerpt from Mr. Redding's cross-examination:

> "Q. Now, Mr. Redding, wouldn't it be a fair statement to say that you really didn't check this ad at all for accuracy?
>
> "A. That's a fair statement, yes."

Mr. Harding Bancroft, Secretary of The Times, whose testimony taken by deposition had been introduced by the plaintiff, testified in the trial below as a witness for the defendants. His testimony is substantially in accord with that given in his deposition and we see no purpose in an additional delineation of it.

As a witness for the defense, John Murray testified that he was a writer living in New York City. He was a volunteer worker for the "Committee to Defend Martin Luther King," etc., and as such was called upon, together with two other writers, to draft the advertisement in question.

These three were given material by Bayard Rustin, the Executive Director of the Committee, as a basis for composing the advertisement. Murray stated that Rustin is a professional organizer, he guessed along the line of raising funds. Murray knew that Rustin had been affiliated with the War Resisters League, among others.

After the first proof of the advertisement was ready, Rustin called him to his office and stated he was dissatisfied with it as it did not have the kind of appeal it should have if it was to get the response in funds the Committee needed.

Rustin then stated they could add the names of the individual defendants since by virtue of their membership in the Southern Christian Leadership Conference, which supported the work of the Committee, he felt they need not consult them.

The individual defendants' names were then placed on the advertisement under the legend "We in the South who are struggling daily for dignity and freedom warmly endorse this appeal."

Murray further testified that he and Rustin rewrote the advertisement "to get money" and "to project the ad in

the most appealing form from the material we were getting."

As to the accuracy of the advertisement, Murray testified:

> "Well, that did not enter the—it did not enter into consideration at all except we took it for granted that it was accurate—we took it for granted that it was accurate—they were accurate—and if they hadn't been —I mean we would have stopped to question it—I mean we would have stopped to question it. We had every reason to believe it."

The individual defendants all testified to the effect that they had not authorized The New York Times, Philip Randolph, the "Committee to defend Martin Luther King," etc., nor any other person to place their names on the advertisement, and in fact did not see the contents of the advertisement until receipt of the letter from the plaintiff.

They all testified that after receiving the letter demanding a retraction of the advertisement they had not replied thereto, nor had they contacted any person or group concerning the advertisement or its retraction.

AMOUNT OF DAMAGES

Under assignment of error No. 81, The Times argues those grounds of its motion for a new trial asserting that the damages awarded the plaintiff are excessive, and the result of bias, passion, and prejudice.

In *Johnson Publishing Co.* v. *Davis, supra,* Justice Stakely in a rather definitive discussion of a court's approach to the question of the amount of damages awarded in libel actions made the following observations:

> " * * * The punishment by way of damages is intended not alone to punish the wrongdoer, but as a deterrent to others similarly minded. Liberty National Life Insurance Co. v. Weldon, supra; Advertiser Co. v. Jones, supra; Webb v. Gray, 181 Ala. 408, 62 So. 194.
>
> "Where words are libelous per se and as heretofore stated we think the published words in the present case

were libelous per se, the right to damages results as a consequence, because there is a tendency of such libel to injure the person libeled in his reputation, profession, trade or business, and proof of such pecuniary injury is not required, such injury being implied. Advertiser Co. v. Jones, supra; Webb v. Gray, supra; Brown v. Publishers: George Knapp & Co., 213 Mo. 655, 112 S. W. 474; Maytag Co. v. Meadows Mfg. Co., 7 Cir., 45 F. 2d 299.

"Because damages are presumed from the circulation of a publication which is libelous per se, it is not necessary that there be any correlation between the actual and punitive damages. Advertiser Co. v. Jones, supra; Webb v. Gray, supra; Whitcomb v. Hearst Corp., 329 Mass. 193, 107 N. E. 2d 295.

"The extent of the circulation of the libel is a proper matter for consideration by the jury in assessing plaintiff's damages. Foerster v. Ridder, Sup., 57 N. Y. S. 2d 668; Whitcomb v. Hearst Corp., supra.

* * * * *

"In Webb v. Gray, supra [181 Ala. 408, 62 So. 196], this court made it clear that a different rule for damages is applicable in libel than in malicious prosecution cases and other ordinary tort cases. In this case the court stated in effect that in libel cases actual damages are presumed if the statement is libelous per se and accordingly no actual damages need be proved.

* * * * *

"In Advertiser Co. v. Jones, supra, this Court considered in a libel case the claim that the damages were excessive and stated: 'While the damages are large in this case we cannot say that they were excessive. There was evidence from which the jury might infer malice, and upon which they might award punitive damages. This being true, neither the law nor the evidence furnishes us any standard by which we can ascertain certainly that they were excessive. The trial court heard all of this evidence, saw the witnesses, observed their expression and demeanor, and hence was in a better position to judge of the extent of punishment which the evidence warranted than we are, who must form our

conclusions upon the mere narrative of the transcript. This court, in treating of excessive verdicts in cases in which punitive damages could be awarded, through Justice Haralson spoke and quoted as follows: "There is no legal measure of damages in cases of this character." '

* * * * *

"The Supreme Court of Missouri considered the question in Brown v. Publishers: George Knapp & Co., 213 Mo. 655, 112 S. W. 474, 485, and said: 'The action for libel is one to recover damages for injury to man's reputation and good name. It is not necessary, in order to recover general damages for words which are actionable per se, that the plaintiff should have suffered any actual or constructive pecuniary loss. In such action, the plaintiff is entitled to recover as general damages for the injury to his feelings which the libel of the defendant has caused and the mental anguish or suffering which he had endured as a consequence thereof. *So many considerations enter into the awarding of damages by a jury in a libel case that the courts approach the question of the excessiveness of a verdict in such case with great reluctance.* The question of damages for a tort especially in a case of libel or slander is peculiarly within the province of the jury, and unless the damages are so unconscionable as to impress the court with its injustice, and thereby to induce the court to believe the jury were actuated by prejudice, partiality, or corruption, it rarely interferes with the verdict.' " (Emphasis supplied.)

In the present case the evidence shows that the advertisement in question was first written by a professional organizer of drives, and rewritten, or "revved up" to make it more "appealing." The Times in its own files had articles already published which would have demonstrated the falsity of the allegations in the advertisement. Upon demand by the Governor of Alabama, The Times published a retraction of the advertisement insofar as the Governor of Alabama was concerned. Upon receipt of the letter from the plaintiff demanding a retraction of the allegations in

the advertisement, The Times had investigations made by a staff correspondent, and by its "string" correspondent. Both made a report demonstrating the falsity of the allegations. Even in the face of these reports, The Times adamantly refused to right the wrong it knew it had done the plaintiff. In the trial below none of the defendants questioned the falsity of the allegations in the advertisement.

On the other hand, during his testimony it was the contention of the Secretary of The Times that the advertisement was "substantially correct." In the face of this cavalier ignoring of the falsity of the advertisement, the jury could not have but been impressed with the bad faith of The Times, and its maliciousness inferable therefrom.

While in the *Johnson Publishing Co.* case, *supra,* the damages were reduced by way of requiring a remittitur, such reduction was on the basis that there was some element of truth in part of the alleged libelous statement. No such reason to mitigate the damages is present in this case.

It is common knowledge that as of today the dollar is worth only 50 cents or less of its former value.

The Times retracted the advertisement as to Governor Patterson, but ignored this plaintiff's demand for retraction. The matter contained in the advertisement was equally false as to both parties.

The Times would not justify its nonretraction as to this plaintiff by fallaciously asserting that the advertisement was substantially true, and further, that the advertisement as presented to The Times bore the names of endorsers whose reputation for truth is considered good.

The irresponsibility of these endorsers in attaching their names to this false and malicious advertisement cannot shield The Times from its irresponsibility in printing the advertisement and scattering it to the four winds.

All in all we do not feel justified in mitigating the damages awarded by the jury, and approved by the trial judge below, by its judgment on the motion for a new trial, with the favorable presumption which attends the correctness of the verdict of the jury where the trial judge refuses

to grant a new trial. *Housing Authority of City of Decatur* v. *Decatur Land Co.,* 258 Ala. 607, 64 So. 2d 594.

In our considerations we have examined the case of *New York Times Company* v. *Conner,* (SCCA) 291 F. 2d 492 (1961), wherein the Circuit Court of Appeals for the Fifth Circuit, relying exclusively upon *Age Herald Publishing Co.* v. *Huddleston,* 207 Ala. 40, 92 So. 193, held that no cause of action for libel arose in Alabama where the alleged libel appeared in a newspaper primarily published in New York.

This case overlooks, or ignores, the decision of this court in *Johnson Publishing Co.* v. *Davis,* 271 Ala. 474, 124 So. 2d 441, wherein this court rejected the argument that the whole process of writing, editing, printing, transportation and distribution of a magazine should be regarded as one libel, and the locus of such libel was the place of primary publication. This court further, with crystal clarity, held that *Age Herald Publishing Co.* v. *Huddleston, supra,* concerned a venue statute, and that venue statutes do not apply to foreign corporations not qualified to do business in Alabama.

The statement of Alabama law in the *Conner* case, *supra,* is erroneous in light of our enunciation of what is the law of Alabama as set forth in the *Johnson Publishing Company* case, *supra.* This erroneous premise, as we interpret the *Conner* case, renders the opinion faulty, and of no persuasive authority in our present consideration.

> "The laws of the several states, except where the Constitution of treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." Sec. 1652, Title 28, U. S. C. A., 62 Stat. 944.

It is our conclusion that the judgment below is due to be affirmed, and it is so ordered.

AFFIRMED.

Livingston, C. J., and Simpson and Merrill, JJ., concur.

THE SUPREME COURT OF ALABAMA

Thursday, August 30, 1962

THE COURT MET IN SPECIAL SESSION PURSUANT TO ADJOURNMENT

PRESENT: ALL THE JUSTICES

3rd Div. 961 THE NEW YORK TIMES COMPANY, a Corporation *vs.* L. B. SULLIVAN	MONTGOMERY CIRCUIT COURT

Come the parties by attorneys and the record and matters therein assigned for errors being argued and submitted on motions and merits and duly examined and understood by the Court, it is considered that in the record and proceedings of the Circuit Court there is no error.

It is THEREFORE CONSIDERED, ORDERED AND ADJUDGED that the judgment of the Circuit Court be in all things affirmed.

It is FURTHER CONSIDERED, ORDERED AND ADJUDGED that the appellant, The New York Times Company, a Corporation, and St. Paul Fire and Marine Insurance Company, a Corporation, surety on the supersedeas bond, pay the amount of the judgment of the Circuit Court and ten per centum (10%) damages thereon and interest and the costs of appeal of this Court and of the Circuit Court.

And it appearing that said parties have waived their right of exemptions under the laws of Alabama, it was ordered that execution issue accordingly.

And it was further ORDERED AND ADJUDGED that the other appellants, Ralph D. Abernathy, Fred L. Shuttlesworth, S. S. Seay, Sr., and J. E. Lowery, be also taxed with the costs of appeal of this Court and of the Circuit Court, for which costs let execution issue accordingly.

Order and Opinion of the Circuit Court on Motion to Quash

Plaintiff, a resident of Montgomery, Alabama, has sued defendant, The New York Times Company, a corporation, and Others, in this Court for an allegedly libelous publication specified in the complaint. The matter is now before this Court on the motion, and amended motion, of the defendant, The New York Times Company (hereinafter referred to as the "Times"), to quash the service of process upon it. Other defendants are not involved in these motions.

Service was obtained on the Times by serving the Secretary of the State of Alabama pursuant to the provisions of Title 7, Section 199 (1) Code of Alabama, 1940, as amended, and by personal service on one Don McKee, as agent for the New York Times. Without dispute, the Secretary of State has performed all acts required of her under the provisions of this Section regarding notification to the Times.

General Appearance

This motion, and its amendment, purport to be a special appearance for the sole purpose of quashing service of process. However, ground 6 of the prayer of this motion asks this Court to "dismiss this action as to The New York Times Company, a corporation, for lack of jurisdiction of the subject matter of said action". Clearly, this ground goes beyond the question of jurisdiction of this Court over the person of the defendant. Plaintiff's attorneys make a threshold argument in opposition to the Time's motion that this defendant has made a general appearance in this case, and has thereby waived any defects in service of process, and has submitted its corporate person to the jurisdiction of this Court.

Plaintiff's contention is sound.

This defendant cannot assert that it is not properly before this Court, and in the same breath argue that if it is, this Court has no jurisdiction of the subject matter of the action.

The Supreme Court of Alabama in *Blankenship* v. *Blankenship* 263, Ala. 297, 303, 82 So. 2d. 335, has recently

held that a party's appearance in a suit for any purpose other than to contest the Court's jurisdiction over the person of such party, is a general appearance in the cause. See also *Thompson* v. *Wilson,* 224 Ala. 299, 300, 140 So. 139, where an objection to the jurisdiction of the Court to hear and determine the matter in controversy on grounds other than proper personal service on the defendant was considered a general appearance.

The Alabama rule is the majority one. See Annotation, 25 A. L. R. 2d. 835, 838. And the rule is applicable "notwithstanding an express statement by the defendant that he appears specially or solely for the purpose of making the objection", 25 A. L. R. 2d. at 840. The matter was succinctly put by the Court of Appeals of New York in *Jackson* v. *National Grange Mutual Liability Co.,* 299 N. Y. 333, 87 N. E. 2d. 283, 284:

> "under its special appearance, the defendant company could do nothing but challenge the jurisdiction of the Justice's Court over its person . . . Hence by its attempt to deny jurisdiction of the subject of the action, the company waived that special appearance and submitted its person to the jurisdiction of the Court."

While its assertion of lack of jurisdiction of this Court over the subject matter of this action would be sufficient to constitute a general appearance, the Times has gone further and taken other steps in this cause inconsistent with its asserted special appearance. It sought to invoke the original jurisdiction of the Supreme Court of Alabama by applying for the extraordinary writ of mandamus to review the order of this Court directing it to produce certain documents. The petition was presented to the Supreme Court and briefed on grounds other than lack of jurisdiction over the person of this defendant. This defendant sought to have the Supreme Court, by extraordinary writ, vacate an order of this Court on non-jurisdictional grounds—that is, grounds totally unrelated to its special appearance in the Alabama courts.

Such action, too, has been held to be inconsistent with a special appearance, and, accordingly, a waiver of the same. *Vaughan* v. *Vaughan,* 267 Ala. 117, 121, 100 So. 2d. 1:

> "Respondent . . . by not limiting her appearance and by including non-jurisdictional as well as jurisdictional grounds in her motion to vacate . . . has made a general appearance and has thereby waived any defect or insufficiency of service. (Citations)"

These acts in the Supreme Court, all inconsistent with its special appearance, strengthen the conclusion of this Court that the Times has appeared generally in this cause.

Validity of Substituted Service

In view of the foregoing holding that the Times has made a general appearance in the cause, and has waived its special appearance, it is not essential to a decision on this defendant's motion to consider the matter of whether service of process on the Times is valid. But, in view of the voluminous testimony of this latter question, and in view of the manifold contacts with the Times maintains with the State of Alabama, it seems appropriate to explain why this Court considers that the Times is amenable to process and suit in the Alabama courts regardless of its general appearance.

Our statute, Title 7, Section 199 (1) Alabama Code 1940, accords with widespread legislation of recent origin designed to afford state residents the opportunity of maintaining suit against foreign corporations, which, while maintaining significant business contract within the State, nevertheless do not qualify to do business as provided by state law. This Alabama statute makes such an unqualified foreign corporation subject to suit here if it does business in this state, and if the cause of action sued on arises out of or is incident to the business done in Alabama. The scope of our statute has been defined in *Boyd* v. *Warrant Paint Co.,* 254 Ala. 687, 688, 49 So. 2d. 599:

> "In determining the question, we are not here concerned with state law, since it is not controlling. The

> issue is regarded in this jurisdiction as a federal question of whether subjection of the defendant to this sovereignty comports with federal due process. *Ford Motor Co.* v. *Hall Auto Co.,* 226 Ala. 385, 147 So. 603; *St. Mary's Oil Engine Co.* v. *Jackson Oil & Fuel Co.,* 224 Ala. 152, 138 So. 834. As was said in Ford Motor Co. *v.* Hall Auto Co., supra: It is recognized that the federal authorities are controlling on questions entering into the inquiry and ascertainment of the facts (1) of doing business, and (2) of authorized agency on which process must be served, or (3) those of due process, equal protection, and interstate commerce. * * *' 226 Ala. 387, 147 So. 605."

Thus, the Alabama statute allows this suit against the Times in Alabama if the suit is not prohibited here by the due process clause (Amendment 14) of the Constitution of the United States. Moreover, the *Boyd* case, supra, makes clear that under this due process inquiry that there is "subsumed the question of whether the action was based on a liability arising out of the local activities, it naturally being less burdensome to subject a corporation to defense of actions so arising than those arising elsewhere". 254 Ala., at 691.

In order to consider in context the business activities of the New York Times in Alabama, the Court adopts the outline of the essential business functions of a newspaper contained in *Consolidated Cosmetics* v. *D. A. Publishing Co.,* 186 F 2d. 906, 908 (7th Cir. 1951):

> "The functions of a magazine publishing company obviously include gathering material to be printed, obtaining advertisers and subscribers; printing, selling and delivering the magazines for sale. Each of these, we think, constitutes an essential factor of the magazine publication business. Consequently, if a nonresident corporation sees fit to perform any one of those essential functions in a given jurisdiction, it necessarily follows that it is conducting its activities in such a manner as to be subject to jurisdiction."

The key question is whether The New York Times, by virtue of its business activities in Alabama maintains suf-

ficient contacts with this State so that suit against it here accords with traditional concepts of fairness and the orderly administration of the laws "which it was the purpose of the due process clause to insure". *International Shoe Co.* v. *Washington* 326 U. S. 310, 319.

In the foregoing context, the Court considers the activities of the Times in this State. Plaintiff has submitted evidence not only as to the year 1960. His evidence, in an attempt to establish a continuing pattern of such activities, extends from the year 1956 to the present.

To gather news for the Times, eleven admittedly regular staff correspondents have spent 153 days in Alabama. The results of their efforts are revealed in part by the 59 staff news stories in evidence which contain the by-lines of these correspondents. Their news gathering activities have been coordinated and correlated by the Times National News Editor, Harold Faber, who testified in this case; and by the southern regional correspondent, who is regularly assigned to cover news events in this state, among others in the southern region. This present correspondent, Claude Sitton, gave a deposition in this case. He came into Alabama and covered news events in Montgomery in March, 1960, relating to certain "demonstrations", which form the basis of a portion of the publication now in suit; and he came into Alabama in May, 1960 on assignment to cover the perjury trial of one Martin Luther King, which event is also the subject of a portion of this publication.

Another regular staff correspondent, Harrison Salisbury, entered Alabama on assignment from the witness, Faber, in April, 1960, and gathered news in Birmingham, Montgomery and Andalusia for subsequent publication in the Times.

In addition to the news gathering activities of its staff correspondents, the Times maintains three so-called "string-correspondents", who reside in Montgomery, Birmingham, and Mobile. The stated purpose of such "stringers" in this state is to have them available for news stories of note in the area of their residence—subject to call by

the Times. The testimony shows that the Times has made an active effort to maintain a "stringer" at these three places in Alabama at all times; has commented upon the value of the services which they have performed; and has actively sought their replacement upon the resignation of any one of them. The testimony is clear that present "stringers" McKee and Chadwick have performed valuable services for the Times' staff correspondents over and above the stories which the stringers themselves sent in for publication. And they performed such services in April, 1960. Moreover, "stringer" McKee was entrusted with the delicate task of investigating the facts involved in the instant complaint when the plaintiff demanded that the Times retract the publication.

Obviously, the Times considers the news gathering activities of these staff correspondents and "stringers" a valuable and unique complement to the news gathering facilities of the Associated Press and other wire services of which the Times is a member. The stories of the "stringers" appear under the "slug" "Special to the New York Times", and there were 59 such "specials" in the period from January 1, 1956, through April, 1960. The staff stories and the "specials" are copyrighted and sold by the Times to other newspapers. Thus, the following rule of law, stated in 30 A. L. R. 2d. at page 751, is applicable:

> "A foreign newspaper corporation which not only employs reporters in another state to obtain news for its own newspaper, but also sells to other newspapers the news thus obtained, has been held to be doing business in the state." (Citing authorities).

In search of revenues, the Times actively solicits advertising in the State of Alabama. One representative spent over a week soliciting advertising in Montgomery, Mobile and Birmingham. Another representative spent 7 days in Alabama visiting Birmingham, Montgomery and Selma, and a third representative spent three days in Birmingham. All of this business activity occurred in the period from July 1, 1959 through June 3, 1960, after an advertising office was

opened in Atlanta, which includes Alabama within its territory. Manager Hurley sold one ad to the State of Alabama which brought between three and five thousand dollars. In 1958, an ad appearing in the Alabama supplement of February 2 brought over $28,000 to the Times. According to its own testimony, the Times received between seventeen and eighteen thousand dollars from ads obtained in Alabama from January 1 through April, 1960. Annualized, these revenues would approximate Fifty to Fifty-five Thousand Dollars per year.

A Times witness, Roger Waters, testified that the daily circulation in Alabama was 390 papers per day, and that Sunday circulation was approximately 2,500 papers. This would produce a revenue of $35,884.55 per year, which, when added to the advertising revenue would give the Times a revenue from business activities in Alabama of over $85,000 per year.

Papers are sold to individual subscribers and independent dealers and wholesalers. Freight is prepaid in New York, thus making the carrier the agent of the Times. Credit is given for unsold newspapers without physical return of the papers. In these circumstances, title does not pass until actual delivery to the consignee.—Title 57, Section 25, Alabama Code 1940; 2 Williston, *Sales,* Section 279 (b) page 90. In giving credit for return, the Times sometimes requires a certificate from the local freight agent located in Alabama. It thus appears that the Times owns property and handles claims in the State of Alabama.

It has also sold and distributed in the State of Alabama sets of its Microfilm Edition to 13 customers, and the New York Times Index to eighteen.

The Times contends that the cause of action did not arise out of its conduct of business in Alabama. The Court is of the opinion that the cause of action is "an incident thereto" within the language of Title 7, Section 199 (1), Alabama Code, 1940. It is noteworthy that Sitton was assigned to Montgomery by the Times to cover the demonstrations at Alabama State College and the King trial, with which the

ad dealt. But, where a corporation is doing business in the State, due process does not require that the cause of action arise out of the business done there.—*Perkins* v. *Benguet Consolidated Mining Co.,* 342 U. S. 437, 96 L. Ed. 485; *Bomze* v. *Nardis Sportswear, Inc.,* 165 F. 2d. 33 (2d. Cir.—Judge Learned Hand—cited with approval in the *Boyd* case); Tauza v. Susquehanna Coal Co., 220 N. Y. 259, 155 N. E. 915 (Judge Cardozo). And *Boyd,* supra, extends the Alabama statute to the permissible limits of Federal due process.

In arriving at its decision, the Court has followed these relevant decisions of the Supreme Court of the United States:

International Harvester Co. *v.* Kentucky, 234 U. S. 579, 58 L. Ed. 1479;
International Shoe Co. *v.* Washington, 326 U. S. 310, 90 L. Ed. 95;
Perkins *v.* Benguet Mining Co., supra;
Polizzi *v.* Cowles Publications, 345 U. S. 663, 97 L. Ed., 1331;
McGee *v.* International Ins. Co., 355 U. S. 220, 2 L. Ed. 2d. 223;
Scripto *v.* Carson, 362 U. S. 207, 4 L. Ed. 660.

While it is not necessary to discuss each of those decisions in detail, it is noteworthy that in the McGee case the minimal contact with the State of California which the Supreme Court held sufficient was the delivery by the insurance company by mail of one insurance policy, and the receipt from the insured in California by mail of premiums on this policy.

In the Scripto case, the minimal contact held sufficient was the production in the State of Florida of an annual revenue of about $42,000 by independent dealers or brokers, who worked for others as well as Scripto. Here, Alabama sent in an annual revenue of over twice that amount, and regular employees of the Times combined their efforts with independent dealers to produce it. See also *W. S. A. Z.* v. *Lyons,* 254 F 2d. 242 (6th Cir. 1958).

The Court finds an extensive and continuous course of Alabama business activity—news gathering; solicitation of advertising; circulation of newspapers and other products. These systematic business dealings in Alabama give the Times substantial contract with the State of Alabama, considerably in excess of the minimal contracts required by the Supreme Court decisions supra. The Times does business in Alabama.

Likewise, the Court finds that to subject the Times to suit in Alabama comports with traditional notions of fair play and the proper administration of justice. Plaintiff resides here, and is a public official of the City of Montgomery. If a reputation has a situs, it is here in Montgomery. The events occurred largely in Montgomery, and witnesses who have knowledge of the truth or falsity of the events as outlined in the advertisement reside in or near Montgomery. Of the four co-defendants, two reside in Montgomery, one in Birmingham and one in Mobile. The Circuit Court of Montgomery County is the appropriate and convenient forum to try this action.

What was said in the case of *Clements* v. *MacFadden Publications, Inc.* 28 F. Supp. 274, 276, is applicable here:

> "To carry the present line of holdings to any greater extent than they now exist could easily result in a publication two thousand miles away destroying a man's reputation, whether he be great or small, and requiring him to come to unfriendly territory, perhaps, to effect his vindication in the courts of justice."

This Court has always been a staunch advocate and defender of freedom of the press. But this freedom and other safeguards of the due process clause do not command the plaintiff to carry his witnesses, his evidence, his counsel and himself more than one thousand miles to a distant forum to bring his action for alleged damages to his reputation and to try his case. It is, therefore,

CONSIDERED, ORDERED, and ADJUDGED by the Court that the motion of the defendant, The New York Times Company, to

quash, and its amended motion to quash, be and the same are hereby denied.

Dated, this the 5th day of August, 1960.

WALTER B. JONES
Circuit Judge.

Filed in office August 5, 1960.
JOHN R. MATTHEWS, CLERK.

* * * * *

IN THE

CIRCUIT COURT
OF MONTGOMERY COUNTY
ALABAMA

L. B. SULLIVAN, *Plaintiff,* *vs.* THE NEW YORK TIMES COMPANY, a Corporation, RALPH D. ABERNATHY, FRED L. SHUTTLESWORTH, S. S. SEAY, SR., and J. E. LOWERY. *Defendants.*	AT LAW Case No. 27416

ORAL CHARGE

The Court: Gentlemen of the Jury, before getting down to the immediate points of law here as the Judge of the Court I would like to join with the attorneys in this case in thanking you for the attention, care and interest which you have shown in listening to the testimony in this case and for your patience in listening to the arguments of coun-

sel. It is always a pleasure to try a case with a jury that is interested and has patience and I wish to thank you for that. Now, one other thing I would like to say although I think it is hardly necessary—one of the defendants in this case is a corporate defendant and some of the others belong to various races and in your deliberation in arriving at your verdict, all of these defendants whether they be corporate or individuals or whether they belong to this race or that doesn't have a thing on earth to do with this case but let the evidence and the law be the two pole stars that will guide you and try to do justice in fairness to all of these parties here. They have no place on earth to go to settle this dispute except to come before a Court of our country and lay the matter before a jury of twelve men in whose selection each party has had the right to participate and out of all the jurors we had here at this term of Court, some fifty jurors, the parties here have selected you because they have confidence in your honesty, your integrity, your judgment and your common sense. Please remember, gentlemen of the jury, that all of the parties that stand here stand before you on equal footing and are all equal at the Bar of Justice.

Now, let us see if I can tell you briefly what this case is about. There are two counts in the Bill of Complaint and I will not try to read them to you at length. The plaintiff in the case is L. B. Sullivan, an individual. The five defendants in the case are The New York Times Company, a corporation, and the following individuals; Ralph B. Abernathy; Fred L. Shuttlesworth; S. S. Seay, Sr. and J. E. Lowery. Now, it is the contention of the plaintiff, Mr. Sullivan, that on or about the 29th of March, I believe it is, in 1960, a certain publication was made in The New York Times on page 25 of the March 29th, 1960 issue in an advertisement entitled "Heed Their Rising Voices." You have seen the witnesses with this advertisement and you have seen them and heard them testify and you have seen the ad and, of course, you will have a photostatic copy on the back of this Complaint to take to the Jury Room with you. It is the contention of the plaintiff, Sullivan, that the statements made in this advertisement, and one of the state-

ments is set out in Count 1 which you heard read and another statement is set out in Count 2, which I will not read again because you are familiar with them and you will have the Complaint with you and it is alleged that they contain false and defamatory matter against him and it is his contention that the extracts from this advertisement contained in these two Counts in the Complaint imputed improper conduct to him and it is his contention that this advertisement subjected him to public contempt, to ridicule, to shame and prejudice, and prejudiced Mr. Sullivan in his public office as Police Commissioner, in his profession, in his trade and in his business and all was done, he claims, with the intent to defame him. Now, in the first count of the Complaint which I will read to you he says this was false and defamatory and injured him in his profession. "In Montgomery, Alabama, after students sang, 'My Country, 'Tis of Thee' on the Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission." "Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for 'speeding,' 'loitering' and similar 'offenses'. And now they have charged him with perjury—a felony under which they could imprison him for ten years." Then, the next part of the advertisement which is objected to is contained in paragraph number 2 which looks like practically the same thing here.

Now, we have a law in Alabama which says that when a public officer contends that a publication libels him concerning his official conduct that he cannot recover any vindictive or punitive damages unless, five days before he brings his law suit he has made written demand upon the defendant for a public retraction of the charge made and published, and that the defendant has failed or refused

within five days to make a full and fair retraction of the published matter or the charge. Under the law, if a defendant fails to make a full and fair retraction, within five days after plaintiff's demand, then the plaintiff is not barred from the recovery of punitive damages if he would be otherwise entitled to claim them. Now, the plaintiff in this case is claiming damages in the sum of five hundred thousand dollars. Now, the defendants have come into Court, as is their right, and they have filed what we call the Plea of the General Issue and that is a general denial that they are guilty of the things charged. They are denying these things that are set out in the Complaint were published of and concerning Sullivan, the plaintiff, they deny that the matter published was defamatory of the plaintiff, Sullivan, and the defendant, The Times, also denies that the ad referred to Sullivan, the plaintiff, or charged him with something that is libelous and they deny that the ad itself charged the plaintiff with any misconduct. Now, there are four individual defendants and they are Ralph D. Abernathy, Fred L. Shuttlesworth, S. S. Seay, Sr. and J. E. Lowery, and they deny and plead the general issue too and they deny before the jury that they signed the ad and they say they did not authorize the use of their names and they say they did not know the ad was being published and never did give their consent to the use of their names. So, when those pleas are filed, the Plea of the General Issue, the law steps in and says to the plaintiff, Sullivan, what? It says, very well, Mr. Plaintiff, if you would have a verdict at the hands of the jury awarding you damages and upon which the Court would be authorized to render a judgment at some later date or on the same day, then you must do this. You must reasonably satisfy the jury from the evidence that what you say in your whole Complaint or in Count 1 or in Count 2 is true. So that's the burden that rests on the plaintiff here today—not to satisfy you beyond all reasonable doubt as would be the case in a criminal case but simply to convince you to your reasonable satisfaction that what he says and what he claims in this Complaint is true. Now, as stated, the defendants say that the ad complained

of does not name the plaintiff, Sullivan, by name and that the ad is not published of and concerning him. Now, the law does not always require the person suing for damages in a libel case to be named by name because sometimes the alleged libelous matter may be directed at a group or the class of people of which the plaintiff says he is a member, but in such a case where the libel is addressed to a class or a group the party suing, that is, the plaintiff, Sullivan, as a member of the group referred to must show by the evidence to your reasonable satisfaction that the words objected to were spoken of and concerning him. The reason for this being that while any one of a class or group may maintain an action because of alleged libelous words, he must show to the reasonable satisfaction of the jury that the words he complained of apply especially to him or are published of and concerning him. Now, when matter alleged to be libelous is published, you are not to read it critically but you read it as the average, reasonable and normal person of ordinary intelligence in the community, the place, the city of Montgomery would read this advertisement. Now, with reference to the publication I will say this. The publication of defamatory material in the legal sense is a communication, the passing on of this material to any person or persons other than the person who is bringing the suit. If the communication is in written form it would be libel instead of a slander. If I said something to you orally or said something about you orally—we call that a slander but if I read it, print it, or put it in a cartoon, then we call that libel. Every person who has any part in such a publication, that is, a written communication, except a disseminator, is held to be strictly libel. Now, the general rule of law is that if a libel is directed at a group or a class of people it can form the basis of a law suit by an individual member of that group provided that he can show that although he is not called by name, while he is not mentioned by name, in that advertisement, yet a person in the place of publication, Montgomery, reading it, can readily identify the plaintiff as the person spoken of and concerned by the publication. So, at the very outset of your deliberations you come to

this question. Were the words complained of in Counts 1 and 2 of this Complaint spoken of and concerning the plaintiff, Sullivan? That's the burden he has. He must show that to your reasonable satisfaction and if the evidence in this case does not reasonably satisfy you that the words published were spoken of or concerning Sullivan or that they related to him, why then of course he would not be entitled to any damages and you would not go any further. Now, the plea filed by the defendants in this case or what we call the general issue, raises the question of the truth of the things published. Now, we have a law in Alabama that in an action of this kind the truth of the words written or published, or the circumstances under which they were published, may be given in evidence under the plea of the general issue in mitigation of damages. Those are the words of the statute.

Now, the Court is of the opinion and so charges you, gentlemen of the jury, that the matter complained of in Plaintiff's Exhibit No. 347, that's the controversial ad which you will have before you, and parts of which are set out in the Counts here in the Complaint, belongs to that class of defamation called in law, libel per se. Now, defamatory words to be actionable per se are those which on their face and without the aid of any other evidence or any other extrinsic proof are recognized by the law as being injurious. Writings libelous per se carry the presumption of falsity and of malice. Now, in the case of words actionable per se, that is, actionable by themselves, their injurious character is a fact of common notoriety, established by the general consent of men. The libel in a case of this kind is such that in the natural and proximate consequences it will necessarily cause injury and damage to the person concerned in his official, public or social relations. And the law in such a case implies legal injury from the bare fact of publication itself. We can say, as part of the law in this case, that a publication is libelous per se when they are such as to degrade the plaintiff in the estimation of his friends and the people of the place where he lives, as injure him in his public office, or impute misconduct to him in his office, or

want or official integrity, or want of fidelity to a public trust or such as will subject the plaintiff to ridicule or public distrust. All these kind of charges are called, libelous per se.

Now, gentlemen of the jury, the publication under consideration by you is not what we call a privileged communication, but it is unprivileged. That is, the publication was not made in the performance of some duty, political, judicial, or the like. So in a case of the kind that we have here, where the Court charges you that this libelous matter is libelous per se, then falsity and malice are presumed. General damages need not be alleged or proved but are presumed and any allegation in the Complaint of specific damages is not necessary. Punitive damages are available to the plaintiff and the Plea of the General Issue merely puts on the plaintiff, Sullivan, the burden of reasonably satisfying you of the publication of the matter in the advertisement by the defendants and that this publication was of and concerning him and was aimed at him.

Now, it is the contention of the plaintiff here that although you may believe, as to the four individual defendants, that they did not sign this advertisement and did not authorize it, yet it is the contention of the plaintiff, Sullivan, that the four individuals the four individual defendants after knowing of the publication of the advertisement and after knowing of its content, ratified the use of their names, that is, that they approved and sanctioned this advertisement. In other words, the plaintiff, Sullivan, insists that there was a ratification of the advertisement and the use of their names as signers of the advertisement by the four individual defendants and we here define ratification as the approval by a person of a prior act which did not bind him but which was professedly done on his account or in his behalf whereby the act, the use of his name, the publication, is given effect as if authorized by him in the very beginning. Ratification is really the same as a previous authorization and is a confirmation or approval of what has been done by another on his account. Now, it is for you twelve jurors to say from all the evidence whether the four

defendants ratified the advertisement now before you, that is, ratified that advertisement as I have defined the word ratification to you.

Now, gentlemen of the jury, if you are reasonably satisfied from the evidence before you, considered in connection with the Rules of Law the Court has stated to you, and you and I both have a part in rendering whatever judgment may be made in this case. You twelve men are what we call the finders of fact, the triers of the facts and I want you to know that every disputed question of fact in this case is left to you and as the Judge presiding at the trial of this case I do not have any opinion whatsoever about the facts of this case, and if I did, it would be highly improper for me to express that opinion in this case. So I leave every one of the disputed facts in this case to you. So, as I said, if you are reasonably satisfied from the evidence before you, considered in connection with the Rules of Law the Court has stated to you, you would come to consider the question of damages and, where as here, the Court has ruled the matter complained of proved to your reasonable satisfaction and aimed at the plaintiff in this case, is libelous per se then punitive damages may be awarded by the jury even though the amount of actual damages is neither found nor shown. Now, what do we mean by punitive damages? Well, gentlemen of the jury, that word, punitive, really defines itself. It is something like a definition of reasonable doubt. By punitive damages, we mean such damages as are given as a kind of punishment to a defendant with a view of preventing similar wrongs in the future. Punitive damages are awarded on the theory that they will deter the defendant from making a like publication and will also deter all other persons similarly situated if they hear about it from making a like publication.

Now, gentlemen of the jury, if after a careful consideration of all the evidence in this case under the rules of law I have just laid down to you and these rules of law you will follow in your deliberations and they will guide you in arriving at whatever verdict you may come to. Now, in case you find for the plaintiff, and you understand that under our

system here in America, all twelve of you must agree on the verdict, you will write this kind of verdict if you find for the plaintiff. We, the jury, find in favor of the plaintiff and assess his damages at so many dollars, not exceeding the amount claimed. It may be that you are reasonably satisfied from the evidence here that you ought to have a verdict against the corporate defendant, against The New York Times Company, but not against the four individual defendants. Then, if that is the case, you would render this kind of a verdict. We, the jury, find in favor of the plaintiff against the defendant, The New York Times Comany, a corporation, and assess his damages at so many dollars. We further find in favor of the other defendants, Ralph D. Abernathy, Fred L. Shuttlesworth, S. S. Seay, Sr. and J. E. Lowery. On the other hand, if the plaintiff in this case has not reasonably satisfied you from all of the evidence of the truth of the allegations contained in his complaint or of any one count thereof, then the defendant would be entitled to the verdict and you would write this kind of verdict. We, the jury, find for the plaintiff. You may let any one of your number act as foreman and I am going to let you take all three of these verdicts out with you and you may sign any one you find to be proper under the evidence and under the law, and as I stated, the verdict must be the concurrent action of all twelve of you men sitting on the jury.

* * * * *

GIVEN CHARGES REQUESTED BY THE DEFENDANT NEW YORK TIMES

The following written charges were requested by the defendant, THE NEW YORK TIMES COMPANY, a Corporation, and given by the Court in writing, viz:

"6. I charge you, gentlemen of the jury, that after reading the advertisement published in the newspaper of the defendant, The New York Times Company, a corporation, and recalling the testimony in this case that it is your duty to determine whether, in fact, that advertisement published in the defendant, The New York Times Company, a

corporation's newspaper intended to and does identify the plaintiff, and I further charge you that the plaintiff in this case has the burden of reasonably satisfying you by a fair preponderance of the evidence that the advertisement does in fact identify him, and if you find from the evidence that the plaintiff has failed to meet this burden, then I charge you that your verdict must be for the defendant, The New York Times Company, a corporation."

Given, Jones, Judge

"7. I charge you, gentlemen of the jury, that if you find from the evidence that the advertisement complained of by plaintiff relates to a person or persons other than the plaintiff and does not concern plaintiff, then I further charge you your verdict must be for the defendant, The New York Times Company, a corporation."

Given, Jones, Judge

"12. I charge you, gentlemen of the jury, that compensatory damages, if awarded at all, must be fixed at such a figure as the jury dispassionately and according to the evidence in this case finds to be commensurate with the injury actually sustained by the plaintiff."

Given, Jones, Judge

"13. I charge you, gentlemen of the jury, that the right, if any, to recover compensatory damages does not necessarily imply a right to recover substantial damages."

Given, Jones, Judge

"19. I charge you, gentlemen of the jury, that for the purpose of rebutting and repelling the idea of malice, the defendant, The New York Times Company, a corporation, has the right to prove and explain all the facts and circumstances surrounding the publication of the advertisement complained of by plaintiff in his complaint."

Given, Jones, Judge

"20. I charge you, gentlemen of the jury, that unless the statements contained in the advertisement of March

29, 1960, published in the newspaper of the defendant, The New York Times Company, a corporation, were directed against the plaintiff, then this advertisement does not afford plaintiff a basis for recovery in this case against the defendant, The New York Times Company, a corporation."

Given, Jones, Judge

"21. I charge you, gentlemen of the jury, if you believe from the evidence that the advertisement of March 29, 1960 was directed at others than the plaintiff and not at the plaintiff, then such advertisement cannot afford the plaintiff a basis of recovery in this case."

Given, Jones, Judge

"29. I charge you, gentlemen of the jury, that should you reach the point in your deliberation as to the assessment of punitive damages, if you have found that the advertisement published by the defendant New York Times Company and complained of by the plaintiff was of and concerning the plaintiff and was libelous, then you must consider in mitigation of such damages all the circumstances under which the advertisement was published which have been given in evidence."

Given, Jones, Judge

"30. I charge you, gentlemen of the jury, that in this case the defendant has entered a plea of the general issue; that is to say that the burden of proof in the first instance is on the plaintiff to show to your reasonable satisfaction by a preponderance of the evidence that the advertisement printed by the defendant New York Times Company was published by the defendant New York Times Company of and concerning the plaintiff. If you find from the evidence that the advertisement was not published of and concerning the plaintiff, then your verdict must be for the defendant New York Times Company."

Given, Jones, Judge

"31. I charge you, gentlemen of the jury, that should you reach the point in your deliberation as to the assessment of compensatory or actual damages, if you have found that the advertisement published by the defendant New York Times Company and complained of by the plaintiff was of and concerning the plaintiff and was libelous, then the burden is on the plaintiff to prove to your reasonable satisfaction by a preponderance of the evidence the items of actual or compensatory damage that he claims to have suffered, and you are further instructed that this amount may be nominal."

Given, Jones, Judge

"32. I charge you, gentlemen of the jury, that the burden is on the plaintiff to prove to your satisfaction by a fair preponderance of the evidence that the advertisement complained of by the plaintiff was published by the New York Times Company of and concerning him."

Given, Jones, Judge

"33. I charge you, gentlemen of the jury, that the burden is on the plaintiff to prove to your satisfaction by a fair preponderance of the evidence that the advertisement complained of by the plaintiff as published by the New York Times Company referred to some ascertained or ascertainable person and that person must be the plaintiff."

Given, Jones, Judge

"34. I charge you, gentlemen of the jury, that you must be reasonably satisfied from the evidence that the advertisement complained of by the plaintiff was published by the New York Times Company with reference to and concerning the plaintiff."

Given, Jones, Judge

"37. I charge you, gentlemen of the jury, that before the plaintiff can recover in this case, he must reasonably satisfy you from the evidence that the advertisement pub-

lished by the New York Times Company and complained of in his complaint definitely and specifically referred to and concerned him."

Given, Jones, Judge

"38. I charge you, gentlemen of the jury, that before the plaintiff can recover in this case, he must reasonably satisfy you from the evidence that the advertisement published by the New York Times Company and complained of in his complaint with a reasonable degree of certainty referred to and concerned the plaintiff."

Given, Jones, Judge

"39. I charge you, gentlemen of the jury, that should you reach the point in your deliberations as to the assessment of compensatory damages, then you cannot consider in such assessment of damages any repetitions of the advertisement complained of by the plaintiff unless you are reasonably satisfied from the evidence that such repetition was done at the instance of the defendant New York Times Company."

Given, Jones, Judge

"40. I charge you, gentlemen of the jury, that as a matter of law no cause of action for libel can be predicated upon a publication of the alleged libel which has been induced, procured or consented to by the plaintiff. Therefore if you believe from all the evidence, that the testimony of any witness was based upon his reading of the advertisement complained of here, only after having been shown a copy of same by the plaintiff or his attorneys, you must disregard that testimony entirely."

Given, Jones, Judge

"41. I charge you, gentlemen of the jury, that should you reach the point in your deliberations as to the assessment of punitive damages, then you cannot consider in such assessment of punitive damages any repetitions by others of the advertisement complained of by the plaintiff unless

you are reasonably satisfied from the evidence that such repetition was done at the instance of the defendant New York Times Company."

Given, Jones, Judge

"42. I charge you, gentlemen of the jury, that should you reach the point in your deliberations as to the assessment of punitive damages, then you cannot consider in such assessment of punitive damages any repetitions of the advertisement complained of by the plaintiff unless you are reasonably satisfied from the evidence that such repetition was done at the instance of the defendant New York Times Company, a corporation."

Given, Jones, Judge

"43. I charge you, gentlemen of the jury, that should you reach the point in your deliberations as to the assessment of compensatory damages, then you cannot consider in such assessment of damages any repetitions by others of the advertisement complained of by the plaintiff unless you are reasonably satisfied from the evidence that such repetition was done at the instance of the defendant New York Times Company, a corporation."

Given, Jones, Judge

"44. I charge you, gentlemen of the jury, that if you believe from all the evidence that the words contained in the advertisement complained of are so vague and uncertain that they could not have been intended to refer to any particular person then your verdict must be in favor of the defendant, The New York Times Company, a corporation."

Given, Jones, Judge

"45. I charge you, gentlemen of the jury, that in this case, the defendant New York Times Company has entered a plea of the general issue; that is to say that the defendant New York Times Company has denied that the advertisement complained of by the plaintiff in his complaint was published of and concerning him, and therefore the plaintiff

must prove to your reasonable satisfaction and by a preponderence of all the evidence that the advertisement complained of by the plaintiff was published of and concerning him."

Given, Jones, Judge

"51. I charge you, gentlemen of the jury, that before the plaintiff is entitled to a verdict under count two of the complaint, the burden is on the plaintiff to reasonably satisfy you from the evidence of the truth of every material allegation contained in count two of the complaint."

Given, Jones, Judge

"52. I charge you, gentlemen of the jury, that before the plaintiff is entitled to a verdict under count one of the complaint, the burden is on the plaintiff to reasonably satisfy you from the evidence of the truth of every material allegation contained in count one of the complaint."

Given, Jones, Judge

"53. I charge you, gentlemen of the jury, that you are not bound to accept the opinion of any witness who has testified in this case, but if any witness has testified to his opinion on any material issue in this case you may give his testimony such weight and credence as you see fit when taken in connection with all the facts and circumstances as shown by all the evidence in the case."

Given, Jones, Judge

"54. I charge you, gentlemen of the jury, that there has been evidence in the nature of opinion evidence introduced by the plaintiff on the issue of whether or not the statements in the advertisement complained of were written of and concerning the plaintiff and I further charge you that you are not bound to accept the opinion of any witness but you may give that evidence such weight and credence as you see fit when taken in connection with all the facts and circumstances as shown by all the evidence in the case."

Given, Jones, Judge

"56. I charge you gentlemen of the jury, that L. B. Sullivan is the only plaintiff in this case and you may not return a verdict in favor of L. B. Sullivan unless you find from all the evidence that the statements contained in the advertisement complained of, referred to L. B. Sullivan."

Given, Jones, Judge

"57. I charge you, gentlemen of the jury, that mere negligence or carelessness is not evidence of actual malice or malice in fact, and does not justify an award of exemplary or punitive damages in an action for libel."

Given, Jones, Judge

"58. I charge you, gentlemen of the jury, that even though you should find from the evidence that the article in question is libelous; and that it was published by the defendant, The New York Times Company, a corporation, with an intent to defame the plaintiff, you are instructed that it does not follow as a matter of law that plaintiff should be allowed anything by way of punitive or exemplary damages; for the granting of punitive or exemplary damages is, even though you find an intent to defame, within the discretion of the jury; and you are further instructed that even on the clearest proof of malice in fact, it is still your exclusive province to say whether or not punitive or exemplary damages shall be awarded; for plaintiff is entitled to punitive damages only when the jury shall, after having found that the article in question was published with an intent to defame the plaintiff, conclude in the exercise of its discretion that such damages ought to be allowed."

Given, Jones, Judge

"61. I charge you, gentlemen of the jury, that if you are reasonably satisfied from all the evidence that damages should be awarded to the plaintiff you may in fixing the amount of such damages consider the fact that only 35 copies of the defendant New York Times, a corporation's newspaper, are distributed daily in Montgomery County."

Given, Jones, Judge

APPENDIX C