

The Court: I think that would be admissible.

Mr. Embry: We accept.

(Newspaper article, The New York Times, Thursday, January 12, 1956 at page 43 entitled "Mobile, Alabama," Special to The New York Times, Mobile, Alabama, January 11, offered and received in evidence and identified as Plaintiff's Exhibit No. 239.)

Cross examination. (Continued)

By Mr. M. R. Nachman, Jr.:

Q. Mr. Faber, are all New York Times stories copyrighted?

A. Not individually.

Q. Are they copyrighted by The New York Times Company as a corporation?

A. The whole issue is copyrighted.

Q. And that means what, Mr. Faber?

A. That it is registered with the Copyright Bureau in Washington.

Q. It means that the story cannot be used by anyone else, doesn't it?

Mr. Embry: We object to that, if the Court please. That's a question of law.

The Court: Yes. I think the Federal Law would cover that.

By Mr. M. R. Nachman, Jr.: (Continuing)

Q. Is the stringer system, as you described it in your [fol. 292] testimony, an innovation of The New York Times?

A. It was there when I came there.

Q. Well, I mean, is it peculiar to The New York Times Company?

A. Well, I have only worked for The New York Times.

Q. You have been in the newspaper business for a good many years, haven't you, Mr. Faber?

A. Yes, sir.

Q. For how many years?

A. For twenty years.

Q. Well, then, based on your twenty years experience in the newspaper business, would you state whether the stringer system is peculiar to The New York Times or not?

A. It is not.

Q. It is not?

A. No.

Q. Is it generally used by all newspapers?

A. Yes, sir.

Q. All newspapers in all States have stringers?

A. I don't know about all, but it is generally used by the newspapers around the country.

Q. How many other New York newspapers have stringers?

A. I can't say. I just don't know.

Q. Does The New York Herald Tribune have stringers?

A. I don't—

Mr. Embry: If the Court please, we object to what other newspapers may or may not do. I don't think that is involved in the question being presented to this Court for its decision.

The Court: Let's stick to The New York Times.

By Mr. M. R. Nachman, Jr.: (Continuing)

Q. Mr. Faber, perhaps you may not be able to tell us about this and if not, I will withdraw the question. Can you tell the Court anything about how The New York Times distributes its newspapers in Alabama?

A. No, sir.

[fol. 293] Q. You know nothing about that?

A. No, sir.

Q. Do you have any knowledge of the circulation figures of the New York Times?

A. In Alabama?

Q. In Alabama?

A. No, sir.

Q. Do you know anything about how the New York Times Index is sold in the State of Alabama?

A. No, sir.

Q. Do you know anything about how the micro-film edition of The New York Times is sold in Alabama?

A. No, sir.

Q. Who would be the person in charge of The New York Times Index, that is, the person in The New York Times organization?

Mr. Embry: We object to that, Your Honor. He just said he didn't know anything about it.

Mr. Nachman: Well, if he doesn't know, all he has to do is say so.

The Witness: I don't know the name of the person.

By Mr. M. R. Nachman, Jr.: (Continuing)

Q. Would the same be true about the micro-film edition?

A. Yes, sir.

Q. All right, sir. That's all.

Redirect examination.

By Mr. T. Eric Embry:

Q. Mr. Faber, you have in your testimony from time to time referred to the Associated Press and the United Press. They were referred to in terms of the A.P. and the U.P. Now, by those terms, do you mean the Associated Press and the United Press respectively?

A. Yes, sir. I think, however, it is the U.P.I. now. It is [fol. 294] the United Press International now.

Q. Are those what you have termed previously wire services?

A. Yes, sir.

Q. I believe on cross-examination you testified that from time to time the New York Times Company obtains from the wire services and by that I assume you referred to the A.P. and U.P. as you have previously testified, items of news. Is that correct?

A. Yes, sir.

Q. By what mechanical means and at what place does The New York Times Company receive from the Associated Press and the United Press the wire service items of news from time to time, and more specifically, during the times we have delineated in this testimony from the 1st day of January 1956 through April of 1960? Where are the news

items received and by what physical and mechanical means are they received?

A. They are received by teletype machines. There are numerous teletype machines in the news room of The New York Times.

Q. By that do I understand your answer to be that you get the printed word from some sort of mechanical device in your plant in New York City?

A. Yes, sir.

Q. Do you know where the other end of the wire is that feeds the machine out of which you get the printed word?

A. Yes, sir.

Q. Where is it located?

A. In New York City.

Q. During the period of time I have delineated from the 1st day of January, 1956 through April of 1960 do and have employees of The New York Times gone out into the field we will call it to the various States including Alabama and furnished news to the Associated Press and United Press which is in turn given back to you? Is that right?

A. New York Times staff people?

Q. Yes, sir.

A. No, sir.

Q. You have testified that you do not know the amount of payment that is made by The New York Times Company to [fol. 295] these wire services. Is that correct?

A. Yes, sir.

Q. Do you know, as a matter of fact, that payment is made?

A. Yes, sir.

Q. Are there any employees of the Associated Press or the United Press that are employees and engaged in work or service for The New York Times Company in the State of Alabama during this period I have referred to?

A. No, sir.

Q. Now, this may have been covered piece-meal in my questioning of you on Voir Dire with respect to certain documents but I will ask you a general question to cover and to embrace all of those particular questions that I previously put to you. I will ask you whether or not it is true that the byline or the designation appearing at the

head of an article quote "Special to the New York Times" unquote, may or may not embrace among it the following sources of news items which are printed in The New York Times newspaper—I used the wrong phrase. That's not a byline—that's a slug. Is that right?

A. Yes, sir.

Q. A slug "Special to The New York Times."

A. Yes, sir.

Q. Now, that news item may, if I understand your testimony, emanate, and we will assume that all of these have Alabama slugs and dateline—

Mr. Baker: We object to the leading, if the Court please.

Mr. Embry: Well, Your Honor, I—

The Court: I will let it in. Go ahead.

By Mr. T. Eric Embry: (Continuing)

Q. Do you recall my question insofar as I have stated it up to this moment?

A. Yes. You were going on and summarizing things.

Q. All right. Now, assuming all that I am hypothesizing have datelines in Alabama, state whether or not these can come from either a staff correspondent, a stringer, directly from a source of news, if it is an institution or an individual such as we have discussed with respect to wedding items, or from press agents of those concerned with the subject matter of the news story?

A. Yes, sir.

Q. Now, does that embrace all of the means by which "Special to The New York Times" could emanate?

A. I think there is one further category and that is when we make phone calls down to Alabama and gather news by reporters in New York.

Q. All right. Now, I will ask you to tell His Honor whether or not from the fact of the slug "Special to The New York Times" you can determine accurately whether a staff correspondent has been present at that place and active in gathering that news or not?

A. You cannot do that from the slug alone.

Q. Now, I show you Plaintiff's Exhibit No. 62 which has been identified by your testimony as being a stringer's card

which we have here in blank. Now, on the top printed line of that card, Plaintiff's Exhibit No. 62, there appears the word "City" opposite of which appears the word "State" printed. What information is placed in those two spaces opposite the word "City" and the word "State" by you when you are putting the data relative to stringers that you testified to on the card?

A. Well, I don't put anything on the card.

Q. You do not?

A. No, sir.

Q. Well, what information is placed on the card by the stringer, assuming that it's the stringer that puts it on there?

A. The City in which he is working and the State in which he is working.

Q. The name, of course, is self-explanatory and the age is self-explanatory. Now, "Newspaper with which connected." There are two other words printed "Morning" and "Evening." Tell us what information is placed in those blanks like the stringer? What information is placed there whether it is The New York Times Company or some other newspaper?

A. Well, this is the newspaper for which he is working [fol. 297] and the City and State which he is working which is listed above it.

Q. That is, his employer?

A. His employer. Yes, sir.

Q. Now, referring to the caption "Position on Paper". What information is put there by the stringer?

A. Well, information about the job on which he is working for the paper as to whether he is a reporter, editor or whatever else it might be.

Q. In the City in which he resides and is working?

A. Yes, sir.

Q. Appearing below that is "Residence Address" and "Office Address". That is self-explanatory. Now, we have a line below that entitled "Days Off." Also the caption "Working Hours." What information is placed in those two places by the stringer in submitting this card to you?

A. The days he does not work for the newspaper for which he is working full time and the hours of those days for which he works for that same newspaper.

Q. Now, to more specifically designate it, let's take Mr. McKee. Would the information on his card show the days that he was not on duty at The Montgomery Advertiser?

A. Yes, sir.

Q. And his working hours at The Montgomery Advertiser?

A. Yes, sir.

Q. Now, I show you Plaintiff's Exhibit No. 1 which is a brown envelope with the following caption in type "Don McKee, Montgomery Advertiser, Montgomery, Alabama." That is the heading on the envelope. Now, I notice there are some headings of correspondence in print and some figures and on this particular exhibit the figure is "98" and the sum in pencil is "\$50" and at the bottom of the column wherein the sum \$50 is is the sum "50 H.F." Now, is this exhibit that you are looking at now, Plaintiff's Exhibit No. 1, does the sum "50", "Harold Faber," represent anything to you?

A. That's my authorization to pay him \$50 for a preceding month.

[fol. 298] Q. All right. For what? Does anything on that envelope indicate why that payment was made to him?

A. No, sir.

Q. What does the figure "98" mean?

A. I assume that is some auditing department figure.

Q. Now, was this sum of \$50 which you remitted to him for April of 1960 a payment to him for news items sold to you by him?

A. Yes, sir.

Q. And was the basic method employed to compute the amount you paid to him for those news items according to the \$10 per column or 1¢ per word rate that you had agreed to pay him for that in the event that you bought it from him and, in fact, in that instance, did buy it from him?

A. That was the basic theory, yes.

Q. Now, I want to ask you whether or not you paid any regular compensation to Don McKee by way of a weekly or monthly payroll check or have you done so at any time since he has been what you term as a stringer for The New York Times?

A. No, sir.

Q. Have all of the payments you made to him been on the basis you testified to with respect to the amount for the article of news sold to you by him or the item of information sold to you by him?

A. Yes, sir.

Q. Has that been true for the entire period that he has been a stringer for The New York Times?

A. Yes, sir.

Q. I ask you the same question with respect to Mr. Chadwick and I exhibit Plaintiff's Exhibit No. 4 to you of January, 1960? Was that envelope reflecting the figures of \$5 with the initials "H.F."—is that representative of the same method of payment and the same manner of handling the transaction as you just testified to about Don McKee?

A. Yes, sir.

Q. Has that been true with respect to Mr. Chadwick at all times since he has been a stringer for The New York Times?

A. Yes, sir.

[fol. 299] Q. Now, do these exhibits one, two, four and five—I will separate them according to the names, Chadwick and McKee—exhibits two, four and five relating to Mr. Chadwick which purport on their face to be for the months of January, March and April, represent the total sum of money paid by you to Chadwick for the news items furnished to you by him for that period of time in 1960?

A. Yes, sir.

Q. And in the case of Mr. Chadwick as reflected by the exhibits representing a total sum of \$135.

A. Yes, sir.

Q. And in the case of Mr. McKee by one exhibit in April, 1960, representing the total payment by you to him in the amount of \$50 during the year 1960.

A. Yes, sir.

Mr. Nachman: I didn't quite understand that. Mr. Embry you say that envelope covers the year 1960? I think it covers the month of April, 1960.

Mr. Embry: No, I said the total amount paid but I made an error.



By Mr. T. Eric Embry: (Continuing)

Q. In respect to Mr. McKee there are also exhibits 6 and 7 introduced by the Plaintiff, adding a total of \$40 to the \$50 you have testified about, being payments made in February and March in addition to the payment made in April. Is that correct, sir?

A. Yes, sir. That's right. Those seem to be the complete figures for 1960.

Q. And that's the total sum of money paid to each of these gentlemen during the year.

A. Yes, sir.

Mr. Embry: Your Honor, it may be that we could save time on an overall basis if I might have a moment to confer with Mr. Faber in order to decide—

The Court: Well, I know you can't do it in a minute [fol. 300] and so the Court will recess for ten minutes. Court is recessed for ten minutes.

(Court recessed for ten minutes.)

Redirect examination. (Continued)

By Mr. T. Eric Embry:

Q. Mr. Faber, you have testified that The New York Times Company has approximately 250 staff correspondents and in your testimony in that regard you went into the details with respect to how many of those had ever been into the State of Alabama. We will get back to that point later. Now, I believe I failed to ask you and I want to ask you now how many stringers or string correspondents does The New York Times Company purchase news items from or do business with nationally?

A. Between 250 and 300.

Q. Now, of those 250 to 300 stringers is it your testimony that at no one time during the period from the 1st of January, 1956 through April of 1960 have there ever been more than three such stringers in the State of Alabama?

A. Yes, sir.

Q. Now, you were asked on cross examination by Mr. Nachman something with reference to the payment of Don

McKee or the authorization of payment to Don McKee during April or for April, 1960 and to Mr. Chadwick for April, 1960—the payment of each a sum of money in connection with the assignment by you of Harrison Salisbury to go throughout certain parts of the South including the State of Alabama, was the payment by you authorized to be made to Mr. McKee and Mr. Chadwick on the occasion you testified about for information furnished to Mr. Salisbury by those two individuals?

A. Yes, sir.

Mr. Baker: We object to the leading, if the Court please.

The Court: Well, I will let it in temporarily. Go ahead. [fol. 301] Mr. Nachman: If I recall Mr. Faber's testimony, it was that he had told Mr. Salisbury that he could call on these stringers in Alabama and had given their names to Mr. Salisbury. I don't recall his testimony about what the payment was for in any greater degree than that and I think I recall correctly that Mr. Faber expressed some ignorance about the details of the service that these stringers had performed for Mr. Salisbury and we object to the question—

The Court: The Record will show what he testified about.

Mr. Nachman: But, Your Honor, the leading question accomplished matters that were not in Mr. Faber's testimony on cross examination—

Mr. Embry: Well, certainly. That's why I want to clarify it.

The Court: Well, you can re-clarify on cross examination. Go ahead.

By Mr. T. Eric Embry: (Continuing)

Q. Was the memo presented to you for approval or authorization—tell the Court whether or not it was presented to you for approval or authorization for payment to those individuals for information furnished to Mr. Salisbury?

A. I sent a memo up to them—up to the auditing department for payment to Mr. Salisbury. That was for information provided to Mr. Salisbury.

Q. Now, the stringer card which was a blank form identified as Plaintiff's Exhibit No. 62, I believe, although I

can't find it, you have testified about the data that was placed upon that exhibit by the stringers at the time it was forwarded to you in New York. Now, tell His Honor, if you will, what was the occasion for you having them put the data on the card and having them send it to you? What was the occasion for that?

A. Well, when we get a new stringer we have them fill out this information on the card so that we can make a card index so that we may refer to it and find his phone number and know whether he is working or not on any day that we want to get something from him.

[fol. 302] Q. All right. Now, Mr. Faber, during this same period of time from the 1st of January, 1956 through April, 1960, have you ever on any occasion with respect to these individual stringers you have testified about in the State of Alabama, have you ever sent that data or the card containing that data of those particular stringers to your personnel department for the purpose of that department entering them or placing them on The New York Times Company payroll?

A. No, sir.

Q. Now, you testified that you made assignments and that that was part of your duties and you did, in fact, make assignments of the individuals that you call staff men or staff correspondents. That's correct, isn't it?

A. That's correct.

Q. You testified that you did that during each of those years from the 1st of January, 1956 through April, 1960?

A. Yes, sir.

Q. Now, how many staff men or staff correspondents did you assign to cover any news events in the State of Alabama in 1960?

A. Two.

Q. Who were those staff men that you so assigned to cover news events in the State of Alabama in 1960?

A. Mr. Sitton and Mr. Salisbury.

Q. On what occasion did you assign Mr. Sitton to cover news events in the State of Alabama in 1960?

A. There were three specific events but I don't recall the exact dates.

Q. Well, if you have a memorandum there that you prepared for the purpose of refreshing your recollection about it, I will ask you to refer to that memorandum.

A. I have one here.

Q. Now, after having refreshed your recollection by referring to it and based upon your recollection and reference to that memorandum, I will ask you to state to His Honor—

Mr. Baker: Where did the memorandum come from, if the Court please?

[fol. 303] The Court: Did you make that memorandum yourself?

The Witness: No, sir, but it was made under my supervision.

The Court: It was made under your supervision?

The Witness: Yes, sir.

The Court: Do you know the facts contained therein to be true and accurate?

The Witness: Yes, sir.

The Court: Well, as I understand the rule about this memorandum business, if the witness says that he cannot recall all of these things but I have a memorandum that is true and correct, then you allow him to read from that memorandum and then his testimony and the memorandum both become evidence. Isn't that correct?

Mr. Embry: That's correct, sir.

The Court: Yes. I think that's correct law.

By Mr. T. Eric Embry: (Continuing)

Q. Now, you mentioned Mr. Sitton. Let's start with him first. On what occasion did you assign him to cover news events in Alabama in 1960?

A. In late January, 1960, he covered a speech by Mr. Symington that took place in Alabama.

Q. Did you make that assignment?

A. Yes, sir. I did.

Q. How long was he in the State of Alabama on that occasion for that purpose?

A. One day.

Q. Now, you indicated that there was another occasion. On what other occasion did you assign him to cover a news event occurring in the State of Alabama?

A. In March of 1960, he came here to cover a story captioned "One Hundred Negroes March in Alabama."

Q. That was in the City of Montgomery, Alabama?

A. Yes.

Q. How long was he in this City on that occasion?

[fol. 304] A. One day.

Mr. Baker: If the Court please, we object to his testifying how long Mr. Sitton was here. He wasn't here himself to—

Mr. Embry: Was that the assignment you gave him to be here for that length of time?

The Witness: Well, the way it happened, Mr. Sitton called me and asked me, can I leave now, and I said, yes, you can leave.

The Court: I will let it in and give you an exception. Go ahead.

By Mr. T. Eric Embry: (Continuing)

Q. Now, Mr. Faber, you said that Mr. Salisbury was assigned by you to cover news events in several of the States and included among those was the occasion when he in fact covered something in Alabama. On what occasion did you assign him to go to places which included Alabama?

A. Beginning in April there was a specific assignment to cover a religious service—

Q. Let me interrupt you. Was that according to the memorandum that you were questioned about on cross examination that outlined what he was to do and where he was to go?

A. Yes, sir.

Q. This wasn't an exhibit I don't believe, but it was referred to in your testimony on cross examination when Mr. Nachman read to you the contents of such memorandum and you said that that was correct.

A. Yes, sir.

Q. Now, go ahead and I will not interrupt you again.

A. The question was—

Q. I had asked you, I believe, did you make the assignment and you said, yes. I then asked you on what occasions you assigned him here.

A. In the beginning of April he went down to Andalusia to cover a religious service and later in the early part of that month he went to Montgomery and Birmingham.

Q. For what period of time did he stay in the State of Alabama on that occasion under your assignment as his superior and after your having given him that assignment? [fol. 305] A. My recollection is four or five days.

Q. Now, in 1959 did you make any assignments of any staff correspondents to cover news events in the State of Alabama, and if so, who were those individuals that you so assigned?

A. Yes, sir. I assigned—Mr. Russell Porter came down—

Q. First, just give us his name.

A. First, Russell Porter.

Q. Who else?

A. John Wicklein.

Q. Who else?

A. Jack Nevard and Mr. Sitton.

Q. Claude Sitton?

A. Yes, sir. Claude Sitton.

Q. Now, starting with the first name that you mentioned, Russell Porter, I believe, would you tell His Honor on what occasion you assigned him to cover news events in the State of Alabama?

A. There was one occasion in late January where there was a Court hearing or rather a verdict on the Judge Wallace case and he came down specifically to cover the Judge Wallace decision.

Q. How long was he in the State of Alabama on that occasion?

A. My recollection is that he was here for one day.

Q. Were there any other assignments for Russell Porter in 1959?

A. No, sir.

Q. All right. Now, take the next one that you assigned

in 1959, Mr. Wicklein, and tell His Honor on what occasions you assigned him?

A. Mr. Wicklein came down in the early part of July, 1959 and I think he spent two days or so here and he wrote a story about a few white ministers taking a stand on segregation.

Q. Was he here on any other occasion under assignment by you?

A. No, sir.

Q. How about the third one, Jacque Nevard?

A. Jacque Nevard was down here one day in November of 1959 covering the T.V.A. ceremony.

[fol. 306] Q. All right. Mr. Sitton was next.

A. Mr. Sitton was here, I think, on three occasions in 1959. One of those occasions was in early March and there was a story about—I can't recall exactly what the story was about but the headline was captioned "Institute Works to Get Answers." That was during the period of early March of 1959.

Q. All right. You said that he was here on three occasions in 1959?

A. I have three listed here.

Q. How much time did he spend here on those occasions?

A. As I recall it, these were each one day assignments.

Q. Does that cover the year 1959?

A. Yes, sir.

Q. All right. Now, during the year 1958 I will ask you the same question. Did you make staff assignments or assignments of staff correspondents, and if so, whom did you assign to cover news events in Alabama?

A. The only record that I have here is one of Mr. Sitton in Alabama.

Q. Do you have the occasions?

A. Yes, sir. This was the hearing on the Civil Rights Commission in Alabama and he was here, I think, for maybe two days.

Q. During the time—

A. In December, 1958.

Q. Did he come here and stay until they completed the hearings?

A. Yes, sir. I think it was a two day hearing and he covered both days.

Q. There were no others in the year 1958?

A. No, sir.

Q. Now, in 1957—

A. I beg your pardon. Excuse me. There is one more further assignment in 1958. John Popham during the period of time when he was Southern correspondent.

Q. On how many occasions was Mr. Popham assigned by you in 1958?

A. There were two occasions.

Q. All right. Tell us about those two occasions.

A. In January of 1958 there was a Democratic Convention—[fol. 307] a one day convention that Mr. Popham covered and in April, Mr. Popham covered a medical story in Alabama and again, as I recall it, this was a one day visit in Alabama.

Q. Was the January meeting the meeting of the Democratic Executive Committee in Alabama?

A. I don't know whether it was the Executive Committee or the actual convention itself.

Q. And the other occasion was about a wrist bone graft or some medical event, was it not?

A. Yes, sir.

Q. Those were the two assignments you gave him in 1958 here?

A. Yes, sir.

Q. Sitton and Popham?

A. Yes.

Q. Now, in 1957 did you assign any staff reporters to the State of Alabama?

A. Yes, sir.

Q. Tell us who they were, please, sir.

A. Clarence Dean and George Barrett.

Q. Go ahead.

A. Clarence Dean was here on one occasion, I assume, in 1957. Again, I assume—my recollection is that it was for a period of one or two days and it was a story about the Birmingham Bus Strike there.

Q. Was there another occasion for him?

A. No. Only one occasion for Mr. Dean.



Q. In 1957.

A. Yes, sir.

Q. The other man in 1957 was Mr. George Barrett?

A. Yes, sir. Mr. Barrett.

Q. Where was he assigned, what did he do, and how long was it?

A. Well, Mr. Barrett was here in March of 1957 and wrote the magazine article entitled "Jim Crow, He's Real Tired." I just don't know how many days he took on that assignment.

Q. You don't have any recollection of it?

[fol. 308] A. No, sir.

Q. Those were the 1957 staff assignments?

A. Yes, sir.

Q. Now, in 1956 there was a number of news events according to your prior testimony occurred in Alabama.

A. Yes, sir.

Q. Did you make several staff assignments or assignments of staff correspondents in 1956?

A. Yes, sir.

Q. Will you tell us first of all who the individuals were that you assigned? Just give us their names first.

A. Clarence Dean, Wayne Phillips, Peter Kihhs, John Popham, George Barrett and Phillip Benjamin.

Q. All right. Tell us about Mr. Dean first. Tell us what assignments and what occasions and how long he was in the State for the purpose of carrying out his assignments.

A. Mr. Dean was in Alabama in December of 1956 for a short time and, again, my recollection is that it was a short assignment for one day and the headline story was "Sniper Fires at Fourth Alabama Bus."

Q. What other occasion was Mr. Dean in Alabama?

A. No other occasion for Mr. Dean.

Q. All right. The next one was Mr. Phillips. What about him?

A. Mr. Phillips was in Alabama in February and March of 1956 continuously from—

Q. What dates inclusive?

A. From about February 8th, 1956 when the first story appeared until March 23rd, 1956 when the last story appeared.

Q. The indication from your answer is that he came to some place in Alabama and remained there until he left on the last date that you mentioned.

A. Yes, sir.

Q. And those dates were about from February 8th through March 23rd. Is that correct?

A. Yes, sir.

[fol. 309] Q. Do you know what place he was in Alabama if it was just one place and if not, tell me if there were more than one.

A. No. He was in several places. He went from Tuscaloosa to Montgomery to Birmingham mainly in a triangular circle.

Q. And he covered the news events in those three cities?

A. Yes, sir.

Q. And Mr. Kihhs—is that spelled K-i-h-h-s?

A. Yes, sir.

Q. Where was he assigned and for what occasions and for how long?

A. Mr. Kihhs was in Alabama on two occasions in 1956. On the first one he was assigned to do a story which appeared in that eight page Special Section and in that same period of time which was a period I recall was about three or four days at the most, he also did some spot news stories when the Authurine Lucy case broke out.

Q. Let me ask you this, Mr. Faber. Was that period of time coincident with the time at which the last individual, Mr. Phillips, was present covering the same news items? You said February the 8th—

A. February the 7th for Kihhs.

Q. Peter Kihhs on the 7th?

A. Well, I recall specifically what happened. Kihhs was down there on the eight-page Special and at that time the Authurine Lucy story broke out and so we sent Mr. Phillips down to cover the Arthurine Lucy developments and told Mr. Kihhs to continue on his gathering of information for the eight-page Special summary.

Q. All right. Mr. Kihhs was there you say on two occasions in 1956, the first of which was February—how long was he there in February?

A. I don't really know. My recollection is about two or three or four days at the most.

Q. All right. Then he was there again on another occasion in March?

A. Yes, sir.

Q. How long was he there on that occasion?

A. Oh, about one day. It was a limited assignment.

Q. All right. That covers Mr. Kihhs, doesn't it?

A. Yes, sir.

[fol. 310] Q. All right. Let's take Mr. Popham now. On what occasions was he assigned there and where and for how long in 1956?

A. In April of 1956 I assigned Mr. Popham to cover the bus boycott in Montgomery and he stayed on that occasion for about four or five days filing stories.

Q. Was there another occasion that he was here or was it just for that one occasion?

A. That was just one occasion and he just stayed.

Q. Now, you had Mr. Barrett next?

A. Yes, sir.

Q. On what occasion and where was he assigned by you and for how long in 1956?

A. Well, Mr. Barrett was in Montgomery in late 1956, December, and he came down here on assignment for the magazine to do a magazine story and also covered some news events for us in the same period of time on assignment for me.

Q. For how long?

A. He stayed there for approximately one week.

Q. In Montgomery?

A. In Montgomery. Yes, sir.

Q. And that was the only occasion he was here?

A. In 1956.

Q. Now, you assigned Mr. Benjamin but I believe you told me that you couldn't find any records about Mr. Benjamin. Is that right?

A. I had forgotten about Mr. Benjamin until I saw the documents introduced here with a byline on stories from Alabama.

Q. Do you have any independent recollection as to when you sent him and for how long a period of time?

A. No, I don't.

Q. You do have records to the effect that you did send him down here though?

A. Yes, sir.

Q. Did you not also assign Mr. Sitton to cover the trial of Martin Luther King here in Montgomery at about the [fol. 311] time this litigation was initiated and begun?

A. Yes, sir.

Q. And the coverage was aborted by the fact that we, as his attorneys, advised him not to be present and you did not include that in your assignment, did you?

A. No, I did not.

Q. But he was here for a few minutes before he was advised not to be here any more. That's correct, isn't it?

A. That's right.

Q. And he had come initially by your assignment.

A. Yes, sir.

Q. All right. That's all.

Recross examination.

By Mr. M. R. Nachman, Jr.:

Q. Mr. Faber, referring to Plaintiff's Exhibit No. 1 and Plaintiff's Exhibit No. 2 again and let's talk about Plaintiff's Exhibit No. 1 first. Is it your testimony that that \$50 represents a computation by you of the amount of words or lines that Mr. McKee submitted for publication?

A. No, sir.

Q. Twenty-five dollars of that amount was for helping Harrison Salisbury, wasn't it?

A. For furnishing information to Salisbury. Certainly.

Q. Where does that appear on this "98" business that Mr. Embry was asking you about?

A. Well, it doesn't appear on the face of it but I presume—

Q. Well, how do you reach \$50 on the basis of the figures that appear on the front of the envelope?

A. When I get the envelopes of all the stringers and based on my own recollection of the amount of words they

have sent in and the information they have given us, I make an independent computation based on the figures within the envelope and on the face of it.

[fol. 312] Q. Then, the figures on the face of the envelope are not meaningful in terms of Plaintiff's Exhibit No. 1 in determining how you arrived at that \$50, are they?

A. Well, they are meaningful to me.

Q. Well, where is there anything on the face of this envelope about payment of \$25 for helping Mr. Salisbury?

A. There is a summary of the amount of money based on all of the data inside it.

Q. What does the quotation marks "98" mean? What does that figure mean?

A. That, I don't know. It is an auditing figure, I think.

Q. On Mr. Chadwick's envelope, Plaintiff's Exhibit No. 2, the \$100 indicated there includes the \$25 paid to him for helping Mr. Salisbury, does it not?

A. It includes the \$25. Yes.

Q. For helping Mr. Salisbury.

A. Yes.

Q. In either event, in terms of Plaintiff's Exhibit No. 1 or Plaintiff's Exhibit No. 2 there was a total payment for the purchase of news stories from these two correspondents, wasn't there?

A. I presume so.

Q. In both events, that is, in the April, 1960 payment to Mr. Chadwick and in the April, 1960 payment to Mr. McKee there was payment for something other than the sale of news lines to The New York Times. Isn't that correct, sir?

A. Yes.

Q. Their help to Mr. Salisbury did not include the sale of any material at all to The New York Times, did it?

A. Well, it was specifically for giving information to Mr. Salisbury.

Q. But not for the sale of any material to The New York Times for publication—

Mr. Embry: I object to that, Your Honor. That's a question of law for the Court—

Mr. Nachman: Your Honor, we think we have the right [fol. 313] to ask whether they paid this man for selling lines

to The New York Times for publication or whether they paid him for assisting one of their staff correspondents or—

Mr. Embry: Well, that makes about three times he has asked that question—

The Court: Well, we will let him repeat one more time.

Mr. Nachman: I simply wanted to ask him about the basis for—

Mr. Embry: Well, we object—

The Court: I will let him ask him one more time. Go ahead. He may have one more repetition.

By Mr. M. R. Nachman, Jr.: (Continuing)

Q. I will ask you, Mr. Faber, if these two exhibits, Plaintiff's Exhibit No. 1 and Plaintiff's Exhibit No. 2, reflect payments to the correspondents, McKee and Chadwick, for matters other than the sale of news material to The New York Times for publication? Is that right?

A. Well, I considered that information given to Mr. Salisbury as news material.

Q. Well, how did you arrive at the figure \$25 then? Did you compute it by line or what?

A. No. I computed it that way because I thought it was a fair figure at that time.

Q. For the services that they rendered?

A. For the information that they gave Mr. Salisbury.

Q. Was it in accordance with the rates stated on your rules for correspondents?

A. No, sir.

Q. It was not, was it?

A. No, it was not.

Q. Now, what did you pay Mr. McKee for the work he did as reflected in Plaintiff's Exhibit No. 77, a telegram to Mr. Garst?

A. I paid him nothing.

Q. Was he paid by The Times?

[fol. 314] A. As far as I know. I don't know.

Q. Have you made any check on that?

A. No. I have not.

Q. I see. You have no memorandum on that.

A. No, sir.

Q. Now, do I recall correctly that you stated that Mr. Sitton came into Alabama on assignment on three occasions in 1960 or was it 1959? How many times did you say that he came here in 1959?

A. In 1959?

Q. Yes, sir.

A. Three.

Q. I would like to read to you from this statement a series of questions and answers and ask you that if Mr. Sitton made this testimony under oath whether or not you would say that he was incorrect. I am now reading from page 46 of the deposition. Question. "In 1959, to the best of your knowledge, how frequently did you come into Alabama to cover news events?" Answer. "Oh, a rough approximation—I would say ten or twelve times." Question. "And over how long a period of time would those occasions extend? I realize they may vary." Answer. "I imagine the longest period was on that Civil Rights Commission thing; I don't really recall. I would guess a week. That's a rough guess." Question. "Did—the longest period of time on any one of those ten occasions was a week?" Answer. "I think so. It might have been longer. It might have been ten days, but without refreshing my memory, I would say a week or possibly ten days." Now, my question is, when Mr. Sitton made those statements under oath in response to the questions would you say that he was incorrect about that?

Mr. Embry: Don't answer that question. We object to that.

Mr. Beddow: Just a minute. We object to that. It calls for the testimony of another individual taken at another occasion and at another time and place, if it please the Court, and it invades the province of the Court.

The Court: Well, I imagine he could sort of refresh the [fol. 315] witness' recollection. I will let it in and give you an exception.

Mr. Beddow: Your Honor, this testimony was taken in Atlanta and this witness was not there and he wouldn't know unless he was there—

The Court: I will let it in and give you an exception.

Mr. Beddow: Your Honor, he is asking this witness to interpret the truthfulness of another man's testimony made in Atlanta—

Mr. Embry: Your Honor, this witness—

Mr. Nachman: Your Honor, I am only asking him whether he disagrees with—

The Court: Whose testimony are you asking him about?

Mr. Nachman: Your Honor, this is Mr. Sitton's testimony and I am asking him if Mr. Sitton made this statement under oath if Mr. Faber would disagree with him or say that it was incorrect.

The Court: I understand. Well, I don't think that's a good question. I will give you an exception. I thought you were asking about his testimony.

Mr. Nachman: No, sir. I was asking about Mr. Sitton's testimony.

The Court: Well, you have an exception. Go ahead.

By Mr. M. R. Nachman, Jr.: (Continuing)

Q. Mr. Faber, am I not correct, sir, that the figures you have given on Re-Direct Examination do not include occasions when these staff correspondents came into Alabama on their own initiative and not under orders from you?

A. I don't recall a single occasion when they came on their own initiative.

Q. Your testimony is then that Mr. Sitton only came into Alabama on three occasions in 1959.

A. According to my records.

Q. I am asking you from your testimony—

A. My recollection is that he came in three times.

[fol. 316] Q. You say positively then that he did not come to Alabama on more than three occasions in 1959? Is that your testimony, sir?

A. I wouldn't say that positively.

Q. You may be wrong, may you not?

A. Oh, I may be wrong, certainly.

Q. You will not state positively then that he did not come into Alabama on more than three occasions in 1959.

Mr. Embry: We object to that as being argumentative, Your Honor. He has stated the same question about eight different times.



The Court: Well, it is re-cross examination and I will let it in. He can give his best recollection about it.

Mr. Embry: Go ahead.

The Court: Your best recollection.

The Witness: My best recollection is that he was here on three occasions.

By Mr. M. R. Nachman, Jr.: (Continuing)

Q. Now, how many times did you say that Mr. Sitton was in Alabama in 1958?

A. Once.

Q. Now, Mr. Faber, I show you Plaintiff's Exhibits numbered 95, 96, 97 and 98 which are New York Times expense statements for Claude Sitton and I will ask you to look at those and state how often those expense accounts show that Mr. Sitton submitted statements of expense for trips to Alabama in 1958?

Mr. Embry: We object to that, Your Honor. He has testified that he didn't know anything about these.

The Court: What was that again?

Mr. Embry: He has testified he didn't know anything about the expense statements nor the procedure and the documents themselves would be the best evidence and they are already in evidence, if the Court please.

Mr. Nachman: Your Honor, this is cross examination and I think I have the right to—

[fol. 317] The Court: I think you have a right to question the witness about it. He might find out that he was in error if he said he was here three times or it may be that he is not in error. Go ahead.

Mr. Embry: We except.

The Witness: The first sheet shows that—

By Mr. M. R. Nachman, Jr.: (Continuing)

Q. What exhibit are you talking about now?

A. I'm sorry. Plaintiff's Exhibit No. 97. This shows that Mr. Sitton arrived in Montgomery at 9:30—I'm sorry. He arrived in Montgomery at 1:30 P. M. on June 2nd—

Q. Just give us the number of occasions.

A. He shows that he was in Birmingham on June 3rd and 4th—

Q. What year?

A. I'm sorry. There is a penciled notation there that indicates 1958, I think.

Q. Go ahead with the next one.

A. Plaintiff's Exhibit No. 98 shows an arrival in Huntsville, Alabama, on May 20th and departure on May 21st—

Q. Where?

A. Huntsville. It also shows on May 31st arrived at Huntsville on May 31st and departed on June 1st.

Q. What year?

A. In 1958. Again on Plaintiff's Exhibit No. 96 it shows Mr. Sitton arriving in Huntsville on July 23rd and leaving on July 24th—leaving the same day. I beg your pardon. Arriving July 23rd and leaving on the same day. On December 1st he shows an arrival in Tuskegee and on December 3rd it shows an arrival in Montgomery and on December 5th leaves for Birmingham. On December 7th he left Little Rock to Birmingham and took a plane out of Birmingham to Montgomery and left Montgomery on December 9th. This is on Plaintiff's Exhibit No. 95.

Q. So, those statements show that he was in Alabama more than your records show that he was in Alabama—

Mr. Embry: We object to that, Your Honor, because it [fol. 318] is not shown—those things don't show whether he was doing anything for The New York Times in connection with gathering news or working in connection with any of the corporate functions of that newspaper on the occasions that they say—

Mr. Nachman: Well, these statements show that the expenses thereon have been paid, don't them? Aren't they stamped paid?

The Witness: Yes, sir.

The Court: Well, they are already in evidence. The Court can figure out how many times he was here. Go ahead.

By Mr. M. R. Nachman, Jr.: (Continuing)

Q. The New York Times doesn't pay its correspondents for jaunts of their own, does it?

A. No, sir.

Q. It has to be on business of The Times, doesn't it?

A. Certainly.

Q. That's what I thought, sir. Now, let's get to Popham in 1957. How many times did you say your records indicated that he was in Alabama in 1957?

A. My records don't show any news events covered by Popham in 1957.

Q. All right, sir. Now, I would like to show you Plaintiff's Exhibits No. 100, 101 and 102 and ask you whether those exhibits do not show expense statements of Mr. Popham for trips to Alabama during 1957 and also show that those expenses were submitted and that he was paid.

A. Plaintiff's Exhibit No. 102 shows an arrival and departure in Birmingham. Plaintiff's Exhibit No. 101 shows an arrival at Gadsden and at Tuskegee and a departure from Gadsden. Plaintiff's Exhibit No. 100 shows an arrival and departure from Florence, Alabama. Plaintiff's Exhibit No. 99 shows an arrival and departure from Memphis and also an arrival and departure from Huntsville.

Q. Now, how about Mr. Kihhs in 1956? What was your testimony about him?

A. In 1956?

[fol. 319] Q. Yes, sir.

A. There were two occasions on which Kihhs covered news events in Alabama.

Q. How long a period of time?

A. My recollection was that on each occasion it was for one or two days. No. On the first one I think he came down on a magazine assignment and stayed a little longer than that. That was on the first occasion.

Q. I show you Plaintiff's Exhibit No. 113 and ask you whether this doesn't show that Peter Frederick Kihhs was in Alabama continuously from January 22nd through January 31st and also again on February 2nd through February 4th?

A. It shows that Mr. Kihhs came into Alabama on January 22nd and stayed through January 31st.

Q. Continuously?

A. Yes, sir, continuously.

Q. Didn't he come in also on February 2nd and stay until February 4th?

A. Yes, sir. He came back to Mobile on February 2nd and stayed until February 4th.

Q. All right, sir. Now, how about Popham in 1956?

A. Well, if I remember correctly, I think I mentioned one continuous assignment for four or five days.

Q. Didn't he come in and out of Alabama on two or three occasions during that time?

A. He may have come in and out of Alabama.

Mr. Embry: If the Court please, we want to object to that. A number of these instances show from the exhibits that obviously Birmingham and Huntsville and those places are points where a man changed airplanes or changed his mode of transportation at a connecting point—

Mr. Nachman: Your Honor, you will recall—we think that there is a substantial difference in—

The Court: Well, these are already in evidence.

Mr. Nachman: Yes, Your Honor, but we think that they [fol. 320] indicate that this witness may be mistaken as to the completeness of the memorandum which he used to refresh his recollection on and they are in substantial conflict with some of these other records of The New York Times—

Mr. Embry: They are not in conflict, Your Honor. They just don't understand what they show and—

The Court: Well, the Court will not consider anything except what is competent and relevant testimony. Go ahead.

By Mr. M. R. Nachman, Jr.: (Continuing)

Q. Mr. Faber, turning back to your memorandum, who prepared your memorandum, sir?

A. Which memorandum?

Q. The one that you referred to in your previous testimony, sir.

A. This was prepared by Kenneth Campbell, a reporter for The New York Times.

Q. What records did he use in order to prepare that memorandum?

A. He used a morgue in our clipping service that classified articles and the bylines of reporters.

Q. In other words, he simply referred to the news stories of those reporters in order to compile that memorandum. Is that correct?

A. Yes, sir.

Q. And there was no attempt made by him to determine how long these people stayed in Alabama on these various occasions, was there?

A. No, sir.

Q. There was no attempt at all made by him to determine that.

A. Not by him.

Q. Was there any other attempt to do so in the preparation of that memorandum—

A. Just my recollection based on these news stories.

Q. Your recollection based on the news stories.

A. Yes, sir.

Q. And this other gentleman's actual search of the news stories.

A. Yes, sir.

[fol. 321] Q. And no other records of The New York Times were examined in order to determine how long and how often these men had been in Alabama during the period of time covered in it.

A. Not in this memorandum. No, sir.

Mr. Nachman: We move to exclude it, Your Honor, because obviously it is not based on all of the records of The New York Times and these expense statements which are in evidence were not even consulted in the preparation of that memorandum and we move to exclude it.

The Court: I will take the motion under consideration. I am inclined to leave it in though and if I do I will give you an exception.

Mr. Nachman: All right. We have no further questions, Your Honor.

## Redirect examination.

By Mr. T. Eric Embry:

Q. This telegram that he referred to of Mr. McKee's which you said you didn't know about, that is, Exhibit No. 77, you did not initiate the request that this—

A. No, sir.

Q. You had nothing to do with it.

A. No, sir.

Q. All right. That's all. No further questions.

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JOSEPH B. WAGNER, having been duly sworn, was called as a witness for the Defendant and testified as follows:

## Direct examination.

By Mr. T. Eric Embry:

Q. This is Mr. Joseph B. Wagner?

[fol. 322] A. Yes, sir.

Q. Mr. Wagner, where do you reside?

A. Long Island, New York.

Q. Are you an employee of The New York Times Company?

A. I am, sir.

Q. How long have you been an employee of that company?

A. For nineteen years.

Q. Are you the Assistant National Advertising Manager?

A. No. I am the National Advertising Manager.

Q. Is one of the functions of your department the acceptance and publication of advertising from those who seek to place advertising in The New York Times newspaper?

A. No.

Q. Do you, as National Advertising Manager, supervise the records pertaining to advertising that is placed in The New York Times newspaper?

A. Yes.

Q. Now, during the years 1956, 1957, 1958 and 1959—I

withdraw that. During the year 1960 up through April, 1960, do you have available to you the information from your records with reference to the amount of advertising that was placed in The New York Times from advertisers in the State of Alabama?

A. Yes. We get that information from our statistical department.

Mr. Baker: If the Court please, we believe that the records would be the best evidence.

Mr. Embry: Well, Your Honor, I can't do it all at one time.

The Court: Well, if you don't connect it up, I will throw it out. Go ahead.

Mr. Baker: Well, if he is going to connect it up, Your Honor, I will withdraw the objection.

The Court: All right. Go ahead.

By Mr. T. Eric Embry: (Continuing)

Q. Have you during the year 1960 assigned any advertising [fol. 323] representative of The New York Times Company to go into the State of Alabama for the purpose of soliciting advertising?

A. No. Not of The New York Times Company.

Q. Has there been anyone acting in behalf of The New York Times Company that has, in fact, gone into the State of Alabama during the year 1960 for the purpose of soliciting advertising to be placed in The New York Times Company paper, The New York Times?

A. There has been nobody from The New York Times Company in the State of Alabama for the first five months of 1960 soliciting advertising.

Q. Has there been anyone else who has solicited advertising for the New York Times Company?

A. There has been from the New York Times Sales Incorporated from the Atlanta office.

Q. Is the New York Times Sales Incorporated an advertising solicitor that solicits business for The New York Times Company?

A. Yes, sir. They are a separate organization.

Q. All right. You say that someone from that organization has solicited advertising in Alabama during 1960.

A. Yes, sir.

Q. Do you know who that individual or individuals are?

A. I believe that Mr. Hurley and Mr. Monger were in Alabama during the first five months of 1960 working out of the Atlanta office of The New York Times Sales Incorporated.

Q. Do you know the dates and occasions on which either of those gentlemen have been in Alabama for the purpose of soliciting advertising as employees of The New York Times Sales Incorporated?

A. I don't remember them but I believe I can find them in my file here. I think you have that.

Mr. Baker: Your Honor, we are going to object to this witness testifying as to dates of which other persons or another person was in the State of Alabama. Mr. Hurley has already given a deposition in this case and we would like to know what records he is referring to.

The Witness: What records I am referring to?

Mr. Baker: Yes, sir.

[fol. 324] The Witness: Well, I have—

Mr. Embry: Just a minute. The Judge has not directed you have to answer that as yet. If it please the Court, his testimony has shown that The New York Times Sales Incorporated, a separate corporation, has solicited advertising for The New York Times Company and now we propose to show on what occasions and what the extent of that was insofar as his knowledge goes to that matter. We want to show how much and what he knows about it.

The Court: What were your grounds of objection, Mr. Baker?

Mr. Baker: It is without the personal knowledge of the witness as to when another person is in the State of Alabama—

The Court: Well, does he have any personal knowledge of these things?

Mr. Embry: Yes, sir. I can go a little further, Your Honor, and—

The Court: Well, supposing you go further into it and lay more predicate. Go ahead.



By Mr. T. Eric Embry: (Continuing)

Q. Do you have any knowledge of the activities of the employees of The New York Times Sales Incorporated in connection with their solicitation on behalf of the New York Times Company of advertising in the State of Alabama from the 1st of January, 1960 through the first five months of 1960?

A. I do because they send an itinerary to our office in New York indicating whenever they are going to be out of town and we also get their expense statements too.

Q. Do you mean by that that they report to you where they are going and when?

A. They send up a copy of their itinerary in case we want to get in touch with them when they are out of town or not in the Atlanta office and moving about. We have a copy of their itinerary.

The Court: You are in the home office in New York City?  
[fol. 325] The Witness: Yes, sir.

By Mr. T. Eric Embry: (Continuing)

Q. Now, has that been true during 1960 and during the period of time we have been talking about?

A. Yes, sir.

Q. That same situation?

A. Yes, sir.

Q. Do you know how many employees the New York Times Sales Incorporated has in its Atlanta office?

A. I do.

Q. How many?

A. They have three.

Q. Of what does that staff consist? Who are those people?

A. Thomas Hurley is the manager of the Atlanta office of The New York Times Sales Incorporated. Frank Monger is a salesman working with Mr. Hurley and Miss Cornelia Dobbs is the stenographer working in the Atlanta office.

Q. Now, with respect to Mr. Monger and Mr. Hurley as employees of The New York Times Sales Incorporated, does that concern have a territory or did it have an area

within which it is employed to solicit advertising for the New York Times Company?

A. Yes, sir.

Q. What area or geographical limit is it within which those people are to solicit advertising for The New York Times Sales Company?

A. The whole State of Georgia, North and South Carolina, Tennessee, Alabama and Mississippi and the Cities of New Orleans and Baton Rouge in Louisiana.

Q. I believe you have already testified that during 1960 the only solicitation of advertising for The New York Times Company was by The New York Times Sales Incorporated in Alabama. Is that correct?

A. Yes, sir.

Q. In that connection, do you have any memorandum to refresh your recollection with or from which you can [fol. 326] testify and tell His Honor who and on what occasions the representatives of The New York Times Sales Incorporated came into Alabama for the purpose of soliciting advertising for The New York Times Company?

A. If you will let me have that file, I can tell you.

Mr. Nachman: Your Honor, we made an objection earlier and we still think that the records themselves are the best evidence.

The Court: Well, when you say to refer to the records, what do you mean by the records?

Mr. Nachman: The records that this witness is now examining and is about to testify from.

The Witness: What shall I do, Your Honor?

Mr. Nachman: I don't know what he has there but apparently they are records of The New York Times.

The Court: What do you have there?

The Witness: I have a memo and one of my assistants gave me a run-down.

The Court: Well, it would be all right for me—for Mr. Nachman to take a look at it, wouldn't it?

Mr. Embry: Surely, Your Honor. He may look at the file.

The Court: Go ahead and take a look at it.

Mr. Nachman: Your Honor, we think that there should be some identification as to who Roger Atwood is—

Mr. Embry: Your Honor, we have not offered that document into evidence.

The Court: Well, if it hasn't been offered in evidence there is no question about it then. Go ahead.

By Mr. T. Eric Embry: (Continuing)

Q. Mr. Wagner, have you prepared a certain memorandum and have you had others of your organization prepare certain memoranda from the record from your organization for the purpose of your being able to refresh your recollection about specific matters of which we have inquired of you in anticipation of your testimony in respect to matters connected with this hearing?

[fol. 327] A. Yes, sir.

Q. Is one of those memoranda which you caused to be prepared for you this paper that Mr. Nachman was examining just now dated May 13th, 1960 directed to you and signed by Roger Atwood?

A. Yes, sir.

The Court: Who is Roger Atwood?

The Witness: Roger Atwood is an Assistant to the National Advertising Manager.

The Court: His headquarters are where?

The Witness: His headquarters are located in New York.

The Court: Does he sort of work for you? Do you have a general supervision over him?

The Witness: Yes, sir.

Mr. Nachman: Your Honor, I object because we have a memorandum which has been prepared by an employee of The New York Times Company which apparently has been extracted from their records and this witness now in his testimony proposes to read from it and we think that the memorandum itself ought to go into evidence as being the best evidence as to what their records show about these matters.

The Court: Which memorandum are you speaking of?

Mr. Nachman: I am speaking of the memorandum which has been identified as being dated May 13th, 1960.

Mr. Embry: Your Honor, I will be happy to introduce

this into the Record after laying a predicate to show what it means.

The Court: Well, let's lay the predicate first then. Go ahead.

By Mr. T. Eric Embry: (Continuing)

Q. At your request and direction and under your supervision did Mr. Roger Atwood, one of your assistants, over whom you have supervision, during the period of 1959 and 1960, prepare for you from the original records of The New York Times Company in New York City this memorandum reflecting the names of the persons and the amount of time those persons had spent in the State of Alabama [fol. 328] soliciting advertising during the years 1959 and 1960?

A. Yes, he did.

Q. Now, you have testified that Mr. Thomas M. Hurley is and was during the year 1959 an employee of The New New York Times Sales Incorporated. Is that correct, sir?

A. Right.

Q. And that is who is referred to when the name "Hurley" appears on this memo?

A. Yes, sir.

Q. And that Mr. Monger—I don't believe you told us his first name.

A. Frank.

Q. Frank Monger is an employee of The New York Times Sales Incorporated—

A. Right.

Q. And that is who this refers to when the name "Monger" appears.

A. Right.

Q. Now, who is "Sullivan" as appears on the memorandum?

A. Sullivan is a member of the New York staff of The New York Times advertising department.

Q. Is he an employee of The New York Times Company, a corporation?

A. Yes, sir. He is.

Q. In the advertising department?

A. Yes, sir.

Q. Who is J. McCullough?

A. He is a member of the New York staff of the advertising department and is employed by The New York Times Company. Now, I made a mistake when I said before that I thought both Hurley and Monger had been in Alabama in 1960. I find now that only Mr. Monger had been here in the year 1960.

Q. You mean as of the date of this memo of May 13th?

A. Yes, sir.

Q. With that correction, I will ask you if the words and figures which say "1959—Hurley" and it says, "Birmingham—2 days." What does that mean?

A. It means that he spent two days in Birmingham.

[fol. 329] Q. What does it mean when it says "Montgomery—4 days."

A. It means he spent four days in Montgomery.

Mr. Nachman: I am sorry to interrupt but it seems to me that we ought to have this introduced into evidence before the witness is examined about it. There is nothing in the record now to show anything about the documents that this witness is being asked about—

Mr. Embry: Your Honor, may I state to the Court that I have no intention of not offering this in evidence.

The Court: Well, if the witness is asked about it, it will have to be introduced into evidence.

Mr. Embry: I intend to do so, Your Honor.

The Court: Go ahead.

By Mr. T. Eric Embry: (Continuing)

Q. Now, you said that Hurley was in Montgomery for four days?

A. Yes, sir.

Q. And Selma for one day.

A. That's right.

Q. Monger in Birmingham for two days.

A. Right.

Q. And Sullivan in Mobile for eight days.

A. Right.

Q. In Montgomery for four days.

A. Right.

Q. And in Birmingham two days.

A. Right.

Q. J. McCullough in Birmingham and Montgomery for three days.

A. That's right.

Q. Is that a total of the days—

A. Yes, sir. A total of three days between the two cities.

Q. And in 1960, Monger, Birmingham, one day.

A. That's right.

Mr. Embry: We offer this in evidence, if the Court please.

[fol. 330] The Court: I will let it in.

Mr. Baker: If the Court please, we ask that it be read.

The Court: Well, why not let the Court read it and that will save some time. Mr. Reporter, let the Record show that the Court read it cover to cover, all four pages.

(Court reads Defendants' Exhibit No. 1.)

The Court: All right. It is in subject to any legal objection.

(Memorandum dated May 13, 1960, addressed to Mr. Wagner and signed Roger Atwood, offered and received in evidence and identified as Defendants' Exhibit No. 1.)

By Mr. T. Eric Embry: (Continuing)

Q. Mr. Wagner, describe for His Honor if you will, please, sir, and assume as I will state to you now that I am speaking of a period of time from the 1st of January, 1960 through the month of April, 1960 in the question that I am about to ask you and describe to His Honor the method by which advertising material is placed in your paper for publication. Tell us how it gets to you and what is done with it when it reaches you for that period of time from any advertiser within the State of Alabama.

A. Well, we can receive advertising copy as a result of an agency placing copy of their clients in The New York Times and we can also receive advertising directly from an advertiser. The mechanics of our handling this adver-

tising generally speaking and particularly in the State of Alabama would be for a recognized advertising agency to prepare a piece of copy and send it to New York with an order or a contract and they have to send the necessary printing material with it and after the copy has been screened and gone over by our advertising acceptability [fol. 331] department and our production department, if the advertising agency is a bona fide recognized agency with satisfactory credit arrangements, then we print the ad. Is that what you wanted?

Q. Yes, sir. Now, has there been any advertising during the year 1960 that has been placed with The New York Times newspaper, the New York Times Company, and by placed, I mean forwarded to you in New York for running or publication in the paper from either an advertiser or an advertising agency in behalf of an advertiser from within the State of Alabama?

A. Yes.

Q. In 1960.

A. Yes. There has been.

Q. Do you have some information relative to who they were and how many?

A. There were probably thirty ads that were placed.

Mr. Nachman: Your Honor, once again, if this witness is referring to a memorandum which is a part of the business records of The New York Times, then we object to his testifying from that memorandum and we think that the memorandum should go into evidence in line with our objections to the last exhibit—

The Witness: Well, suppose I—

Mr. Embry: Just a minute.

Mr. Nachman: I don't know whether he is or not but if he is, then we make that objection.

The Court: Let me look at the memorandum in question for a moment. Now, what is the chief objection to this, Mr. Nachman?

Mr. Nachman: May I see it, Your Honor? My objection is, Your Honor, that this document which I take it has been extracted from the records of The New York Times, ought to be introduced into evidence instead of having

the witness reading such figures from a memorandum which has been prepared, unless he is relying on his own knowledge of the matter and I take it that he is not and that he is relying on what this memorandum contains. We also think that a substantiating record should be introduced into evidence.

[fol. 332] Mr. Embry: Your Honor, it would be obviously impossible for any human being short of a genius, I would assume, to recall what he had gone into the records and read and observed and retained in his memory—

The Court: Well, I understand that if Mr. Wagner refers to this memorandum that it will be introduced into evidence.

Mr. Embry: Your Honor, I think we have a right to offer that memorandum to him for the purpose of refreshing his recollection as well as any other memorandum that he may have—

The Court: Well, when you do that, doesn't his testimony and the memorandum become part of the evidence? That's my understanding of the rule.

Mr. Embry: I don't think so, Your Honor—

The Court: Well, you can check into that. He just can't refresh his recollection from this memorandum and then not let the memorandum go in.

Mr. Baker: This memorandum was prepared in the Comptroller's office which is an entirely different department from his department.

Mr. Embry: Your Honor, I might point this out. We were required by Your Honor to produce about eighty-five pounds of documents relating to this same sort of thing and in anticipation of those documents being attempted to be made a subject for evidence in this case, it became necessary for the defendant to prepare for the witness for his own use memoranda from which he could testify so as to refresh his recollection as to the extent of the advertising and as to whether there was any originating in the State of Alabama and if so by whom it was placed and how much money was paid for it and who solicited it, if anyone, in behalf of this corporation and during what period of time and it is quite a voluminous thing as Your Honor must necessarily have observed in this hearing.



We have spent hours going over it and I can't examine this witness in toto in five minutes and I would like the opportunity of going forward and being permitted to develop my evidence. I would like Your Honor to rule on his objections [fol. 333] and let's be done with them and go ahead.

The Court: Well, I will say that if he testifies from this memorandum that the memorandum will have to go in.

Mr. Embry: Well, then, I will not examine him about the memorandum, Your Honor. May we have a moment to confer, Your Honor?

The Court: Yes.

(Off the Record discussion between counsel.)

By Mr. T. Eric Embry: (Continuing)

Q. Did you prepare for yourself from the records of The New York Times Company, within your own department, a memorandum with respect to the advertising of Alabama advertisers the amount of lines in the paper and I will ask you to explain more about that in detail later, for the year 1959 and part of the year 1960?

A. I did have that prepared in my department.

Q. Now, I show you a document identified as Defendants' Exhibit No. 2 for identification and ask you to tell us whether that is the memorandum you have just described.

A. Yes, sir. That is a copy of it.

Mr. Embry: If the Court please, we offer this memorandum into evidence and we want to examine the witness about it.

(Court examines Defendants' Exhibit No. 2.)

(Memorandum entitled "Alabama Accounts" for the year 1959 and January and April, 1960, offered and received in evidence and identified as Defendants' Exhibit No. 2.)

By Mr. T. Eric Embry: (Continuing)

Q. What do you refer to and what is referred to on your memorandum there, Defendants' Exhibit No. 2, as lineage? What do you mean by lineage?

[fol. 334] A. Well, lineage means the actual number of lines that were printed on a full sized page. In our weekday and Sunday paper there are twenty-four hundred lines on each page and eight columns to the page and our magazine there are eight hundred fifty lines to a page because that is tabloid size and there are one hundred seventy lines in each column and five columns to the page.

Q. Well, you have me confused now. The normal page is what? Twenty-five hundred lines?

A. The normal page is twenty-four hundred lines and there are eight columns in one of our full sized pages and there are three hundred lines in each column.

Q. So that an average normal page other than your tabloid size which is your Sunday publication—

A. Of which there are eight hundred fifty lines. That's right.

Q. As contrasted to the normal page of twenty-four hundred lines.

A. Yes, sir.

Q. Now, do you have on your memo there the total number of lines placed by Alabama advertisers in The New York Times for the months of January and April—January through April, 1960, both inclusive?

A. Yes, sir.

Q. Is that thirteen thousand two hundred fifty-four lines?

A. Yes, sir. Thirteen thousand two hundred fifty-four lines.

Q. And there being twenty-four hundred lines to the page.

A. Yes, sir.

Q. Do you have that information giving the names of the advertisers for the year 1959 showing the total number of lines of advertising placed in your paper by Alabama advertisers?

A. Yes, sir.

Q. What is that?

A. That figure is five thousand four hundred seventy-one in 1959.

Q. Mr. Wagner, as a predicate to this question I want to ask you, you have just testified that for the period January through April, 1960, both inclusive, there appeared in The

[fol. 335] New York Times newspaper thirteen thousand two hundred fifty-four lines of advertising of Alabama advertisers. Tell His Honor if you will, please, sir, how many lines of advertising were carried in the New York Times newspaper in toto from all advertisers all over the nation during that same period of time?

Mr. Baker: We object to that.

Mr. Nachman: We object to that, Your Honor. The question is whether they were doing business in Alabama—

The Court: Go ahead.

Mr. Embry: Your Honor, there are many cases and we can give Your Honor citations—

The Court: I will let it in. Go ahead. You may have an exception to the Court's ruling.

By Mr. T. Eric Embry: (Continuing)

Q. Do you remember the question?

A. Do you mean for the first half of this year?

Q. Yes.

A. We have carried a little better than—

Mr. Nachman: We object to that. The first half of the year was not covered by the question—

The Court: Well, connect it up specifically.

Mr. Embry: My question was—

The Court: Connect it up as to whatever the date was.

By Mr. T. Eric Embry: (Continuing)

Q. January through April, Mr. Wagner. Not the first half of the year. January through April inclusive.

A. The January through April figure would be a little in excess of twenty million lines.

Q. Twenty million lines?

A. Yes, sir.

Q. Twenty million lines of advertising as compared to thirteen thousand two hundred fifty-four?

[fol. 336] A. Yes, sir.

Q. Now, you have testified that Alabama advertisers carry five thousand four hundred seventy-one lines of advertising in The New York Times during the year 1959.

How much advertising was carried in The New York Times for all advertisers in the year 1959 throughout the nation?

A. Over sixty million.

Q. Over sixty million?

A. Yes, sir.

Q. Now, you have told us that advertising which came from Alabama advertisers may come directly from the advertiser or may be placed in their behalf by an agent or agency which you referred to as a recognized or bona fide advertising agency.

A. Yes, sir.

Q. Is there any other means by which advertising can be placed in your newspaper from an advertiser in Alabama and could have been during 1959 and 1960?

A. Well, it would have to be direct or through an advertising agency.

Q. Now, in the case of an agency, how is advertising and such as that that was in fact placed by an agency and making that distinction rather than direct—this memo shows that certain advertising was placed by an agency—how does the agency place the advertising with The New York Times to be carried by it? By what means do you get the advertising of these agencies which you did get during 1959 and 1960 from Alabama?

A. Well, they send it up by mail and I suppose they bring it up in person.

Q. Do you recall any instance where that has ever happened?

A. No, but we usually receive insertion orders and printing material in the mail except where there is an advertising agency based right in New York. Generally speaking, it would be through the mail.

Q. All right. Now, during the year 1959 and 1960 did either of the gentlemen you have mentioned who were soliciting advertising for you during the time they solicited it for you, whether employees of yours or members or employees of The New York Times Sales Incorporated, did any of those men, McCollough, Sullivan, Monger or [fol. 337] Hurley, have any authority from you to enter into any contract in the State of Alabama with reference

to carrying advertising by The New York Times newspaper?

A. No.

Q. Do you reject or accept advertising after it reaches your plant in New York?

A. We sure do.

Q. Are all contracts for the running of advertising by you made and accepted in New York?

A. Yes, sir. They certainly are.

Q. What is the procedure or the mechanics during this period of time of 1959 and 1960—wait just a minute. I withdraw that question. Is some advertising placed with you as a result of a contract made by The New York Times Company with an advertising agency and with individual advertisers?

A. Well, an advertising agency can put into effect a contract for an individual account with the Times.

Q. All right. Limiting the information to that right now, have there been any contracts, or can you tell by looking at that memo there, whether any of the advertising placed during 1959 and 1960 was placed as the result of a contract between an agency and The New York Times?

A. Yes. The Birmingham Committee of 100 has signed a contract with us.

Q. You are talking about what year now?

A. Well, they had one in 1959 and they have one currently.

Q. Is that advertising contract for the running of the Birmingham Committee of 100 advertising with an agency or is that direct?

A. That is through an agency.

Q. What agency is that?

A. The Sparrow Agency.

Q. Sparrow?

A. Yes, sir.

Q. Now, let me see if I have got it straight. We were talking about the Committee of 100 which I believe placed advertising by means of a contract between The New York Times Company and the Sparrow Advertising Agency of [fol. 338] Birmingham, Alabama, both in 1959 and 1960,

and there is a contract I believe you said in existence now for the placing of that advertising.

A. Yes, sir.

Q. Now, did we make clear or did I ask you with respect to whether in connection with those contracts for advertising, the two that you mentioned of 1959 and 1960 with Sparrow, whether any advertising solicitor and an employee of The New York Times Company or a solicitor you have described who solicits for The New York Times Company and an employee of another concern has any authority to make such a contract with an advertising agency in Alabama or did either of those individuals have any such authority during 1959 or 1960?

A. No, they didn't.

Q. Now, tell His Honor whether those two contracts you mentioned of 1959 and 1960 and the current one in effect, were prepared on a form of The New York Times Company and forwarded to the advertising agency, to the Sparrow Agency in Birmingham, with the signature of the agency affixed thereon and the contract returned to you in New York and accepted by you and signed by a representative of The New York Times Company in New York after which it was returned to New York?

A. Yes. After it is returned to New York it is countersigned by one of the Executives, either the Business Manager or the Associate Business Manager.

The Court: How do you accept it? Do you write them a letter or what do you do?

The Witness: No, sir. When we have an advertiser who wants to sign a contract with us, we make out the forms in duplicate and send them to the agency and then the agency signs both of them and we keep the original and send the duplicate back to the advertising agency countersigned by the Business Manager or the Associate Business Manager or someone in authority.

The Court: In The New York Times office?

The Witness: Yes, sir. In the New York office. We keep the original there and send the duplicate back to the agency.

[fol. 339] By Mr. T. Eric Embry: (Continuing)

Q. Now, the indications from your testimony would lead me to ask you whether as a matter of fact during 1959 and 1960 there was any other advertising placed with you by means of an advertising contract and so I am now asking you whether there was any other contract, other than The Birmingham Committee of 100 or the contract with Sparrow relative to the Committee of 100 advertising, and I am asking you now whether there was any other advertising placed with you by means of making an advertising contract during those years?

A. In 1959 and 1960?

Q. Yes.

A. Yes, sir.

Q. If there were, how many other contracts were there from Alabama?

A. The Alabama Planning and Industrial Development Board, Bureau of Publicity and Information, came through the Sparrow Advertising Agency.

Q. Is that the advertising of the State Publicity Department?

A. Yes, sir.

Q. When was that contract in effect? For what period of time? Do you recall?

A. No, but I know that it is not in effect now. It has expired. It was sometime during 1959 and 1960 but right now it has expired.

Q. Sometime during 1959?

A. Yes, but it might have expired sometime in January or February of 1960. It might have started in 1959 and expired in 1960.

Q. When was the contract entered into by and between the Sparrow Advertising Agency and The New York Times Company with respect to the advertising of The Alabama Planning and Industrial Development Board and Bureau of Publicity and Information? Was that during 1959?

A. Yes, sir.

Q. Was that contract made and entered into in the same fashion as you have described the contract with Sparrow relative to the Committee of 100 advertising?

[fol. 340] A. Yes, sir.

Q. That is, in respect to the preparation of it by you and the forwarding of the two copies to the Sparrow Advertising Agency and there affixing their signature thereon and returning it to you and you affixing your signature thereon?

A. Yes, sir.

Q. In New York City?

A. Yes, sir.

Q. Now, does any member of your department, the Advertising Department of The New York Times Company, presently reside in the State of Alabama?

A. No, sir.

Q. Did any member of your department, the Advertising Department of the New York Times, reside in the State of Alabama during the year 1959?

A. No, sir.

Q. Has any solicitor that you have described to us and referred to or not, whether you have talked about them or not, has any solicitor of advertising for The New York Times Company by whomever he may have been employed during the year 1959 and 1960 been a resident of the State of Alabama?

A. No, sir.

Q. Now, what do you call a format? What does the word format mean in the parlance of the newspaper world or in your department, the Advertising Department?

A. It means the shape.

Q. The shape?

A. Yes, sir.

Q. All right. What do you call copy? What is copy?

A. The content of the advertisement.

Q. Now, if someone makes up something that is proposed to be an ad, do you refer to that as copy?

A. Yes, sir.

Q. Is that what you call it?

A. Yes, sir. The content of the ad would be the copy.

Q. And the format would be its physical shape?

[fol. 341] A. Yes, sir.

Q. Are these items or ads that were the result of the transaction you have referred to in your memorandum



from the advertisers in Alabama by whomever they were placed—was the copy and material or content of those ads prepared by the agency and forwarded to you at the New York office?

A. Yes, sir.

Q. Is that how it is done?

A. Yes, sir. That's how it is done.

Q. Was that true during the period of 1960 up to—

A. Yes, sir.

Q. And during 1959?

A. Yes, sir.

Q. During that same period of time, of 1959 and 1960 thus far, did any of these solicitors you have described on the occasions they solicited advertising from agencies in Alabama or individual advertisers, did any of those individuals have any authority to accept or reject advertising when they were in and about their solicitation of same in behalf of The New York Times Company?

A. No, they don't have any authority to do that.

Q. Do they have any authority from The New York Times Company to make any contract to the running of advertising when they call on a person to solicit advertising from them?

A. To make a contract?

Q. Yes.

A. No.

Q. Now, does your department within the realm of your knowledge in the advertising department, own any property of any kind real or personal in the State of Alabama at the present time or has it owned any such properties during the year 1959 and the year 1960?

A. Not that I know of.

Q. Now, does your department within the realm of your knowledge in the advertising field there at The New York Times—does it presently have any bank account in the State of Alabama?

[fol. 342] A. Not that I know of. No, sir.

Q. Has it had any bank account in Alabama during 1959 and 1960?

A. No. Not that I know of.

Q. Now, where is the type—the lead, I guess you would call it type that makes the impression on the paper when the paper is printed on an ad—where is that type put together and made into type in the sense that it is made into words and figures? Where is that done for the running of advertising of advertisements of Alabama advertisers during this same period of time I have been asking you about in 1959 and 1960?

A. Well, that could be done in a number of places.

Q. Well, let me limit the scope of my inquiry. Has that ever been done in the State of Alabama by any representative, employee or agent of The New York Times Company?

A. Oh, no. It couldn't be done by—no. No, sir.

Q. Is the type made up in New York or the lead or the linotype or however you do it?

A. Well, wherever the type has to be set when we get a piece of copy it requires the setting of type and it is done right in our own composing room. It is set right there in our own composing room.

Q. Well, that's what I was trying to get you to tell me. Now, are these advertising agencies—you mentioned a few in your memorandum which is in evidence as Defendants' Exhibit No. 2—Sparrow you have already talked about—Luckie—is that an advertising agency in Birmingham? The Luckie Advertising Agency?

A. Yes, sir.

Q. Who is Howard Barney?

A. He is an advertising agency too.

Q. In Mobile, Alabama?

A. Yes, sir.

Q. Who is H. B. Humphray, Allay and Richards?

A. That's an advertising agency in New York.

Q. Well, you have got here, "U.S. Pipe and Foundry, H. B. Humphray, Allay and Richards, Agency."

[fol. 343] A. Yes, sir.

Q. You have the word, "Decision, Alabama and New York." What do you mean by that?

A. Because in our opinion the decision on the placing of the copy is made both in Alabama and in New York.

Q. Where have you received from Messrs. H. B. Humphray, Allay and Richards any order or have had placed with you an order to run that advertising? Where did that come from?

A. New York.

Q. When you referred to a "Decision" in your opinion, do you refer to a decision as to whether or not to run it in your paper by the advertiser?

A. Yes, sir.

Q. You are not talking about any decision of The New York Times, are you?

A. No, sir.

Q. So, actually, when you listed in your memorandum that advertising under Alabama accounts the U.S. Pipe and Foundry account, I will ask you to tell us whether or not that, in fact, did not result from an order placed from Alabama?

A. It did not.

Q. Now, I notice two other items here. You have got "Southern Natural Gas" during 1960 listed on this same exhibit No. 2—

A. Yes, sir.

Q. You have listed here "Southern Natural Gas, Sparrow and DeRamus." What does that mean?

A. Some copy that Southern Natural Gas runs is handled by Sparrow and some is handled by DeRamus. This is the total here of 580 lines and it may be that half of it was placed by DeRamus and half by Sparrow and so we put both of them down.

Q. Who is DeRamus?

A. DeRamus is a financial advertising agency in New York.

Q. Now, there is one other item I noticed on the memorandum in that regard. You have one other listed here as "Avondale Mills, N.W. Ayar," and they are listed as Alabama and New York.

[fol. 344] A. Yes, sir.

Q. What do you mean by that?

A. We included the 4,250 lines of Avondale on this report because the advertising agency for Avondale Mills is located in New York and Philadelphia and the New

York office also works on the account but the home office of Avondale Mills is here in Alabama and so we included them both.

Q. So, actually, that memorandum does not—I will ask you to tell His Honor if this is correct or not. The memorandum does not reflect that contract or orders for advertising were made by Alabama agencies in all of these instances, does it?

A. No. There are one, two, three—there are three instances here that you have just gone over.

Q. Now, you have listed on Defendants' Exhibit No. 2, without repeating where an agency appears more than once, the following separate agencies, Howard Barnay who you listed as being located in Mobile, Alabama. You also have the Sparrow Advertising Agency in Birmingham and H. B. Humphray, Allay and Richards which I believe you said were located in New York?

A. Yes, sir.

Q. Also the Luckie Advertising Agency located in Birmingham.

A. Yes, sir.

Q. You have some listed where there is no agency.

A. Yes, sir.

Q. Also N.W. Ayar in New York.

A. N.W. Ayar at their branch office in New York and they have their home office in Philadelphia.

Q. All right. Now, are those independent concerns or independent advertising agencies?

A. Yes, sir.

Q. Do you have any control or did you during the year 1959 and 1960—did you, The New York Times Company, exercise or have any control over those agencies with respect to the manner in which they conducted their business?

[fol. 345] A. No, sir.

Q. Now, during this period of 1959 and thus far into 1960, you have given us comparative figures with respect to the lineage of advertising which has emanated from these—which you have on your memorandum, Defendants' Exhibit No. 2, in Alabama and nationally—a comparison between that—

A. A total.

Q. A total?

A. Yes, sir.

Q. Is the dollar volume of the compensation paid to The New York Times Company by these agencies and advertisers for the running of this advertisement also a comparatively infinitesimal small amount of the total dollar value revenue from the advertising nationally?

Mr. Nachman: We object to that question, Your Honor. We object to the comparison. The figures would speak for themselves and he can ask the witness the figures he has with regard to the lineage.

By Mr. T. Eric Embry: (Continuing)

Q. With respect to the dollar volume, would you be more familiar with that or would the gentleman from the Comptroller's office be more familiar with it?

A. The gentleman from the Comptroller's would be more familiar with the dollar allotment.

Q. Now, how is the New York Times Company paid by the advertiser when you have accepted the advertising and have run it in your newspaper? By what method or means are you paid for the performance of that service in New York?

A. Well, if the account is direct we send the accounted bill usually at the end of the month if they have any kind of a contract with us. If it is a one-time or two-time advertiser they usually get a bill within a matter of fifteen days and they send us a check. In the case of recognized advertising agencies, they get monthly bills and we send them to the advertising agency usually by the 10th or the 15th of the month following publication. We send them a [fol. 346] bill for any advertising they have placed on behalf of their client or clients and we send those bills to the agencies involved and we discount their bills fifteen per cent.

Q. Then, do I understand from your testimony that you have a different rate which you charge for advertising which is applicable to an advertiser who places his advertising directly with you than that rate which you apply in

billing an advertiser or billing an agency for the placing of advertising through that agency with you?

A. Yes. We do.

Q. What is the difference in the rate you charge as reflected by the bills you send in the case of a direct advertiser as contrasted with an agency?

A. The bill that we send to a direct advertiser is for the gross amount as stipulated in our publication rate card.

Q. You have a series of rates that you publish for the information of those interested in it?

A. Yes, sir.

Q. With respect to advertising?

A. Yes, sir.

Q. And classified according to the kind of advertising, the amount, the volume and that sort of thing affects the amount?

A. Yes, sir.

Q. Did I understand you to say that you bill the direct advertiser at that full rate?

A. Yes, sir.

Q. And you bill the agencies or what you call the recognized agencies—

A. Yes, sir. They have to be recognized advertising agencies.

Q. You bill them at that rate less fifteen per cent.

A. Yes, sir.

Q. Tell His Honor whether you ever send any money or any check for money or negotiable paper or payment of any kind to any advertiser in Alabama and whether you have done it in 1959 or 1960? Have you ever paid any advertising agency in Alabama any money during any of those two years by sending them a check for it?

[fol. 347] A. No. The practice is that we send an advertising agency a bill for eighty-five per cent of the published rate card rate and they the advertising agency will bill their clients at the full rate published in the rate card. As a matter of fact, there might be an exception to that but usually it even works out the same way that if an advertising agency has a ten thousand line contract with us and they find that they use more space than that they get a rebate on it but that would be also applied to our bill.

Q. In other words, are you saying—you still don't send any money, do you?

A. That's right—

Q. You just reflect the change in the billing—

A. Yes, sir.

Q. In the amount that you bill them for?

A. Yes, sir.

Q. Now, is payment made to you for that advertising and was it in the case of those—that advertising which you testified to according to Defendants' Exhibit No. 2 which was placed with you during 1959 and 1960 by advertisers in Alabama—payments sent to you in New York for that?

A. Yes, sir.

Q. When you would bill them?

A. Yes, sir.

Q. And you received the medium of payment, either check or money order or however they were sent, in New York.

A. Yes, sir.

Q. Is there another means by which you receive advertising otherwise than what you have told us about which you referred to as a space order?

A. Yes. The space order would be an order for one or two or three insertions and if the advertiser didn't believe they were going to use enough to warrant their taking out a contract, they would just give us a space order for it.

Q. Are those space orders, and were they during these same years, are they sent to you in New York?

[fol. 348] A. Yes, sir.

Q. Then, do you either accept that order by running the advertisement or running the advertisement or not there in New York?

A. Yes, sir.

Q. Then, do you go through any process which you have described by which you obtain payment for that by billing that individual or billing whoever sends the space order?

A. Yes, sir. We go through the same process.

Q. Now, I may have asked you about this but in asking you about the type or lead I may have been too restrictive in the matter. Where are the activities concerning the printing and composing of advertising performed? That is really the question I should have asked you.

A. Where are they?

Q. Yes.

A. In New York.

The Court: Let me ask you this question. Suppose the Sparrow Advertising Agency sent you an ad from Birmingham and you accepted it and you ran the ad, where and how would you get paid? Would you send a bill or what would you do?

The Witness: Yes, sir.

The Court: Would you send the bill to the Sparrow people or to the advertiser?

The Witness: If it came from Sparrow, we would bill Sparrow.

The Court: Your dealings would be largely with him?

The Witness: Yes, sir.

The Court: Then he would collect it from the other fellow.

The Witness: Yes, sir.

Mr. Embry: If the Court please, I don't have any further questions for this witness but I do want to point out to your Honor that by examining him with respect to 1959 and by asking our prior witness questions relative to the period of time before 1960, I don't mean to waive our objections—

[fol. 349] The Court: Oh, no. I understand that.

Mr. Embry: We still contend, Your Honor, that that period is not relevant.

The Court: Yes. Go ahead.

Mr. Embry: That's all we have for Mr. Wagner, Your Honor.

Cross examination.

By Mr. M. R. Nachman, Jr.:

Q. Mr. Wagner, the revenues from advertising are quite important to The New York Times Company, are they not, sir?

A. Yes, sir.

Q. Do you happen to know, sir, approximately what percentage of the total revenue of The New York Times Company was, let's say for 1959 or do you have any figures for any portion of 1960—what percentage was derived



from advertising as distinguished from other sources of revenue?

A. I have just a vague idea on that.

Q. Could you give us a rough approximation of the percentage?

A. I would say about seventy per cent. I would say between seventy and seventy-five per cent. You are talking about a total now. Is that right?

Q. Yes. You would say from seventy to seventy-five per cent from advertising?

A. Yes, sir.

Q. And the rest of the revenue comes from other sources.

A. Yes, sir.

Q. Does The New York Times spend a considerable amount of money in the solicitation of advertising?

Mr. Embry: We object to that unless it is predicated on what is or is not spent in Alabama or some definite period of time.

The Court: Yes.

Mr. Nachman: I will limit it to Alabama then.

[fol. 350]

NEW YORK TIMES COMPANY ASSIGNMENT OF  
ADDITIONAL GROUNDS OF OBJECTIONS

Mr. Embry: Under the stipulation and agreements had throughout the hearing on the Motion to Quash in the L. B. Sullivan case wherein it was agreed that counsel for The New York Times Company could assign any additional grounds of objections to questions propounded to the various witnesses and to the introduction of documentary evidence that they saw fit to do, such stipulation being for the purpose of saving the Court's time on the original hearing, the defendant, The New York Times Company, wishes to and does assign the following additional grounds of objections. To each objection made originally to questions propounded to the witnesses and the introduction of documentary evidence, that the questions called for a mental operation of the witness and not facts and that the questions called for an answer which does not tend to prove or disprove whether Don McKee and John Chadwick were

agents of The New York Times Company so that purported service upon McKee would constitute valid service upon this defendant. It does not tend to prove whether or not the Times did business in Alabama or whether the cause of action attempted to be stated in the complainant's cause accrued from or was incident to the doing of business or performance of work or service in Alabama by The New York Times Company or its agents, servants or employees and that these same grounds of objection apply to the introduction of the various exhibits offered by the Plaintiff. Further grounds of objection to questions propounded to the various witnesses as well as to the introduction of documentary evidence are that the question and the evidence sought to be adduced by an answer thereto and the documents would not be material or legal evidence such as would authorize a construction by the Court of Section 199 (1) of Title 7, Code of Alabama, 1940, that would permit the Court to assert jurisdiction over the person of The New York Times Company, a corporation, and to admit such evidence for such purpose would be such a misapplication of the law as would deprive this defendant of its property without due process of law in contravention or violation of the Fourteenth Amendment of the Constitution of the United States and in contravention or violation of [fol. 351] Article 1, Section 6, of the Constitution of Alabama, 1901, and would deny to this defendant equal protection of the law in contravention or violation of the Fourteenth Amendment to the Constitution of the United States and would constitute an abridgement of freedom of the press in contravention or violation of the First Amendment to the Constitution of the United States, taken together with the Fourteenth Amendment of the Constitution of the United States and would impose an unreasonable burden upon Inter-State Commerce in contravention or violation of Article I, Section 8 of the Constitution of the United States and such questions and the evidence sought to be adduced therefrom and such documents would be illegal and immaterial as a basis for the Court construing or holding that Don McKee was an agent of this defendant upon whom service of process might be had so as to support a holding by the Court that any purported service upon

him would subject this defendant to the jurisdiction of this Court and the admission of such evidence and the holding on the basis of such evidence that he was an agent so as to subject this defendant to the jurisdiction of this Court would deprive this defendant of its property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States and in violation of Article 1, Section 6 of the Constitution of Alabama, 1901, and would deny to this defendant equal protection of the law in violation of the Fourteenth Amendment of the Constitution of the United States and would abridge freedom of the press in violation of the First Amendment to the Constitution of the United States, taken together with the Fourteenth Amendment of the Constitution of the United States and would impose an unreasonable burden upon Inter-State commerce in violation of Article 1, Section 8, of the Constitution of the United States.

[fol. 352] By Mr. M. R. Nachman, Jr.: (Continuing)

Q. Does it spend much money on the solicitation of advertising from Alabama advertisers and from Alabama advertising agencies?

A. You said, does it spend money. The answer is yes.

Q. Yes, it does.

A. Yes.

Q. For the solicitation from advertisers in Alabama and also from advertising agencies located in Alabama.

A. You are talking about 1959 and 1960 now?

Q. Well, you may restrict your answer to those years if you like.

A. Yes, sir.

Q. And did it in the years prior to 1959, let's say 1960 up to the present time—I beg your pardon, 1956. From 1956 up to the present time.

Mr. Embry: We object to that question on the same grounds previously assigned, Your Honor. It is incompetent, irrelevant and immaterial and too remote in point of time—

The Court: Yes. Overruled. You may answer if you can.

The Witness: Yes.

By Mr. M. R. Nachman, Jr.: (Continued)

Q. Would you explain to the Court the corporate relationship of The New York Times Sales Incorporated to The New York Times Company, the defendant in this case? Maybe I should be more specific. Who owns the stock in The New York Times Sales Incorporated? Do you know?

A. The New York Times—I don't know that I am qualified to answer that question.

Q. You don't know?

A. No. You are talking about the corporate set-up?

Q. I am talking about the stock ownership. Do you know who owns the stock in The New York Times Sales Incorporated?

A. So far as I know it is a subsidiary organization.

Q. Wholly owned?

[fol. 353] A. Yes, sir.

Q. By the New York Times Company?

A. Yes, sir.

Q. When was it set up? When did it begin its corporate existence, that is, as The New York Times Sales Incorporated?

A. I believe in 1956 but that's only so far as I know.

Q. Does The New York Times Sales Incorporated solicit advertising for any other publication other than The New York Times Company?

A. No, sir.

Q. Its activities are restricted solely to the solicitation of advertising for The New York Times Company. Is that correct, sir?

A. Yes, sir.

Q. Am I correct too, Mr. Wagner, in saying that the expenses of The—

A. Excuse me. May I change something?

Q. Yes.

A. I think there is some circulation involved—I think there is some circulation activity involved in The New York Times Sales Incorporated.

Q. Well, I am talking about the solicitation of advertising.

A. Yes.

Q. Insofar as that is concerned, it solicits for no publications other than the New York Times. Is that correct, sir?

A. Yes, sir.

Q. Am I correct in stating that its solicitations in Alabama consist of having its representatives, Mr. Hurley and Mr. Monger, come into Alabama and call on prospective advertisers and advertising agencies?

A. Yes, sir.

Q. And to urge those advertisers and advertising agencies to place advertising in The New York Times? Is that correct, sir?

A. Yes, sir.

Q. That is correct, sir?

A. Yes, sir.

Q. Am I also correct, Mr. Wagner, in stating that The New York Times Company actually pays the expenses of Mr. Hurley and Mr. Monger and did so for their solicitation trips into Alabama?

[fol. 354] A. The New York Times Company?

Q. Yes, sir, as distinguished from The New York Times Sales Incorporated.

Mr. Embry: We object to that, Your Honor, unless the question calls for who ultimately paid it or how it was handled—

The Court: Well, he can ask who paid it and you can come back with your questions later.

By Mr. M. R. Nachman, Jr.: (Continuing)

Q. You may answer.

A. No. The New York Times Sales Incorporated pays the expenses of the employees of The New York Times Sales Incorporated.

Q. I show you, Mr. Wagner, four exhibits identified by the Reporter as Plaintiff's Exhibits No. 266 through No. 269 and ask you to look at those and ask you whether they do not represent New York Times Advertising Department expense statements for Mr. Hurley and for Mr. Monger for trips into Alabama and whether the department concerned is not listed as the National Advertisement Department of The New York Times Company?

Mr. Embry: Your Honor, we are going to object to this because the question was who paid those expenses. The man who knows about that is here and he can testify. I would like to ask this witness on Voir Dire whether he knows. I would like to ask him how the fiscal affairs in that regard are handled on the books and who is charged with it and who, in fact, pays these expenses?

Mr. Nachman: Your Honor, we—

The Court: Well, if he doesn't know, there wouldn't be any use in asking him. Go ahead and ask him a few questions about it and see if he knows.

By Mr. T. Eric Embry: (Continuing)

Q. Do you know how the fiscal affairs there are handled in that regard between the New York Times Sales Incorporated and The New York Times Company?

A. Yes, I do.

[fol. 355] By Mr. M. R. Nachman, Jr.: (Continuing)

Q. Would you go ahead then and answer my question in regard to these expense accounts, sir?

A. Do you want to give me the question again, please?

Q. The question is whether those documents which I have just handed to you, Exhibits 266 through 269, do not show payment by The New York Times Company of the expenses of Mr. Hurley and Mr. Monger for trips into Alabama during the period stated on the exhibits?

Mr. Embry: We object to that. The Record speaks for itself there.

The Court: I will let it in and give you an exception.

Mr. Embry: We except.

The Witness: These are on forms of The New York Times Advertising Department. The way these are handled—when Hurley or Monger takes a trip, they make out one of our regular expense forms and then all items in connection with that are charged to The New York Times Sales Incorporated account. They have to be authorized first and they are authorized by me—

By Mr. M. R. Nachman, Jr.: (Continuing)

Q. They are authorized by you and—

A. By me and then by the auditing department.

Q. In other words, The New York Times Sales Incorporated pays the expenses which are authorized by you. Is that correct?

A. Yes.

Q. You authorized the expenses and they were paid to the person concerned by The New York Times Company? Is that correct? Then the New York Times Company is reimbursed by The New York Times Sales Incorporated. Is that right? Is that the way it works?

Mr. Embry: That's not what he said.

The Witness: No.

Mr. Nachman: Well, if I am wrong, you can correct me.

The Witness: No. These expenses are—the only reason [fol. 356] they are made out on a regular New York Times expense account form is because we just didn't have any New York Times Sales Incorporated forms made out. We don't get that many of them and so we just didn't have any made out. We do have separate stationery for The New York Times Sales Incorporated but we don't in this particular instance. These are—I don't know what the legal term is but these are actually computed and the dollars involved for The New York Times Sales Incorporated men are charged and paid out of the New York Times Sales Incorporated account.

Mr. Nachman: If the Court please, we offer these four documents into evidence which have been identified as Plaintiff's Exhibits 266, 267, 268 and 269.

(Four New York Times Advertising Department Expense Statements for Thomas M. Hurley and Frank M. Monger, dated January 8th, 1960, December 4th, 1959, October 31st, 1959 and August 21st, 1959, offered and received in evidence and identified as Plaintiff's Exhibits No. 266, No. 267, No. 268 and No. 269.)

## Cross examination. (Continued)

By Mr. M. R. Nachman, Jr.:

Q. Isn't it a fact, Mr. Wagner, that you as head of The New York Times Company National Advertising Department supervised the activity of The New York Times Sales Incorporated?

A. I supervised their selling activities, yes.

Q. The selling of advertising?

A. The selling of advertising. Yes, sir.

Q. And the activities of The New York Times Sales Incorporated are under your supervision.

A. Yes, sir.

Q. As the National Advertising Head of The New York Times Company.

[fol. 357] A. Yes, sir.

Q. Is there anybody else other than yourself, Mr. Wagner, who is authorized to approve expense accounts for employees of The New York Times Sales Incorporated?

A. Yes, sir.

Q. Who is that person or persons?

A. Max Faulk. He is our advertising—

Q. Is he an employee of The New York Times Company?

A. Yes, sir.

Q. All right. Anyone else?

A. Monroe Green, our advertising director.

Q. He is also an employee of The New York Times Company?

A. Yes, sir.

Q. Anyone else?

A. No, sir.

Q. Now, returning to Defendants' Exhibit No. 1, this memorandum to you from Mr. Roger Atwood, dated May 13th, 1960, I notice he refers to the time spent by members of "Our Staff". Is Mr. Atwood with The New York Times Company?

A. Yes, sir.

Q. Now, I may be incorrect about your testimony but as I recall it you said that no employee of The New York Times Company came into Alabama to solicit advertising in 1960. Was that your testimony?



A. Yes, sir. I think I changed that. I said first that there were two and then I changed it to one, didn't I?

Q. Yes, sir. Now, this memorandum, Defendants' Exhibit No. 1, shows, does it not, that Mr. Sullivan came into Alabama during 1960.

A. No, sir.

Q. It doesn't show that?

A. I don't think so. This is 1959. This is 1960 right here.

Q. Oh, I see. You didn't mean to—you were just restricting it to 1960.

A. I thought that's the question that you asked me.

[fol. 358] Q. Well, I beg your pardon. It was my mistake and I'm sorry. Now, in 1959 Mr. Sullivan and Mr. McCullough came into Alabama, didn't they?

A. Yes, sir.

Q. Is the Mr. Sullivan referred to here Mr. Robert S. Sullivan of The New York Times Company?

A. Yes, sir.

Q. What position does he hold with The New York Times?

A. He is a salesman on our staff.

Q. Sales advertising?

A. Yes, sir.

Q. And he is not employed by The New York Times Sales Incorporated.

A. No, he is with The New York Times.

Q. How about Mr. J. McCullough?

A. He is a salesman on our staff.

Q. On the staff of The New York Times Company?

A. Yes, sir.

Q. I take it that the purpose of their trips into Alabama was to solicit advertising from agencies and advertisers in Alabama.

A. Yes, sir.

Q. Now, when these gentlemen—let's just restrict it to the gentleman listed on that exhibit, Defendants' Exhibit No. 1—when these gentlemen came into Alabama to solicit advertising, did they bring any kind of samples with them?

A. They do on occasions. Yes, sir.

Q. Would you describe what sort of samples they would bring?

A. Well, we may have an idea that we would like to sell to the Board of Mobile for example, a cooperative effort, and we would bring them a rough lay-out of what we had in mind and we would try to interest them in it and try to sell their participation.

Q. Are you familiar with a man by name of Edward T. Kennedy?

A. Yes, sir.

Q. What position, if any, does he hold with The New York Times Company?

A. He is the area development advertising manager for The New York Times.

[fol. 359] Q. Does he solicit advertising in Alabama?

A. No. So far as I know he has—no.

Q. Would you recognize Mr. Kennedy's signature if you saw it?

A. Yes, sir.

Q. Now, Mr. Wagner, I show you a letter dated January 22nd, 1960 addressed to Mayor Earl D. James, Municipality, City of Montgomery, Montgomery, Alabama, and purportedly signed by Edward T. Kennedy. Do you recognize the signature thereon as being Mr. Kennedy's signature?

A. Yes, sir.

Q. He is the Mr. Kennedy we have just been talking about. Is that correct?

A. Yes, sir.

Mr. Embry: Did he say yes?

The Witness: Yes.

Mr. Diana: Where was the letter sent from?

The Witness: New York.

By Mr. M. R. Nachman, Jr.: (Continuing)

Q. The letter is on the letterhead of The New York Times Company, is it not?

A. Yes, sir.

Q. Is this an advertising brochure or sample that is used by The New York Times Advertising Department to obtain advertisers of this sort, namely, area development and so forth?

A. Yes, sir.

Mr. Nachman: If the Court please, we offer into evidence the letter and the book as our next exhibits.

Mr. Embry: Your Honor, we can get pretty remote in offering evidence but a letter written from New York City to a Mayor in a City of Alabama—to contend that that indicates activity in the State of Alabama by The New York Times Company, a corporation, is really getting more remote than I have ever encountered—

Mr. Nachman: We are going to tie it up right now, Your Honor. We are going to tie it in with another letter. [fol. 360] The Court: Well, I will give him a chance to tie it up and if he doesn't we will throw it out—

Mr. Embry: We object to it, Your Honor, on the grounds that—

The Court: I will let it in subject to it being connected up.

Mr. Embry: It is incompetent, irrelevant and immaterial and sheds no light on the activities of the defendant corporation within the State of Alabama and shows on its face that it was sent in to the State of Alabama by United States mail and it has no evidentiary value with respect to whether or not this defendant was doing business in the State of Alabama at or about the time of this purported service of process on it in April of 1960 or within a reasonable length of time before or after that date or at the time the letter and accompanying brochure purports to have come into the City of Montgomery to Mayor Earl D. James in January of 1960 by United States mail.

The Court: I will let it in for the present subject to its being connected up.

Mr. Embry: We except, Your Honor.

By Mr. M. R. Nachman, Jr.: (Continuing)

Q. Now, I show you another letter, Mr. Wagner, dated July 14th, 1960 and I call your attention to the signature thereon and ask you whether or not you recognize that signature as being the signature of the same Edward G. Kennedy?

Mr. Embry: Don't answer that question, please, sir. Your Honor, we object to an inquiry about anything whether

relevant or irrelevant in July of 1960, after this litigation has begun. It is incompetent, irrelevant and immaterial and cannot possibly shed any light on the issues before Your Honor in this inquiry with respect to the jurisdiction of Your Honor over this defendant or on the activities of this defendant indicating whether or not this defendant corporation was doing business at or about the time of service or a reasonable length of time before or after.

[fol. 361] Mr. Nachman: Now, Your Honor, the objection to the former letter was that it wasn't connected up with any activity other than mailing something in. This letter—the first paragraph of this letter dated July 14th, 1960 reads, “Some time ago you wrote for information about attracting industry to your city, county, State or region. We were pleased to send you a copy of the book, “Area Development Promotion or Progress and Prosperity.” That book referred to is the book we have just introduced. Now, that referred to this paragraph in this letter of July 14th, 1960 which reads as follows: “We would very much appreciate an opportunity for our representative to call on you at your convenience to present this material, to discuss the specific possibilities of your area and to supply any further information you may require.” So, Your Honor, this initial mailing was to be followed up according to the intention of The New York Times by a visit from a representative of The New York Times according to this letter which we now introduce. It is definitely connected with the prior matter and we offer it into evidence for that purpose, Your Honor.

The Court: Well, what is the date of this first letter?

Mr. Nachman: That letter is dated January 22nd, 1960, Your Honor.

The Court: Let me see it. Now, according to this letter it looks like the Mayor wrote up there though.

Mr. Embry: That's correct, Your Honor.

The Court: It says, “We are pleased to send you the requested copy of the book.” Does that indicate that he wrote that?

Mr. Embry: Yes, Your Honor.

The Court: All right. Now, let me see the second letter dated July 14th, 1960.

Mr. Nachman: Your Honor, I don't know whether this is the appropriate time to put Mr. James on the Stand but it is our understanding that he did not write soliciting the brochure or the information but we will put it on when—

Mr. Embry: Your Honor—

[fol. 362] The Court: Well, suppose an agent of The Times came down here or a representative of The Times came down here in response to these two letters, what would these two letters show?

Mr. Nachman: They would show, Your Honor, that The Times is anxious to send a personal representative into Alabama in order to—

The Court: Well, they may have had the intention of sending a man down here but he never got here—

Mr. Nachman: Because, Your Honor, this is part of the business they do and Mr. Wagner has testified that seventy to seventy-five per cent of the revenues of The New York Times are obtained from advertising and we submit that this is a clear attempt—

The Court: Well, wouldn't it be protected by the Interstate Commerce laws—

Mr. Nachman: Your Honor, the cases are clear that a foreign corporation cannot avoid suit in a State by claiming it does business in Interstate Commerce. The question is whether it has sufficient contacts with the State to make it subject to suit there—

Mr. Baker: Your Honor, the International Harvester case—

Mr. Nachman: It is just a question again of the business they do in Alabama and we submit when they express a willingness to send a personal representative into Montgomery to discuss with the Mayor an advertising brochure—

The Court: Well, is that doing business or the expression of a wishful desire to do business?

Mr. Nachman: We think it is a wishful desire to do business and it is a solicitation of business in the State by a representative or employee of The New York Times Company.

The Court: Do you have something to say, Mr. Baker?

Mr. Baker: I just want to call Your Honor's attention to International Harvester against Kentucky, where every-

thing that was done was in Interstate Commerce and the Supreme Court of the United States held that if it was substantial enough it constituted doing business in Ken- [fol. 363] tucky.

Mr. Nachman: As recently as this term, Your Honor, in *Scripto* against Carson where the materials were sold from the State of Georgia to the State of Florida and there was a question as to whether Florida could make collectors out of a non-resident corporate defendant—

The Court: Your idea would be that no agent or representative of the company would have to come into the State?

Mr. Nachman: It is our idea, simply, Your Honor, that this is evidence of the fact that the Times in order to get business, advertising business in Alabama, is willing as it says in this letter to send—

The Court: Well, was that sent to the Mayor from New York or what?

The Witness: From New York. Yes, sir.

Mr. Nachman: As I say, Your Honor, while this is not the appropriate time for us to put on our evidence, it is our understanding from Mr. James that he did not write asking for that material.

The Court: Mr. Embry?

Mr. Embry: Your Honor, I would like to point out that, of course, there is no question of Interstate Commerce being involved. The matter on its face shows it was dispatched by mail from New York City. It doesn't shed any light on anything done in Alabama. That's the question before Your Honor. The question is what may or may not have been done in Alabama—activity in Alabama. Contact in Alabama, Your Honor. There is no case in the history of this country that has ever held that the writing of a letter or that the forwarding of a piece of written material into a State by mail reflects any activity in the State of Alabama by any representative of this corporate defendant. That is absurd, Your Honor.

Mr. Nachman: What about *McGee* versus The International Insurance Company—

Mr. Embry: Well, he is citing cases, Your Honor, and I am familiar with some of those cases. The questions before

those Courts are not the questions we are dealing with [fol. 364] before this Court. This insurance case he is talking about calls for contracts in the writing of insurance and insurance contracts and whether or not that outfit was doing business when they wrote those contracts in the State. We are not concerned with that. We are concerned with one little piece of evidence and whether it is admissible and whether it sheds any light on the activities of this corporate defendant as to whether it was doing business in the State of Alabama and it is objectionable from five or six stand-points. For one thing, the time which it was sent here makes it objectionable. For aught appearing it was sent at the request—it was sent in response to a request for doing something connected with this litigation—there is no evidence to the contrary before the Court. There is nothing in the content of the letter except to show to Your Honor without peradventure of a doubt that it was sent by mail to the recipient, Mayor James, and if any inference can be drawn from it it shows that no representative of The New York Times came or was in Alabama in connection with this piece of evidence. I don't know how to state it otherwise. It just has no evidentiary value except to build up a bulky record and to encumber the Record without having any probative force whatsoever.

Mr. Nachman: It shows, Your Honor, that a representative of The Times was ready, willing and able—

The Court: Well, ready, willing and able but he never got here—

Mr. Nachman: And that he was anxious to come in order to show this material to Mayor James in an effort to try to sell some advertising to the City of Montgomery and it shows a constant course of advertising solicitation by the Times in this State in order to sell advertising as Mr. Wagner has stated from the Stand. He said that was part of their business that they spent money soliciting advertising in Alabama and that they are anxious to sell advertising in Alabama because it increases their business.

The Court: Well, suppose in response to this the agent or representative came down here after the suit was filed. Where would you be then?

[fol. 365] Mr. Nachman: Well, Your Honor, we disagree with Mr. Embry on the cut-off dates. We know that Your Honor does not wish to hear the final arguments at this point. We think that the question of what is relevant and important is whether or not there is a course of conduct in a foreign State by a foreign corporation so that Alabama can say that this corporation has sufficient contacts in Alabama—the minimal contacts to use the language of the cases—so as to make it fair to subject that corporation to suit in Alabama. That, as we understand it, is the issue on doing business point. Now, we don't think that he can cut this off at a date where there has been a continuous course by this defendant namely, in this case—

The Court: Well, I wasn't asking that question to irritate you or to—

Mr. Nachman: I understand, Your Honor. That is the overall theory that we are presenting to you and we think that it is part of a pattern—

The Court: Can you do business in a State by sending a couple of letters and a book?

Mr. Nachman: We say, Your Honor, as I have just pointed out that this is a part of a course of conduct or an attempt to gain advertising by sending solicitors in asking to have another solicitor come in. We have already obtained testimony to the effect that solicitors did come in to Alabama in an attempt to sell advertising in the State and we present this as another part of that overall course of business.

Mr. Embry: Your Honor, that's nearly three months after this litigation was instituted.

Mr. Nachman: Well, it ties in with the other, Your Honor. If it had originated in July, I think there might be some question but it ties in and it ties in with the event that took place in January.

The Court: Well, it looks like there was some correspondence but there were no salesmen coming in here. I don't think this is admissible. Let me give you an exception.

Mr. Nachman: Your Honor, I don't want to impose upon the Court's time but would it have any bearing on the [fol. 366] Court's ruling if I were to ask this witness if it were a part of a course of conduct—



The Court: You may ask him that question but I don't know whether the Court would change its mind or not. Go ahead and ask the question if you wish.

By Mr. M. R. Nachman, Jr.: (Continuing)

Q. Mr. Wagner, you have heard the discussion between Court and counsel. Is it part of the advertising solicitation plan and activity of The New York Times Company to send such brochures to municipal officials and to send representatives in to show them an advertising display in an attempt to obtain such advertising as this for The New York Times?

Mr. Embry: Just a minute. Don't answer that. We object to that, Your Honor, because it is not predicated what in fact was done during any particular period of time or at any particular place. Therefore, it is not evidential as to what may or may not have been done by—

The Court: Well, I don't know what he is going to say because I cannot read his mind but the Court is still disturbed over the fact that no agent came here. Let me stand by my ruling.

Mr. Nachman: All right, Your Honor. May we make a showing on these documents I have offered into evidence?

Mr. Beddow: We have an exception, if the Court please?

The Court: Yes.

Mr. Nachman: We wish to make a showing for the Record of Plaintiff's Exhibit No. 270, 271 and 272.

The Court: All right. Go ahead.

(Letter, The New York Times, to Mayor Earl D. James, Montgomery, Alabama, signed Edward T. Kennedy, dated January 22nd, 1960, offered in evidence but disallowed and excluded by the Court and offered for a showing and identified as Plaintiff's Exhibit No. 270.)

[fol. 367] (Letter, The New York Times, to Hon. Earl D. James, Montgomery, Alabama from Edward T. Kennedy, dated July 14, 1960, offered in evidence but disallowed and excluded by the Court and offered for a showing and identified as Plaintiff's Exhibit No. 271.)

(Book, The New York Times, entitled "Area Development Promotion for Progress and Prosperity," offered in evidence but disallowed and excluded by the Court and offered for a showing and identified as Plaintiff's Exhibit No. 272.)

Mr. Nachman: Now, Your Honor, we have been going through a series of exhibits which have been previously identified as Plaintiff's Exhibits 240 through 265 and they all contain advertisements placed by Alabama advertisers or Alabama advertising agencies. Am I correct, Mr. Wagner? You have gone over these documents here, have you not?

Mr. Embry: I am going to have to disagree with that, Mr. Nachman. The only thing that we could say in a general statement is that each of these have ads appearing in them which relate to something in Alabama and if you are going to offer them I am going to object to them and set out my grounds—

Mr. Nachman: Yes, you may go ahead but I just wanted to establish identification, if the Court please.

The Court: Go ahead.

Mr. Nachman: Have you been over these at an earlier time, Mr. Wagner?

The Witness: Yes, sir.

Mr. Nachman: You have looked over these exhibits?

The Witness: Yes, sir.

[fol. 368] Mr. Nachman: Do all of these exhibits contain ads placed by Alabama advertisers either directly or through Alabama advertising agencies in The New York Times?

The Witness: Yes, sir.

Mr. Nachman: We would like to introduce these, Your Honor numbered from 240 to 265.

Mr. Embry: After Your Honor has looked them over and studied them we would like to take a little time to state our grounds of objection.

(Court examines Plaintiff's Exhibits 240 through 265.)

Mr. Embry: As to those exhibits which he has just offered numbered 240 through 265 consecutively, Your Honor,

we have numerous grounds of objections. Those consist of photostatic copies of pages of issues of The New York Times newspaper. Those exhibits which he has offered into evidence embrace pages from issues of that newspaper extending for a period of time from the 1st day of January, or embraced in this period, from January, 1956 through April 13th, 1960 and possibly some of them are later than that but the motion to produce under which they were brought here is an accurate delineation of the period of time. Each of those pages are photostatic copies of pages of that newspaper which are being offered here as exhibits into evidence. They contain various advertisements as Your Honor has sampled by looking at a couple of them and, of course, Your Honor will look at all of them eventually. None of those advertisements contained in that newspaper contain any facts or recite any information—

Mr. Baker: Excuse me for interrupting but perhaps Mr. Embry doesn't understand—

Mr. Embry: What?

Mr. Baker: We are perfectly willing to limit them to just the Alabama ads. We don't care to—

Mr. Embry: Well, I am objecting to that—

Mr. Baker: Well, we are offering them only as to the Alabama ads.

[fol. 369] Mr. Embry: Well, I understand that to be true and I didn't mean to object to any of the other ads because I am not concerned with those. The statement I was going to make ultimately would have ended by referring to the ads he has referred to in these various sheets of paper and I think that what I was stating to Your Honor was that none of those ads which are made apparent to Your Honor from each of the pages of the exhibits in any wise relate to Alabama either by reference to the announcement or the sale or of an item of commodity or—

The Court: Well, what about the Birmingham ad of 100.

Mr. Embry: The Committee of 100. We will take that as illustrative of that fact. They do not contain any content or recitation of any facts which shed any light or have any probative force on the question of whether the defendant corporation was active and doing business or not or whether it was in fact doing any business or not during any of this

period of time that I have already delineated to Your Honor for those four and one-half years. The fact that such an ad appears there is of no value as evidence in proving or disproving to Your Honor on the question before Your Honor on the grounds of the Motion to Quash among which are the grounds and the question naturally growing from that of whether this defendant corporation has done any business or is doing any business and, more particularly, whether it was doing any business in Alabama so as to subject itself to the jurisdiction of this Court at or about the time of the service of the summons of process upon it in April of 1960. In line with that outline of our contention to Your Honor—of course, another ground of objection is that by virtue of that those particular and separate and several pages of paper with that ad in it is immaterial, incompetent and irrelevant because of the reasons I have outlined. Another ground of objection is that insofar as any of those issues of the paper have ads contained in them from an issue of the paper which appeared at any time other than a time right around the 21st and 26th day of April, 1960, when the service was purported to be had—then in that respect they are too remote in point of time to be of evidentiary value on the question of whether this [fol. 370] defendant corporation was doing business in fact and or about the time of April 21st to April 26th, 1960. They are not calculated either separately or severally, in toto or piece by piece—those ads nor the contents of the ads—they are not calculated to either be evidence contrary to the grounds and averments or allegations of the Motion to Quash or in support of it. They have no value as evidence either in support of or contrary to these grounds of this Motion to Quash. We feel that their not having any evidentiary value, the offer of those exhibits into evidence can do no more than to encumber the Record to the extent of placing a great bulk of paper material in the Record and Your Honor having it in the Record will have nothing more before him than he had before same gets into the Record which will shed any light on the issues in this case. If I may be allowed to pause for a minute, Your Honor, I would like to check with my associate counsel to see if they have any other grounds that I haven't stated for the Record that they would want me to state for the Record.

The Court: Go ahead.

Mr. Embry: Now, as I understand it, Mr. Nachman, these objections I have made apply to each of these separately and severally and we had an understanding on the other series of exhibits—

Mr. Nachman: Yes, surely.

The Court: Well, you have an objection to each aspect of these pages—

Mr. Embry: That if the occasion demanded it and if there was a request for a transcript that under our agreement that we had previously we have the same agreement that my objections would appear by each item separately.

Mr. Nachman: Well, that's our understanding and all of these fall into a common category.

Mr. Embry: And if we chose to they could be put in physically by each and now I want to add one more ground and it may be that I didn't state it to you clearly. Now, the appearance of that ad under the testimony of this and another witness in each of these separate sheets in each of the issues of these separate papers would not be any [fol. 371] evidence and it would not shed any light on whether or not the ad appeared in this newspaper as a result of someone like Mayor James requesting that an ad be run or whether it was done as a result of any activity in Alabama by any representative of The New York Times or by anyone acting in its behalf. I think that is probably one of the strongest objections to them. It fails to shed any light on that question. Just looking at the ad in its ultimate appearance in the paper doesn't indicate whether it is simply as a result of a desire on the part of an advertiser or an advertising agency that sent the ad to the newspaper and placed it in the New York Times and whether Mr. Wagner came down here and asked these people to put an ad in The New York Times newspaper.

Mr. Nachman: Your Honor, I will be very brief. Now, as to the question of time, Your Honor has ruled over and over again on that point but it is amazing to me that these gentlemen put on a witness because he is their witness and not ours—they spent a considerable amount of time asking this witness how ads get to The New York Times from Alabama and where the ads were composed and who makes

up the format and who puts the lead in the linotype machine and how the ads get there and how they are paid for and they go through all the rest of this process and then, Your Honor, when we put the ads themselves in, the actual finished product, the imprint on the newspaper which is the end product of all the matters they asked this witness about and then they turn around and say that it has no probative value in this case whatsoever and sheds no light on the issues involved. We think that these end products of all the questions they asked this witness about have a very clear probative value in this case and we respectfully urge that they be admitted into evidence.

The Court: I believe they are inadmissible. Let me give you an exception on each ruling on each ad.

Mr. Embry: All right, Your Honor. We would like to except and if it is agreeable with opposing counsel we want the exception to apply to the ruling and we want the exception to apply to each individual exhibit.

[fol. 372] Mr. Beddow: Now, Your Honor, do I understand that the agreement had heretofore that when we made an objection unless we wanted to assign special and additional grounds and other grounds that we would have all the other grounds that we had heretofore assigned the same as though we assigned them separately and severally to each separate and several exhibit?

The Court: Well, you put the Court on notice that you excepted and I think that will be all right.

Mr. Nachman: We would certainly stipulate that, Your Honor. We had that agreement all along and it certainly applies throughout the hearing so far as we are concerned.

Mr. Beddow: All right, Your Honor. We just wanted to be certain that we had that agreement clearly understood.

The Court: All right. Go ahead.

(Twenty-five pages of The New York Times newspaper of various dates containing Alabama ads, offered and received in evidence and identified as Plaintiff's Exhibits 240 through and including 265.)

Mr. Nachman: Your Honor, now we have a series of advertisements which are called an Alabama supplement which

was published on February 2nd, 1958, I believe. We have gone over these ads with Mr. Wagner and opposing counsel and have agreed that there are certain ads in this Supplement which should not be considered by the Court because they did not originate from any Alabama transactions. Those are ads for the Seaboard Air Lines Railroad Company, Lumber Fabricators, G. M. & O. Railroad Company, Olen Company, Chem-Strand, North Alabama Associates, L & N Railroad, J. W. Galbraith and Southern Industries Corporation. Did I leave any out, Mr. Wagner?

The Witness: No, I think you have covered it.

Mr. Nachman: Now, there are several pages in this [fol. 373] exhibit which I will offer as one exhibit to be identified as Plaintiff's Exhibit No. 273.

Mr. Embry: Of course, Your Honor, by agreement we have eliminated some of those but we object to all the rest of that exhibit on the same grounds previously assigned to the preceding exhibits 240 through 265, separately and severally.

The Court: Are these the Alabama Supplement?

The Witness: Yes, sir.

(Court examined Plaintiff's Exhibit No. 273.)

The Court: I think they are admissible. I will let them in subject to all legal objections.

Mr. Embry: We except, if the Court please.

(Nine pages of The New York Times newspaper, dated February 2, 1958, designated as The Alabama Supplement, offered and received in evidence and identified as Plaintiff's Exhibit No. 273.)

By Mr. M. R. Nachman, Jr.: (Continuing)

Q. Mr. Wagner, do you know how much The New York Times received for that ad placed in that Supplement, Exhibit No. 273?

Mr. Embry: Your Honor, we object to that. I don't know whether it is agreeable to counsel but during Mr. Faber's testimony we had an understanding about objections to questions along that line but I would like to assign these grounds in addition if it is agreeable that the other grounds

assigned to the ads be adopted as grounds of objection to this question in addition thereto—

Mr. Nachman: We agree to that.

Mr. Embry: We say that the amount of money paid for this ad in February of 1958 is incompetent, irrelevant and immaterial evidence on the question of the activity of this defendant during any pertinent period of time of [fol. 374] the inquiry before the Court about doing business and, more particularly, it is too remote from the date of April, 1960.

The Court: I will let it in and give you an exception. It may be a link in the chain even if weak. I will let it in and give you an exception.

Mr. Embry: We except.

The Witness: I would have to guess at it. The rates have changed since then.

By Mr. M. R. Nachman, Jr.: (Continuing)

Q. Let's see if this will refresh your recollection, Mr. Wagner. I show you two sheets, Mr. Wagner, and call your attention to the initial entry from the Comptroller's office at the bottom of that second sheet and ask you whether that sheet refreshes your recollection as to the amount which was paid to The Times by Alabama advertisers in connection with that Supplement.

A. Well, according to this sheet you have shown me it is \$26,801.64.

Q. Are you satisfied in your own mind that that figures is substantially correct, sir?

A. Yes, I think that's about right.

Q. Well, at any rate, you have no disposition to disagree with those figures, do you, sir?

A. No. I do not.

Q. Now, I show you a letter dated September 9th, 1957 which has been identified as Plaintiff's Exhibit No. 274 for identification. Now, this letter consists of three pages and it is dated September 9th, 1957 and is addressed to Mr. Ralph Silver, Birmingham, Alabama and it has a dim signature from someone with The New York Times Company and I show you that signature and ask you if you can identify it where it says, "Assistant National Advertising Manager."



A. I sure do. It is mine.

Q. Your signature?

A. Yes, sir.

[fol. 375] Q. Now, will you look at that letter and tell the Court whether you know of your own knowledge that was sent to the addressee shown on that letter?

A. Yes, it was sent.

Q. What does the letter concern?

A. It concerns—well, do you want me to read it?

Mr. Nachman: Well, we might let the Court read it unless you—

Mr. Embry: Your Honor, there are going to be some objections to the contents and I don't want to interrupt your questioning of the witness but it may be better to offer it into evidence—

Mr. Nachman: All right. I will offer it. I was just trying to save some time.

Mr. Embry: Well, you had better offer it first. I would like to suggest that mode of procedure.

Mr. Nachman: Well, I thought we might identify it a little more fully before we offered it but we can offer it into evidence at this time.

Mr. Embry: Has it been identified?

Mr. Nachman: Yes. It has been identified by date, September 9th, 1957 and marked for identification by the Court Reporter as Plaintiff's Exhibit No. 274.

The Court: Let me see it.

(Court examines Plaintiff's Exhibit No. 274.)

Mr. Embry: If the Court please, we want to object to this letter dated September 9th, 1957 on the grounds that—we would like to adopt all the other grounds previously assigned to the ads separately and severally and the grounds specified in objection to the last question to which we objected which was put to Mr. Wagner which Your Honor will recall. Without stating all the details of my previous objection, it is too remote in point of time from the date of the purported service and the inquiry before the Court.

Mr. Nachman: Of course, Your Honor, it relates directly [fol. 376] to this ad of February 2nd, 1958 which is already in evidence.

Mr. Embry: And we object further on the ground that it only purports to be a letter sent from New York to Alabama.

The Court: I believe the letter is admissible. You may have an exception.

Mr. Embry: We except, if the Court please.

(Three page letter from The New York Times, dated September 9, 1957 to Mr. Ralph Silver, Birmingham, Alabama, from Joseph B. Wagner, offered and received in evidence and identified as Plaintiff's Exhibit No. 274.)

By Mr. M. R. Nachman, Jr.: (Continuing)

Q. Referring now to this letter, Plaintiff's Exhibit No. 274, Mr. Wagner, am I correct in stating, sir, that it indicates that The Times is paying a company in Birmingham to perform certain services in connection with the preparation of the materials which will go into this Alabama Supplement?

Mr. Embry: Don't answer that question. We object, Your Honor. The letter speaks for itself.

Mr. Nachman: I am not asking about the contents of the letter—

Mr. Embry: Well, he is asking what it means and what it indicates.

The Court: Well, it is rather ambiguous phrasing—I will let it in and give you an exception.

Mr. Embry: We except. We further object on the grounds that it invades the province of the Court—

The Court: I will let it in. Go ahead.

Mr. Nachman: You may answer.

The Witness: Briefly, it is a letter that outlines an [fol. 377] agreement we made with Ralph Silver of the Silver News Company for his assistance in connection with the publication of the State of Alabama Section. His assistance was to include furnishing of the advertising reading matter and lay-outs and generally assist in the sale of advertising for the Alabama Section and his coming to

New York to assist us in the final preparation of the dummy to see that it was put together properly. Does that answer your question?

By Mr. M. R. Nachman, Jr.: (Continuing)

Q. Yes, sir. Partially. He was to be paid and by he I mean the company—the company was to be paid by The New York Times?

A. Yes, sir.

Q. Have there been any other such occasions during the period from January 1st, 1956 up to the present, Mr. Wagner, where The New York Times had paid for similar services in connection with ads that would appear in The New York Times during this period?

A. You are talking about Alabama?

Q. Yes, sir. Restrict it to Alabama.

A. No, sir. Not that I know of.

Q. That's the only occasion that you can recall?

A. Yes, sir.

Q. I believe you testified that the payment was made to this company for its services as outlined in this letter, did you not?

A. I didn't, but—

Q. Well, I am sorry then, sir. Was it?

A. So far as I know, yes.

Q. So far as you know, it was.

A. Yes, sir.

Q. Am I correct, sir, in stating that you do not have the figures on the revenues on the dollar revenues from the Alabama ads? Did you say on your direct testimony that you could only give the lineage?

A. I have the lineage figures.

Q. Someone else would have to give the rest of these figures?

A. Yes, sir.

[fol. 378] Q. The revenue figures I am talking about.

A. Yes, sir.

Q. Or do you know the revenue figures?

A. No. I would be guessing about that.

Q. Now, I believe you stated that samples are taken into

Alabama by persons who solicit for The New York Times or The New York Times Sales Incorporated, did you not?

A. On occasions they are, yes.

Q. Are there any other materials other than samples which these representatives of The New York Times bring into Alabama in connection with their advertising solicitations?

A. Sales promotional materials and presentations.

Q. In addition to the samples?

A. Yes, sir.

Q. These are shown, I believe you said, to the advertisers themselves or to prospective advertisers as well as agencies such as Sparrow and Luckie and the others.

A. Yes, sir.

Q. Are those materials furnished by The New York Times Company?

A. Yes, sir.

Q. Are they paid for by The New York Times Company?

Mr. Embry: We object to that. He doesn't specify when, Your Honor—

Mr. Nachman: I said by what agents. I thought I specified during the period of January 1st, 1956 and let's say through April, 1960—advertising representatives of The New York Times Sales Incorporated or The New York Times Company such as Mr. Sullivan and the other gentleman listed on Defendant's Exhibit 1. The materials that they brought into Alabama during this period and displayed to prospective advertisers or advertising agencies—were those materials paid for by The New York Times Company?

Mr. Embry: We object to that. There is no evidence that anyone came in here during 1958, 1957 and 1956, and if so, who, and who brought what?

[fol. 379] The Court: I will let it in and give you an exception.

Mr. Embry: We except.

By Mr. M. R. Nachman, Jr.: (Continuing)

Q. You may answer.

A. Whatever was brought in by any of the men you mentioned would have been, yes.

Q. Paid for by The New York Times Company.

A. Yes, sir.

Q. Did representatives of The New York Times come into the State of Alabama during the year 1958 for the purpose of soliciting advertising for The New York Times?

A. Yes, they did.

Q. Did representatives come in during 1957 for that purpose?

Mr. Embry: We object to that as being too remote in point of time, Your Honor.

The Court: I will let it in and give you an exception.

Mr. Embry: We except.

The Witness: Yes. In 1957 they did.

Mr. Nachman: Did they in 1956?

The Witness: No—

Mr. Embry: We object to that as being too remote, Your Honor—

The Court: Same ruling—

Mr. Embry: Well, no. I withdraw that objection. Go ahead and answer.

The Witness: No.

Mr. Nachman: Your Honor, may I take a one minute recess and let the witness look at certain documents and see whether he can testify about them and if not I will not go into the question with him.

The Court: Yes. You may confer for a moment.

By Mr. M. R. Nachman, Jr.: (Continuing)

Q. Mr. Wagner, have you ever turned down an ad from [fol. 380] Alabama? I believe you testified that the acceptance or rejection of same was under your jurisdiction.

A. No. The acceptance of advertising is not under my jurisdiction.

Q. Under whose jurisdiction is it?

Mr. Embry: I think there is some confusion here. May I point out to the witness that acceptability and acceptance—there is a difference there and he is talking about whether you accepted an order for advertising and not whether it was acceptable advertising. Do you follow me, Mr. Wagner?

The Witness: Well, I thought he just asked me had I ever turned down an ad.

Mr. Nachman: I did say that.

The Witness: That's what I understood you to say.

Mr. Nachman: Yes, that was the question.

The Witness: Is that your question now?

Mr. Nachman: Yes. That's my question.

The Witness: It is not my responsibility to accept or reject advertising on the basis of the content of it and when you said did we ever turn down an ad before, that's the way I interpreted it.

By Mr. M. R. Nachman, Jr.: (Continuing)

Q. Under whose jurisdiction is that?

A. That's the advertising acceptability department manager.

Q. Separate from your National Advertising Department.

A. Yes, sir.

Q. Well, let's get down to the orders now, the distinction Mr. Embry just made. Is the acceptance or rejection of the orders for the ads, if there is such a distinction between that and the acceptance of content, I will ask you if that comes under your jurisdiction?

A. Part of it would, yes. Because it also has to be accepted in our credit department and has to be accepted in our production department also. Do you follow me?

Q. Yes, sir. Do you know whether any ads from Alabama have ever been rejected in that sense? I am leaving out the [fol. 381] question of content now which comes under a different department.

A. Not that I know of.

Q. Could you give us the name of the man who was in charge of the advertising acceptability department—

Mr. Embry: Your Honor, we object to that because it is obviously designed to fish for information with respect to the merits of the controversy which is not before the Court on the question of the ads complained of in the Complaint in this cause.

Mr. Nachman: I haven't mentioned any ad. I just asked for the name of the man who is the head of the advertising acceptability department.

Mr. Embry: It cannot have any value as evidence in this inquiry and as I have stated, that could be the only purpose for it—

The Court: Well, I doubt if on a motion of this kind that that would be admissible.

By Mr. M. R. Nachman, Jr.: (Continuing)

Q. Mr. Wagner, do you know anything about the sale of The New York Times microfilm edition in the State of Alabama?

A. No, sir. I don't.

Q. That does not come within your department?

A. No, sir.

Q. Is your department concerned at all with sending out any advertising brochures connected with The New York Times microfilm edition?

A. No, sir.

Q. Would your answer be the same in regard to The New York Times Index?

A. Yes, sir.

Q. Would your department have anything to do with the increase of circulation of The New York Times or the securing of subscribers or news stand space in Alabama?

A. No, sir.

Q. Do you happen to know whether the New York Times has any road circulation men who come into the State of Alabama to promote the sales of newspapers in these States?

[fol. 382] A. No, I wouldn't be in a position to know that.

Q. All right. That's all.

Redirect examination.

By Mr. T. Eric Embry:

Q. Mr. Wagner, you testified about a contract with the Sparrow Advertising Agency—well, two contracts. You specified that one had to do with the State Publicity Department and the other being the Committee of 100 to Birmingham.

A. Yes, sir.

Q. I failed to ask you one question in respect to those contracts. Were they for the sale of advertising space by you to Sparrow for that customer of Sparrows? Was that what the contracts covered?

A. Yes, sir.

Q. All right. That's all.

Mr. Nachman: No further questions.

(At this point Court recessed and reconvened Wednesday, July 27th, 1960.)

Redirect examination. (Continued)

By Mr. T. Eric Embry:

Q. Mr. Wagner, I show you a document marked as Defendants' Exhibit No. 3 for identification and ask you to look at it.

A. Yes, sir.

Mr. Nachman: Your Honor, the document which counsel now proposes to show to the witness relates in some way, and I don't know exactly the extent of the relationship, to the ad that is the subject of this suit, namely, the advertisement charging these matters about the Commissioners and others. We fail to see how this on Re-Direct Examination, and it is being offered in evidence on Re-Direct Examination, has any relationship to any matters that we went into on Cross Examination. Indeed, there was some [fol. 383] overtone and murmur from counsel on some of my questions to the effect that I was attempting to get into that matter and that it was improper for me to do so and as we understand the scope of Re-Direct Examination, it is to go into matters to clarify matters that I went into on Cross Examination, and this is a brand new subject matter that has never been brought out before and we think, Your Honor, that it goes beyond the scope of Re-Direct Examination and we object to it on that ground.

Mr. Embry: Your Honor, the purpose of this evidence, if I can find the summons and Complaint—let's see. I have the wrong one. If the Court please, the summons and Complaint in this case contains an affidavit of Mr. Nachman



wherein he attempts to bring himself under the provisions of Title 7, Section 199 (1), Code of Alabama, 1940, wherein he avers the affidavit in order to attempt to qualify under the provisions of that statute that this cause of action has arisen out of the doing of such business or as an incident thereof by the defendant in the State of Alabama and so forth about appointing the Secretary of State. This document is offered for the purpose simply of showing that the advertisement complained of in the Complaint and sued on, actually contended to be libelous, was bought for and the order for the sale of that advertisement to the advertiser was made in New York City—the contract for that, and there was nothing done about it in the State of Alabama, and that's the only purpose for offering it into evidence, Your Honor.

Mr. Beddow: May I say this, Your Honor?

The Court: Go ahead.

Mr. Beddow: Your Honor, we are not playing a game of chess; we are not playing a game of checkers; we are trying to get the facts before Your Honor. If there were any merit in the objection it would at the worse be discretionary with Your Honor. We couldn't be foreclosed unless Your Honor decided in your discretion that we should in the hurry of things to get along that we should have done a certain thing on Direct Examination. It is discretionary and I am sure Your Honor wants the facts and it won't take but a moment to introduce this particular instrument and that will be all for this witness according [fol.384] to my recollection of the decision made this morning.

Mr. Nachman: My objection, Your Honor, is not in terms of time and I want to get at the facts just as much as Mr. Beddow does. When I asked questions yesterday about this advertising acceptability committee, I was accused of trying to fish about matters concerning this matter. Now, apparently, there is some realization by counsel for the defendant that they had better go into this matter and so as an after thought they present this now, after Cross Examination is closed.

Mr. Embry: Your Honor, that inquiry yesterday—

The Court: Well, let me say this. It might save time

of eminent counsel here. Of course, I understand the rule but I imagine this matter would be within the sound discretion of the Court and under the exercise of that discretion I will let it in and give you an exception.

Mr. Baker: Your Honor, will we be entitled to go into how the signatures of the Alabama defendants were obtained to that ad?

The Court: Well, let's get to that point when we get to it. Go ahead.

Redirect examination. (Continued)

By Mr. T. Eric Embry:

Q. Mr. Wagner, is this the order or a photostatic copy of the order from the Union Advertising Service of 302 Fifth Avenue, New York City, New York, by which the ad "Heed Their Rising Voices" which was sued on in this case was purchased, that is, the space for the running of this ad was purchased from The New York Times?

A. Yes, sir.

Q. Is the Union Advertising Service to your knowledge located in the City of New York?

A. Yes, sir.

Mr. Embry: We offer this in evidence, if the Court please.

(Court examines Defendants' Exhibit No. 3 for identification.)

[fol. 385] The Court: I will let it in.

(Insertion Order, Union Advertising Service, 302 Fifth Avenue, New York, New York, dated March 28, 1960, offered and received in evidence and identified as Defendants' Exhibit No. 3.)

By Mr. T. Eric Embry: (Continuing)

Q. Is that the means by which the advertiser as is shown on this Defendants' Exhibit 3 purchased the space from your company, The New York Times Company, for the running of that ad by them? The means by which they

purchased the space for the running of that ad by the advertiser?

A. Yes, sir.

Q. Does it show the advertiser to be the National Committee to Defend Martin Luther King, Jr.?

A. Yes, sir.

Q. And that purchase was made in New York City from your company.

A. Yes, sir.

Q. The space.

A. Yes, sir.

Q. All right. That's all.

Recross examination.

By Mr. M. R. Nachman, Jr.:

Q. Mr. Wagner, is this the ad we are talking about?

A. Yes, sir.

Mr. Nachman: If the Court please, we offer this in evidence.

Mr. Embry: If the Court please, we object to that. It is incompetent, irrelevant and immaterial insofar as the purpose for which this document was offered—

[fol. 386] The Court: I will let it in and give you an exception.

Mr. Embry: We except.

(Newspaper ad, The New York Times, Tuesday, March 29, 1960, at page 25, entitled, "Heed Their Rising Voices" offered and received in evidence and identified as Plaintiff's Exhibit No. 275.)

By Mr. M. R. Nachman, Jr.: (Continued)

Q. As I understand your testimony, this ad was placed by The National Committee to Defend Martin Luther King, Jr.

A. The ad was placed by the Union Advertising Service on behalf of their client, The National Committee to Defend Martin Luther King.

Q. Do you know anything about that committee?

A. No, sir.

Q. Specifically, do you know whether it has any members who are residents of the State of Alabama?

A. No, I don't.

Q. Now, did you see this ad when it was placed? I am referring now to Plaintiff's Exhibit No. 275.

A. You mean before it was placed?

Q. Well, at any time in the process of its publication from the time it first got to The New York Times until the time it came out in the newspaper?

A. I saw it when it was in the paper.

Q. After it was printed?

A. Yes, sir.

Q. You never saw it in the form in which it was submitted to The Times?

A. No, sir.

Q. Who is the person who would have seen it in that form?

Mr. Embry: We object to that, if the Court please. We object to that on the same grounds assigned previously. [fol. 387] It goes into the question of merit—

Mr. Nachman: Your Honor, we—

The Court: I will let it in and give you an exception. Go ahead.

Mr. Embry: We except.

Mr. Nachman: You may answer the question.

The Witness: Give me the question again, please.

By Mr. M. R. Nachman, Jr.: (Continuing)

Q. Who, in The New York Times, would have seen this ad before it went into print?

A. Well, it would have been seen by the production department and by the advertising acceptability department.

Q. Who are the persons in charge of those departments?

Mr. Embry: We object to that question on the same grounds, Your Honor, in that it goes into the question of the truth of the content of the ad and into the merits of the controversy.

Mr. Nachman: We are not going into the question of the truth of the ad, Your Honor, but they say that they can go into the ad because they say they want to show it didn't arise out of anything having to do with Alabama but they say we cannot go into the ad and I don't know why we can't go into it but presumably they think it is a one-way street.

Mr. Embry: He apparently doesn't understand what I—

Mr. Nachman: I certainly don't.

Mr. Embry: Your Honor, the fact of whether or not the contract for the purchase of space was made in Alabama or New York is material evidence under the question of the averment or affidavit about the cause of action having accrued from the doing of work or business or the performance of a service in the State of Alabama but the content of the ad itself, who signed it and that sort of thing, has nothing whatsoever to do with it.

Mr. Nachman: Well, whether or not any Alabama activity went into the obtaining of this ad, Your Honor, is of course—

[fol. 388] The Court: I don't believe that is material and I will give you an exception to the Court's ruling. Go ahead.

By Mr. M. R. Nachman, Jr.: (Continuing)

Q. Mr. Wagner, do you know how the signature Ralph D. Abernathy of Montgomery, Alabama, was obtained on this ad?

A. No, I don't.

Q. Do you know whether or not it was obtained?

A. No, I don't.

Q. Do you know whether the signature of Fred L. Shuttlesworth of Birmingham, Alabama was obtained on this ad?

A. No.

Q. Do you know whether the ad was shown to him before publication?

A. No, I don't.

Q. Do you know whether the signature of the Rev. S. Seay of Montgomery, Alabama was obtained on this ad before publication?

A. No.

Q. Do you know whether in fact it was or whether it was not?

A. No, I don't.

Q. Do you know whether or not it was ever shown to the Rev. S. S. Seay, Sr.?

A. No, I don't.

Q. How about the Rev. J. Lowery of Mobile, Alabama? Would your answer be the same?

A. The same. Yes.

Q. Do you know whether The New York Times undertook any activity by way of checking the material contained in this ad, and if so, whether they consulted anyone in Alabama or whether they undertook any activity at all in Alabama to check the correctness of the matter contained in this ad?

Mr. Embry: We object to that. That's going into—

Mr. Nachman: Alabama activities—

The Court: I don't think that's admissible. Let me give you an exception.

[fol. 389] Mr. Embry: Part of his question may have been, Your Honor, insofar as was there any activity in and about the procurement of the ad in Alabama but he added to that question about checking the contents of the ad and so forth. He added that to his question.

The Court: Well, I understood the question was did any agent of this company come down here to have a talk with these people to get them to sign or something like that?

Mr. Nachman: Mr. Wagner, do you know whether the Times engaged in any activity in Alabama to check into any of the matters contained in this ad?

Mr. Embry: Your Honor, we object to the part about checking into the matters contained in the ad.

The Court: That would sort of go into the merit I believe.

Mr. Nachman: Your Honor, we are trying to—they say that this ad had nothing to do with any conduct in Alabama. Now, they have got an advertising acceptability committee in this newspaper. What I am trying to find out is whether the newspaper other than Mr. Wagner's department en-

gaged in any activity in Alabama in connection with this ad. The New York Times newspaper is not limited to Mr. Wagner's department. That was the point I was trying to bring out, Your Honor.

The Court: Well, I will give you an exception. He may answer if he knows.

The Witness: Will you ask the question again?

By Mr. M. R. Nachman, Jr.: (Continuing)

Q. What activity, if any, did The New York Times—any department of it—anybody connected with it—engage in to check the matters, content, signatures or any matters, contained in this ad which is in evidence as Plaintiff's Exhibit No. 275.

A. I don't know.

Q. Doesn't The Times have a regular procedure for checking into ads which are placed?

A. Yes, sir.

[fol. 390] Mr. Embry: We object to that. Don't answer that. We move that his answer be excluded, if the Court please. That goes into the question of the truth of the contents—

The Court: Well, suppose they checked around here in Alabama. Would that be activity in the State?

Mr. Embry: He asked if they checked the contents of the ad, Your Honor. That goes into the question of the truth of the contents which is not involved at this time, Your Honor.

Mr. Nachman: I am not trying to establish whether or not they knew it was true or false but if they engaged in activity in Alabama to—

The Court: Well, I am willing to let you ask the question and if you can show it then you can show it. You may show if there was any investigation or checking or anything like that. Go ahead.

By Mr. M. R. Nachman, Jr.: (Continuing)

Q. Your answer to the last question was, yes. The Times does have a regular procedure for checking ads, is that correct?

A. Yes, sir.

Q. Now, what does that regular procedure consist of?

Mr. Embry: We object to that, Your Honor.

The Court: I will let it in and give you an exception.

Mr. Embry: We except. We offer to show, Your Honor, that when he asked about the procedure that the procedure is with reference to the truth of the contents of the advertising or if from the standpoint of pornography or bad taste or—

Mr. Nachman: Your Honor, we object. This is my Cross Examination and he has an opportunity to—

The Court: Well, he has a right to make his objection. I will let the question in if you can show any activity in regard to that ad here in Alabama. Go ahead. You have an exception.

Mr. Embry: We except.

[fol. 391] By Mr. M. R. Nachman, Jr.: (Continuing)

Q. Go ahead. Explain the regular procedure the New York Times had for checking ads.

Mr. Embry: We object to that, Your Honor. It hasn't been shown that this witness knows what this procedure is.

The Court: Well, he can say he doesn't know.

The Witness: The regular procedure is for our advertising acceptability department to check the copy. I don't know the details of how they check it to answer your question. They have been doing this for some time I understand and this is their complete responsibility.

Mr. Nachman: They do it rather carefully, don't they, Mr. Wagner?

Mr. Embry: We object to that, if the Court please. It hasn't been shown that he knows what they do and he said—

The Court: He said he didn't know much about it and he didn't know the details of how it was done.

Mr. Nachman: You don't know whether they do it carefully or not, Mr. Wagner?

Mr. Embry: We object to that, if the Court please. It is argumentative.

The Court: I sustain the objection.



By Mr. M. R. Nachman, Jr.: (Continuing)

Q. Have you ever had anything to do with the advertising acceptability department of The New York Times?

A. I was never in that department.

Q. Have you ever worked with that department in such a way as to become familiar in some degree with their procedures?

A. No. I—no. The answer is no.

Q. So, you are not in a position to say that no activity in Alabama was undertaken by The New York Times in the matter of checking this ad before publication.

Mr. Embry: Don't answer that. That pure argument, Your Honor.

[fol. 392] The Court: Yes. I think the question is bad. I sustain the objection.

By Mr. M. R. Nachman, Jr.: (Continuing)

Q. You cannot state then, as I understand your testimony, what investigation, if any, was undertaken by The Times in connection with checking the content or the signatures on this ad. Is that your testimony, sir?

Mr. Beddow: Now, Your Honor, we are going to object to a useless repetition of testimony. He has asked that question over and over again—

The Court: I am willing to let you ask one more time about the signatures but it seems to me he has answered that.

Mr. Beddow: The first answer, Your Honor, was to the effect—

The Court: I have ruled with you, you see. You might make me change my mind.

Mr. Beddow: I want to call Your Honor's attention to one thing. This gentleman's first answer covered the whole thing. He said he didn't see it until it was in the paper.

The Court: I have ruled with you.

Mr. Beddow: I know you have, Your Honor, but I wanted to call Your Honor's attention to that point.

The Court: All right. Let's go ahead.

By Mr. M. R. Nachman, Jr.: (Continuing)

Q. Mr. Wagner, do you know whether there was any solicitation in Alabama by this committee to finance the placing of this ad?

Mr. Embry: We object to a transaction between others. Res Inter Alios Acta—

The Court: Yes. How would The Times be responsible for what they did? I believe the objection is good. Let me give you an exception.

[fol. 393] By Mr. M. R. Nachman, Jr.: (Continuing)

Q. Does this document, Defendants' Exhibit No. 3, indicate who paid for this ad?

A. It indicates that this is an order from the Union Advertising Agency at 302 Fifth Avenue in New York City, New York and it has as the advertiser the National Committee to Defend Martin Luther King.

Q. Well, is that the answer to the question, that the committee paid for the ad?

A. The advertising agency is the one that would pay us for the ad and from whom they get their money is—

Q. You got it out of the advertising agency.

A. Yes. The Union Advertising—

Q. They paid you.

A. Yes, sir.

Q. Did you run it at the usual fifteen per cent discount?

A. Yes, sir. They are a recognized agency.

Q. All right, sir. That's all.

Mr. Embry: No further questions.

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ROGER J. WATERS, having been duly sworn, was called as a witness for the Defendant and testified as follows:

Direct examination.

By Mr. T. Eric Embry:

Q. Your name is Roger Waters?

A. Roger J. Waters.

Q. Are you a resident of New York?

A. Yes, sir.

Q. New York City or New York State, and if so, where do you reside?

A. Mt. Vernon, New York, Westchester County.

Q. Are you the National Circulation Manager of The New York Times?

A. Yes, sir.

[fol. 394] Q. The New York Times Company, the defendant in this case?

A. Yes, sir.

Q. One of the defendants?

A. Yes, sir.

Q. Mr. Waters, as such is it your business to distribute The New York Times newspaper for whatever distribution is made of that newspaper in the sense of getting that newspaper to whomever would wish to have it in the State of Alabama?

A. Yes, sir.

Q. Now, by what means is that newspaper sent from New York to anyone who might wish to have that newspaper in Alabama?

A. We would receive an order from either a dealer, a subscriber or a wholesaler, direct from them by mail.

Q. Well, what is an order? You said you would receive an order—

A. They would request us to send them so many copies of each issue and we would fulfill that order.

Q. Now, during the year 1960 thus far and during the year 1959, were there any such orders placed with you or sent to you in New York from any of those kind of individuals or concerns that you have just described, dealers or subscribers by mail?

A. Yes, sir.

Q. Now, as I understand it, you have testified that you make shipments from New York City to wholesalers and retailers and by mail to subscribers.

A. Correct, sir.

Q. In each of those instances is the shipment made as a result of the order during the two years I mentioned—

as the result of an order sent to you in New York by those people?

A. Yes, sir.

Q. Now, in the case of the retail and wholesale dealers, when an order is sent to you such as was sent to you during the year 1959 and thus far into 1960, how are you paid? How is The New York Times Company paid for any such paper as are shipped to wholesale or retail dealers in the State of Alabama?

[fol. 395] A. The retailer or the wholesaler including the subscriber pays The New York Times direct in New York City.

Q. Is that payment received by you in response to a bill rendered to them by you for the number of papers that they have purchased from you by order placed with you in New York?

A. Yes, sir.

Q. Is there any difference in the manner in which those individuals who receive the paper by mail, the United States mail, which you have described as subscribers? Is there any difference in the method of payment by those people?

A. Naturally, if they take an order—if they request a subscription for three months, six months or one year, they pay in advance for their subscription.

Q. Is that handled in the same fashion as normally are magazines and other periodicals?

A. Yes, sir.

Q. Are orders placed with you and you are paid in advance and you send it as long as the money holds out. Is that correct?

A. That's correct. They carry an expiration date.

Q. Was that true in 1959 and 1960 in Alabama?

A. Yes, sir.

Q. That was true for whatever subscribers you had in Alabama?

A. Yes, sir.

Q. Now, during the year 1960—first of all, let me show you a memorandum. Is that yellow piece of paper in your handwriting?

A. Yes, sir.