Supreme Court of the United States

OCTOBER TERM 1970

In the Matter of:

MONITOR PATRIOT CO., ET AL., Petitioners,	
vs.	
ROSELLE A. ROY, ETC., Respondents.	

Docket No. 62

Place Washington, D. C.

Date December 17, 1970

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

C O N T E N T S

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

MONITOR PATRIOT CO., ET AL., Petitioners,	:	
vs.	:	No. 62
ROSELLE A. ROY, ETC., Respondents.	:	

Washington, D. C.,

Thursday, December 17, 1970.

The above-entitled matter came on for argument at 10:02 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HENRY BLACKMUN, Associate Justice

APPEARANCES:

EDWARD BENNETT WILLIAMS, ESQ.,
Washington, D. C.
Counsel for Petitioners

STANLEY M. BROWN, ESQ.,
Manchester, New Hampshire
Counsel for Respondents

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument in No. 62, Monitor Patriot Company vs. Roy. Mr. Williams, you may proceed whenever you're ready.

ARGUMENT OF EDWARD BENNETT WILLIAMS, ESQ.,

ON BEHALF OF PETITIONERS

MR. WILLIAMS: Mr. Chief Justice, and may it please the Court. On September 10 of 1960, a column appeared in the Concord, New Hampshire Monitor Patriot, synidcated and distributed by the North American Newspaper Alliance.

The column discussed and reported upon the up-coming New Hampshire Democratic Senatorial primary race. The column had been written by the late Drew Pearson. The column reported that there were three candidates vying for the Democratic nomination to oppose the Republican incumbent, the late Senator Styles Bridges. Those candidates were Professor Herbert Hill, a Dartmouth College professor, a respected political figure in the State of New Hampshire, and clearly the front runner in the race; one Alfonse Roy, who became the plaintiff in this cause in the court below, and one Frank Sullivan, whose release from the Cheshire County Jail, after his 19th conviction for public drunkenness, had been obtained on the eve of the last filing date by Candidate Roy, so the column reported.

The column further reported that candidate and plaintiff below, Roy, had induced and procured Sullivan's candidacy

as a means of attracting an ethnic vote away from Hill, and that candidate Roy had done this in concert and complicity with the Republican incumbent, the late Senator Bridges.

The column characterized candidate Roy as "a former small-time bootlegger, later U.S. Marshal."

Two other candidates, also habituaries of the New Hampshire jail system, had been disqualified by the New Hampshire Ballot Commission, so the column reported. Roy promptly filed suit in the New Hampshire courts, naming the Concord Monitor Patriot as a defendant, and naming North American Newspaper Alliance as a defendant. He lodged three specific libels: First, the characterization of him as a former small-time bootlegger; secondly, the fact that he had induced and procured Sullivan as a candidate; and, thirdly, the fact that he had done so in complicity with the Republican candidate.

At the trial, the jury returned a verdict for the plaintiff against both Concord Monitor Patriot and North American Newspaper Alliance, solely upon the characterization of Roy as a former small-time bootlegger, and that defamation is the only alleged defamation germane to the appeal in this case.

It is our contention, if the Court please, that the trial judge and the New Hampshire Supreme Court misread, misjudged and misconstrued the language of this Court in

Garrison vs. Louisiana, decided in 1964.

Q How much was the verdict?

A It was $10,000 against each defendant, Mr. Justice, an aggregate of $20,000, which is permissible under New Hampshire law.

The trial judge, if the Court please, gave the jury what was a bifurcated instruction on the law of libel. He told them that if they found that the characterization of Roy as a small-time bootlegger was on a par with the criticism of a public official for the misconduct of his office, then New York Times vs. Sullivan would be applicable, and it would be necessary for the plaintiffs to show malice, that is that the falsehood was uttered with knowledge of its falsity or with a wreckless cavalier of disregard to its truth or falsity.

The trial judge did not stop there. He went on and told the jury that they might find that the libel was in what he characterized as the private sector. He said that if the alleged defamation had no relevance to Roy's fitness for office, if it was merely a bringing forward of his long forgotten past misconduct, if it was not a matter in which the public had no interest, then it was a private matter and New York Times vs. Sullivan would not be applicable, and in that case the plaintiff might recover unless the defendant successfully asserted one of two defenses.

He then told them what the two defenses were under the

law of New Hampshire. The first one was justification, and the second one was conditional privilege. He then went on to describe the defense for justification. He said that the defandants could prevail if what they said was true and if it was uttered with good motive.

Secondly, he told them that the defendants might prevail if the defense of conditional privilege obtained, and he said that they could avail themselves of conditional privilege even if what they had uttered was untrue, if it was uttered with a reasonable belief in its truth, a reasonable basis for believing it to be true, and if it was uttered with justifiable purpose and good motive.

He told the jury that if they found the characterization of Roy to have been a public libel, in the public sector, under New York Times vs. Sullivan, then they must exonerate North American Ne spaper Alliance because there had been no showing whatsoever of malice against North American Newspaper Alliance.

Obviously, the jury found the libel to have been in the private sector because it returned verdicts against each defendant in this case.

Q The second, the alternative part of the charge, instructing the jury as to the conditions under which they could find liability if this were not a public libel, did not -- that part of the charge did not purport to have any

reference to the United States Constitution, did it? That was purely a matter of New Hampshire law, wasn't it?

A Exactly, Mr. Justice.

Q The theory being, I suppose, that if it were that kind of a defamation, the United States Constitution had no impact whatsoever upon it. Is that right?

A That's exactly right, sir.

Now, it is our contention, if the Court please, that the trial judge committed error of constitutional dimension when he permitted the jury to find that this characterization of Roy could be a so-called "private libel." It is our contention, if the Court please, that the rule which applies to public officials for defamations concerning the discharge of their public duties, namely that the defamation must be shown to have been made with malice before recovery can be made, applies to a candidate for public office, whether he expires to executive, legislative or judicial office.

It is our contention, if the Court please, that the logical sequel to New York Times vs. Sullivan is that defamations against candidates for public office, so long as they relate to the fitness of the candidate for office, so long as they are in the ambit of public discourse and dialogue regarding the qualifications and background of the candidate, have a constitutional protection unless uttered maliciously.

This Court, when it articulated New York Times vs.

Sullivan, cited immediately with approbation, a case which had been cited for almost half a century with approbation by many state and federal courts. It dealt with the candidate for office. It was the case of Coleman vs. McKenna, and in that case eloquently and articulately is stated what we contend should be the rule.

There the Court said it is of the utmost consequence that the people should discuss the character and qualifications of candidates for office. The importance to the state and to society of such discussion is so vast and the advantages derived are so great that they more than counterbalance the inconvenience of private persons whose conduct may be involved and occasional injury to the reputation of individuals must yield to the public welfare although at the time such injuries may be great.

Q I suppose you would contend at the very least this man was a public figure if not a public official?

A Of course, he was a public figure, we contend, Mr. Justice. We say more than that, he was a candidate for public office, so there can be no doubt about the malice rule applying to him in his aspirations to public office.

Q Either one would bring it under the Times rule, wouldn't it?

A Yes, sir, I believe it would.

Q Do you think, Mr. Williams, that there is a

separate category for candidates as supplementing the distinction that is made between public figures and public officials?

A This Court, in Curtis Publishing Company vs. Butts divided, as I read the opinion, with respect to the rule that should apply to public figures as against public officials. I say that there is no reason for division here because certainly a candidate for public office should be treated as a public official.

Q A public official or a public figure?

A A public official, sir. I think the rule that applies to a public official on defamations concerning the discharge of his duties should apply to a candidate who aspires to such office, because I believe that when a candidate announces for office he lays his life before the press for scrutiny, and I believe that anything in his life is relevant to his fitness for office, his private life and his public life, his character, his mental and physical health, his record, whether it be academic, professional, commercial, social, marital, or criminal, as in this case.

I believe that all of that is appropriate for public discourse and that there is a constitutional protection surrounding the discourse so long as it is within the ambit of dialogue relating to his background, his qualifications, or his fitness for office.

Q Did I understand you to say that you see no real

difference between public figure and public official classifications, or do you mean as it applies to this case?

A As it applies to this case. In Curtis Publishing Company vs. Butts, where the Court discussed in great detail the doctrine relating to public figures, as I read the opinion, four Justices of this Court felt that there should be a rule of highly unreasonable conduct applicable to the press before a recovery could be made. Other Justices felt that the New York Times rule applied, the rule of malice. I suggest that that distinction does not lie with respect to a candidate for public office. I believe that the New York Times rule should apply in its full import and all of its implications with respect to a candidate for public office.

Q I think that was the holding in Butts as to a "public figure," wasn't it, by virtue of, I think, a footnote in the opinion of Chief Justice Warren?

A I think so, yes, sir.

Q Justice Harlan wrote the prevailing opinion but the fact is that --

A Yes, sir.

Q -- those four justices were out-gunned by that footnote.

A Yes, sir. So we contend, if the Court please, that any other rule would ice the wings of public debate concerning candidates for office, concerning, as in this case,

the candidate for a high office. It would dampen the vigor of and limit the variety of discourse with respect to the qualifications of a candidate for office --

Q Mr. Williams, you probably already said it, but I guess I didn't hear it -- was it a fact, a proven fact that this plaintiff had been a small-time bootlegger?

A There were five witnesses, Mr. Justice, who testified that he had the reputation for having been a small-time bootlegger. He vigorously denied this and claimed that his brother was a bootlegger. But one witness took the stand who had been the original source of the information for the writer of this column and swore that this man had been a former small-time bootlegger and had admitted it to him.

Q Do I understand though that, treating this as a private sector case, as the trial judge did, it would not have been a defense that it was true?

A It would have been a defense, Mr. Justice, under the New Hampshire rule of conditional privilege even if it were not true if the defendants reasonably believed it to be true. But if they offered it with justifiable purpose and good motive --

Q But I would -- suppose the jury had found it was true, would it nevertheless under New Hampshire law have been an action for libel?

A Yes, sir, there would have been because under the

defense of justification, even though the allegation is true, unless it is published with justifiable purpose, there may be a recovery by the plaintiff, and that is what the jury was told in this case.

Q Mr. Williams, you have spoken of New Hampshire law several times. Do you think the state law for libel has survived the line of cases, New York Times and others, or is the state law viable simply up to the point where it is in collision with the first amendment cases in this Court?

A I think, Your Honor, that it is certainly a fragment of state libel law has survived, and I think that the trial judge in the New Hampshire Supreme Court misjudged how much of it had survived. The trial judge, if the Court please, read Garrison vs. Louisiana to support the instruction which he gave to the jury. You will remember, if the Court please, that in that case this Court discussed the defense of truth to the criminal libel law of Louisiana and discussed the limitation on truth, namely that the utterance had to have been made with good motives.

In a footnote, the Court said this, footnote 8: "We recognize that different interests may be involved where purely private libels, totally unrelated to public affairs, are concerned. Therefore nothing we say today is to be taken as intimating any views as to the impact of the constitutional guarantees in the discreet area of purely private libel."

Now, we do not contend, if the Court please, here before this Court that the moment that a man announces that he is a candidate for high office in this land that he loses all his rights under the area -- in the area of defamation, all the rights that enure to him as a private citizen.

For example, if a candidate announced that he was going to run for the Senate and simultaneously in an unrelated transaction he was seeking to buy a house and the prospective vendor was sent a credit report by a credit information bureau in which it was said untruthfully that he had eight unsatisfied judgments against him, and if the sale were cancelled because of that, then if the defamation ever got into the public discourse concerning his fitness for office, if it never became part of the dialogue concerning his qualifications, if it never came within the ambit of what was uttered to influence votes but remained purely private between the credit information bureau and the prospective vendor, we say that his rights would survive as a citizen under appropriate New Hampshire law.

Q Well, I don't quite understand that. I thought your theory would permit anybody to put that right into the public discourse, even though untrue, would say this candidate for Senator has eight unsatisfied judgments.

A Yes, sir, and if it got into the public discourse and --

Q Well, anybody could put it in, a columnist or

anybody else.

A -- and once it got into the public discourse, it would have a constitutional umbrella over it.

Q That is what I thought you would say.

A That is exactly what I would say.

But take another illustration: If a gossip should go to the candidate's wife during a campaign and say that he was conducting a meritritious relationship with one of his staff while out on the hustings, and if that stayed private, if it broke his marriage but if it never got into the public dialogue, if it never became part of the public discourse, then I suggest it would remain in what this Court characterized as the discreet area of purely private libel. But once it was injected into the discourse concerning his qualifications, fitness for office by the press or by his opponent or by any member of the media, then it would have a constitutional umbrella protecting it unless maliciously uttered.

Q Do you not think there that you are probably suggesting an imaginary line --

A I don't think --

Q -- that would occur in politics?

A I think --

Q Do you think that there is anything that any man who runs for office has ever done or said or been charged with that won't be found out and become a part of a campaign?

A I think that the chances are very high that any defamation that was uttered during the life of the campaign will find its way into the public dialogue and get the protection of the Constitution. But I say that it is possible certainly that there could be a defamation in what this Court has called the discreet area of purely private libel where the candidate would still retain his rights under the Constitution.

Q And the public would never find out anything about it?

A The public might not find out anything about it.

Q I couldn't imagine that --

A I think it could happen, Mr. Justice. I think it could happen.

Q But your distinction would depend upon the identity of the libel law, that is if it is done by a newspaper or --

Q Well --

Q -- or anyone publicly, to the public?

A I think it depends --

Q It is protected, but on the other hand it is just a private communication from a gossip to the candidate's wife and then it is unprotected?

A I think not, Mr. Justice. I think it depends upon two things: I think it depends upon whether the utterance comes within the perimeters of public discourse on the

candidate's fitness. I think it depends upon the design, the purpose for which it was uttered in the first instance. I don't think we can divorce ourselves from the content, from the design for which it is uttered. I think if it gets into the ambit of public discourse regarding the candidate's fitness for office, then it has the constitutional protection.

Q I am somewhat confused. Let me see if I can clear up what your thinking is on the private libel. Let's assume that in today's atmosphere, where pollution is a big problem, someone describes in a column, describes the president of a power company as one of the worst polluters in American life, something of that kind. Up to that time nobody has ever heard about the president of the power company. He isn't a candidate for office. He isn't a public official. Is this a private libel?

A No, sir, I think it would be a matter of such high public interest that it would fall within the perimeters of Curtis Publishing Company vs. Butts and therefore that the Times rule would apply, to this particular kind of libel which you cite, Mr. Chief Justice.

Q Even though he is neither --

A Even though he himself may not be known to the public.

Q Not a public figure and not a candidate, not anything.

A Because I think it is a matter of such high public interest, a matter in which the public has such a deep concern.

Now, in this case, of course, we're dealing with the characterization of the man as a bootlegger, as a law breaker. Certainly it cannot be held to be irrelevant to his fitness for office. This Court nine years ago found that whether a man was a bootlegger or not was relevant to his fitness for citizenship. And I suggest to the Court that if it is relevant to his fitness for citizenship, it is relevant to his fitness for membership in the United States Senate.

In Costello vs. United States, decided in 1961, the Court found that the Bureau of Immigration and Naturalization might certainly have turned away this applicant for American citizenship if they had known that he was a former bootlegger. And I say it applies here.

Now we ask not simply that this case be remanded, because indeed there is no cause for remand; we ask that it be reversed because there is absolutely no evidence in this record that this alleged defamation was done with malice on the part of these defendants.

The trial judge himself found absolutely no malice with respect to North American Newspaper Alliance. The record is completely devoid of any evidence of malice with respect to the Concord Monitor Patriot. They subscribe to this column.

They relied on the information in it, but beyond that the testimony in the record was that the editor of the paper himself knew of the plaintiff's reputation as a former bootlegger, he read the column before he allowed it to be printed, relying on his own information as well as his prior experience with the columnist, he permitted the column to go forward.

There was no evidence in this record which suggested that there was any awareness of falsity or that there was any wreckless or cavalier disregard as to the truth or falsity of the publication on the part of Concord Monitor Patriot.

Q Mr. Williams, I take it you would -- if you would prevail on the basic law, you would foreclose the plaintiff from attempting to establish the New York Times standard of malice from what you have just said? Do you think you should be foreclosed if the case in fact was tried on the state standard?

A Not if it had been, Mr. Justice, but it was not.

Q It was not --

A In fact, the trial post-dated New York Times vs. Sullivan and appropriate amendments were made to the pleadings to allege malice within the purview of New York Times vs. Sullivan, and the plaintiff put proof in to show malice so as to comply with the standards of New York Times vs. Sullivan, and I suggest to the Court that that makes it unnecessary for a remand for that purpose.

Q How far back do the alleged bootlegging activities go?

A It was not specified, Mr. Justice, but it had to be twenty-six years at least, because the Volstead Act had died twenty-six years before the campaign.

Q Well, there wouldn't be any bootleggers where it allowed whiskey to be sold legally.

A I'm sorry, Mr. Justice.

Q I say the mere fact that the Volstead Act was not in effect wouldn't determine that, would it?

A Well, I was --

Q There were bootleggers in sections where they --

A I was using the term "bootlegger" as a term of art to describe people who traffic in whiskey at a time when it was illegal to traffic in whiskey.

Q Yes.

A But I agree, Mr. Justice, it is possible that he could have been a bootlegger even after the prohibitions against the sale of liquor were --

Q It is not only possible, but it takes place all the time in the country.

A I don't know whether it takes place in New Hampshire, Mr. Justice.

Q Well, we had a case like that from Massachusetts. There was evidence that if he was a bootlegger, it was sometime

in the early 1930's. There was some evidence of that.

A Yes, sir.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Williams.

Mr. Brown?

ARGUMENT OF STANLEY M. BROWN, ESQ.,

ON BEHALF OF RESPONDENTS

MR. BROWN: Mr. Chief Justice, and may it please the Court. Let me start where my Brother Williams left off, and let me start out by answering Mr. Justice Brennan's question, what was the situation factually. Factually, this claim of bootlegger was totally false -- totally false.

It wasn't even close. Now, here is the one brush with the law that my client had over sixty-eight years of life, the majority of his adult life being public life and public office, including being a Congressman, being twice a member of the Executive Council of my state.

In 1923, one of his brothers was running what in those days was known as a near-beer joint. Now, those of us who remember near-beer remember that it really wasn't much of a drink unless you had a shot to put in it. And the local police officers thought that the brother, Emanuel -- not this plaintiff, not the respondent, but they thought that Emanuel probably was selling an occasional shot of whiskey. So they sent a spy in and the spy got a shot of whiskey and he has to preserve that evidence because that is going to be the evidence on which they

are going to rack up Emanuel.

So he takes the shot of whiskey and he is holding it under the bar when the rest of the vice squad breaks in in a rush --and this is in the record -- they jump over the bar, hit the bartender in the nose and grab the bottle out of which the shot was poured, and they got Emanuel, there is no question about it. And they also got Oscar, who was acting as bartender at the time.

In the rush of people coming in and people inside trying to get out, somebody jossled the arm of the officer who was carefully holding the evidence and spilled the shot, and the officers coming in said, "Alphonse Roy did that and we want him over at the station. We are going to charge him with interfering with a police officer."

And he went over to the station. No charge was ever filed. Captain Grory, running the vice squad, told him, "Look, Al, will you see if you can't get your brother out of this racket? He shouldn't be doing it." And Alphonse -- this is the testimony -- he had been trying to get his brother out. And with the assistance of another Franco-American professional man in the area, after he paid this fine, he did get out of it and went back to an honest living.

Now, that is the total evidence on which this was written some twenty-six years later, during a period when this man was in vigorous political campaign, and nobody ever made

the suggestion, Drew Pearson publishes that this man was a former small-time bootlegger.

Q It wouldn't require any brushes with the law to prove a fellow was a bootlegger, I don't suppose?

A Mr. Justice White, what we did in this case, we discovered the informant, Drew Pearson, we took his deposition and we gave him a chance to tell us every single thing he claimed to know that was to justify his making this report and then we went out and we found witnesses alive to disprove every one of that man's lies, and we proved that Scott, the informant was a bald-faced liar.

Q Well, that is arguing the evidence. But could I ask you if under the court's instructions it was essential, absolutely essential and unavoidable for the jury to find this charge was false, this allegation was false in order to give a recovery?

A No recovery is possible under New Hampshire law if the truth is made out a defense. They had to find and presumably did find that it was false.

Q As I understand your colleague, Mr. Williams, and as I read the instructions of the court, the court said that if the jury found this was on the private side of the libel laws, that it wasn't a public matter, to which the New York Times applied, that even if the matter were true, the defendant had to justify it. That is the way I read the

instructions. Is that the way you read them?

A If Your Honor is talking about the total charge, Your Honor, I think, misinterprets it. If Your Honor is talking about both segments of the charge my Brother Williams has briefed, you would get that impression. The law in New Hampshire, as I argued to this Court back in 1966, gives a broader conditional privilege than that which this Court is attempting to work on, and you have to read the total charge on the private sector of the state law to see that you can either justify or excuse and in the total picture you cannot -- a plaintiff cannot recover for a false or for a true defamatory publication. The plaintiffs must prove falsity, and you pick that up in the beginning of the charge where the court instructs them with regard to what action is defamation in New Hampshire.

May I say this, Mr. Justice White, with regard to this situation to which you're directing our attention: On page 406 of the record in this Court, you will find the defendant's request for instruction No. 20. Now, under our practice, at the conclusion of the trial, counsel submit requests which is supposed to put the judge on the hook, he either grants them or denies them. If he denies them, the fellow who submitted them gets an exception and can go some place. But if he grants them, that becomes the law of the trial and that party is not under our laws entitled to come forward later and complain about the instructions being given that he asked. And

this is the defendant's instruction as applied to this case, applying New York Times to this case.

Whether or not it was published and circulated among the voters for the sole purpose of giving what the defendant believes to be truthful information concerning a candidate for public office, and for the purpose of enabling such voters to case their ballots more intelligently, and the whole thing is done in good faith and without malice. The article is privileged.

Q Well, does that say to the jury that the plaintiff in a private defamation is entitled to recover for the injury done to him unless the defendant establishes justification?

A Justification if the matter was true and published for a justifiable purpose. And then there was an additional section of the charge that he -- if he can't justify, then he may excuse it.

Q Sure, if untrue then he can't justify it and then he goes to conditional privilege.

A That's correct.

Q I know, but what if the plaintiff -- what if the jury finds in its own mind that this statement is true, the statement is true? Now, as I read the court's instructions, the jury then does not automatically give a recovery, even if he thinks it is defamatory.

A Mr. Justice White, I have read that charge more than once -- talking about the one of Judge Morris in this case -- and I cannot accept your interpretation of it, and I think perhaps there is a misunderstanding with regard to what --

Q What New Hampshire law is?

A -- what the New Hampshire law is.

Q Well, it may be what New Hampshire law is, but what about this case? We are deciding this particular case, and under the instructions if the judge said even if it is true the plaintiff can recover, he said that to the jury, I suppose that the jury might have found it was true but still have given a recovery because the defendant didn't publish it with a justifiable motive.

A Mr. Justice, I do not believe that those instructions, that charge left that position open. I am relatively sure that it did not. I was involved in that case, and I have gone over this now. I would be glad to submit -- I didn't brief it here because I didn't think it was going to come up. But what has happened here, a particular portion of the charge has been overemphasized by the defense, and if you read the entire charge as it was given, and understand it was it was given, that position is not open, that is to recover for publication of the truth. It never has been since 9 New Hampshire--

Q And does the Supreme Court opinion straighten this out?

A The Supreme Court, the State Supreme Court decision in this case says that a charge of bootlegging based upon this solitary brush with the law that I spoke of, which is at least 26 and maybe 37 years old, the rest of the evidence was that such rumor that he might have been a bootlegger had dried up, stopped, it was not prevalent from 1930 on, that bringing that into a 1960 campaign as it was done in this case, could be found factual to be irrelevant to the man's 1960 qualifications for office.

Now, the Supreme Court decision says obviously the trial court came to that preliminary decision, which is the suggested procedure under Times vs. Sullivan, and obviously in addition the jury so found, and that is what this record is at this point. Nobody, until we get here, has suggested the contrary, that this is not a factual matter as to whether or not something as stale as this is material, relevant to the man's fitness at the time.

Q Could I ask you another thing about the instructions.

A Surely.

Q Do you think the instructions fairly left it to the jury to decide whether this was a so-called private matter or public matter?

A Yes.

Q Or was the overall reading of the instructions

that -- or did the judge himself decide that he was a public figure or public official?

A No, no, Your Honor. The charge is quite specific and in language that jurors could understand, that they came to this division in the road, they must decide as a matter of fact themselves was this bootlegging -- you see, they don't comment on evidence in New Hampshire, the judges, not at all -- if this charge having been published, if they found it would bear on the man's fitness for office and therefore it would be --

Q That is a different question. That is a different question.

A I'm sorry.

Q Is there any issue in the case with respect to whether --was there any issue left to the jury with respect to whether the plaintiff was a public figure or a public official?

A No, Your Honor. We stipulated at the outset -- Butts and Walker had not yet come down, and we stipulated --

Q So concededly he was a public official or a public figure?

A That's correct.

Q To which the New York Times rule applied.

A Well, we conceded that he was a public official.

Q Right.

A That aspect of it.

Q But did you --

A We did not concede that this subject matter was comment concerning his so-called official competence.

Q Yes.

A But his status as a public figure, public official, we conceded and tried the case on that basis. That wasn't left open to the jury. The jury was instructed that that had been agreed upon and they were to handle the case on that basis.

Q Well, do you think that if a publication injures ap ublic candidate for public office in the minds of the voters, injures his reputation in the minds of voters, that it nevertheless can be held to be irrelevant and private?

A I would say --

Q That is your position, I take it?

A Your Honor, I say the answer to that is yes, and I will go back to Hitler's Mein Kampf, the big lie is the one that hurts. Now understand this, if it please the Court: Not one nickel was awarded for the loss of the election, though he lost the election for whatever time and effort he put into it, and the public lost the benefit of having him as a public official. But in addition to that and thereafter, because this was a big lie, the damage continues on and it damages him in his personal private capacity, and that is what the verdict represents.

I don't think that you can take the position that is

argued by my Brother Williams that what anybody wants to write about anybody who stands for public office is automatically subject to the stricture of New York Times vs. Sullivan. If you take that position, I think you are moving in the wrong direction.

The application of the Times doctrine below has gone so far that Judge Skelly Wright, for example, has completely reversed all of the normal procedures that courts are supposed to use on motions for summary judgments, motions to dismiss, and motions for directed verdict. He says that the court shall take into account the credibility of witnesses and the court shall draw all the inferences, and the court shall -- this is his decision in Glassman -- unless the court is satisfied that the plaintiff has won, the case never gets to the jury for determination.

Now all of the law that I know of says that on each of those situations, if there is evidence in the case which raises the material question of fact, the jury is the trier of the fact. In New Hampshire that must be the situation because that is the constitutional requirement. This judge --

Q That is the constitutional requirement of a trial by jury in your state?

A Yes, but additionally if the court is conducting a jury trial, the court is powerless to make any factual determinations.

Q And that is a matter of state constitution?

A State constitution, statute and practice since the beginning of time.

Let me point out one thing that my Brother Williams did not mention to the Court. We have ample evidence of New York Times malice in this case, but it was not permitted to be considered by the jury because our trial court made one error in ruling. He ruled that Drew Pearson and Drew Pearson's malice, in talking about his wreckless disregard, was not chargeable to manner and to the newspaper. He did this because the defense below, although there were orders to make this clear, successfully avoided letting the court know whether or not Pearson was the real party and in interest the defendant and therefore chargeable with his own act.

When they came to this court, by letter they acknowledged that Pearson was the real party in interest by letter to Judge Brennan asking for an extension, which they had been unwilling ever to say to the state court. The factual background between Pearson and these people is that Pearson, by contract with Monitor, writes Mannor is not permitted to change his writings and is affirmatively obligated to spread it out to the newspapers, and if there is any libel, Pearson indemnifies Mannor and in this case also indemnifies the Monitor. And we tried this case assuming that the malice of Pearson, that this whole thing was based on one telephone

call to a man he did not know and had never met, no verification whatsoever, and it was false.

This is the situation: There was a name, it wasn't an anonymous telephone call, the fellow's name was Joe Scott. But it might just as well have been anonymous. Did he ask or attempt to find out from the other side, was it true or false? I asked him that, and he said no, he didn't try to find out from Roy whether it was true or false because people in embarrassing positions he knows would deny it anyway.

Now this is malice, and we preserved our position that the court was wrong, excluding that -- it came in but the jury was instructed to disregard it. So that if it were necessary on remand, we would go back to the state supreme court prior to a new trial and that court would, I am quite sure, advise the trial court that that was error. We would try it again with this evidence in and we would satisfy all of the requirements of Times vs. Sullivan that anybody justly could say applied to the case.

One other thing --

Q Mr. Brown, this private sector thing, I think I am confused. Suppose they said that this man was bootlegging last year, would that be in the private sector?

A The State Supreme Court decision, Mr. Justice Marshall, adverts to that. What the State Supreme Court says is that a charge of bootlegging, it is difficult to say that

that is not relevant, particularly if it were an event of recent occurrence, but with the passage of time the --

Q Well, that is what worries me, is the position of your court, that the passage of time puts it in the private sector. I mean the word "private" gets me in trouble, that a candidate for public office has a private sector.

A Well, the court does not --

Q Maybe I'm quarreling with the word "private."

A -- the court does not, as a matter of law, rule that this was in the private sector. I don't like the language either. What it says is that with the passage of time of more than a quarter of a century, and with no actual factual basis for the charge being made, it becomes a question of fact as to whether it is relevant in a 1960 campaign and therefore let a jury determine that question of fact.

Q Under proper instructions, of course?

A Sir?

Q Under proper instructions?

A Yes.

Q That is part of the case.

A May I add one other thing, and it builds on the point that you bring up. Pearson testified under oath that he didn't make this publication for the purpose of instructing the voters at all. Now, you will find that at page -- I think it is 190, 194 perhaps, and again at 183. What he

said was that he was writing this for national consumption and had no intention at all to affect the outcome of the election.

So you get this situation: The defense is that since this man is running for public office, anything that is said about him to help the voters or to help persuade them should have this privilege, and the man who wrote it said that isn't what I was writing it for. The only reason that it was published on the Saturday before the election was the general reader interest in this type of thing is highest then, in other words the column has more salability then than it would have a week or two weeks later. But there was no effort to use this, Pearson says, to influence voters.

Now, as to whether or not it was relevant and whether to the election campaign, bear this in mind: Nobody in the election campaign itself ever used this bootlegger charge at all. The Hill camp that this article might have helped, they never put out a word claiming any bootlegging. That is the vicious thing about this whole case. You can say, I think, and it is difficult to argue, you can say almost anything about a candidate that may have some relevance to it, almost, and if it is used for the purpose of helping the voters make their decision, then it should have some higher standing than as if it is published a month afterwards for the purpose of making some other story.

What happened here was that Pearson claimed that

Sullivan was a straw after a hearing had been had on it and at which he was held not to be a straw. So this was false. At that hearing the theory of the Hill forces was that Roy had procured all three of them and that wasn't substantiated so that again was false. He throws it in. Nobody really believed that Senator Bridges would fool around with these Democratic candidates. The three of them together couldn't have licked him, and they didn't. It wasn't that close.

The evidence is that a national columnist throws big names in to attract attention to his column, that is why Bridges was in there, and he had three people with criminal records who had filed for this office, that is Sullivan, McCarthy, and Robertson, and he wanted one more to make the story that much better, and he made my client, Roy, into a criminal for that purpose. And the information that he got at the time he got this information, he was told that Roy had been a U.S. Congressman. He was told that Roy was a responsible public officer and a responsible businessman. He left that out and he deliberately substituted this. This is something like the Polk case. It is something like Wasserman and Ogarno. He knew that Roy was actually a responsible person. He deliberately maligned him and degraded him, not for the purpose of helping the voter one bit, but for the purpose of selling that column throughout the United States, and you can take his word for that and not mine.

This is the part that this Court is going to have to face up to at some time. You cannot assume that publishers are publishing with proper motives. Motive may be a bad word in this Court, but in good faith and for a proper purpose those two things have always been the underlying basis for allowing the privilege. And where the person claiming that privilege does not make that out, I say there is no basis for this or any other court in this country saying that the injured person who has a constitutional right of equal magnitude to a remedy for that damage to send that person away remedyless.

Unless the Court has questions, thank you.

MR. CHIEF JUSTICE: Thank you, Mr. Brown.

Mr. Williams, you have about three minutes left.

ARGUMENT OF EDWARD BENNETT WILLIAMS, ESQ.,

ON BEHALF OF PETITIONERS -- REBUTTAL

MR. WILLIAMS: Thank you, Your Honor.

Under the instructions that the trial judge gave, it was entirely possible for the jury to have found that the alleged defamation was true and yet to permit recovery for the plaintiff. Let me read the instructions.

The trial judge said, "If you decide" --

Q What page are you on?

A Page 11 of our brief, if the Court please.

Q Fine.

A "If you have decided that it is a private

defamation, the plaintiff would be entitled to recover unless the defamatory matter was justified. Now justification is established if the facts stated are true and are published with a justifiable motive."

The jury was given full license to find that this publication was not with a justifiable motive and even though the allegation was true, they could have brought in a verdict in this case for the plaintiff.

Now, counsel concedes that New York Times vs. Sullivan is appropriate here for application. What counsel is arguing to this court is that under New York Times vs. Sullivan, it is possible that an alleged defamation may be true and yet a recovery may be had by the plaintiff.

Q I didn't understand that to be his argument. I thought his argument was that he concedes that New York Times vs. Sullivan is fully applicable if this were defamation having to do with this public figure's record as a public figure, relevant to his qualifications as a candidate. However, he argues the jury was entitled to find, as the court instructed them in this case, that the defamation did not touch upon or was relevant in any way to his fitness for the office for which he was a candidate but had to do with his long forgotten past and in which the public had no interest, and that if the jury found that, then the law of New Hampshire is applicable, and what the law of New Hampshire is is of no business to this

Court whatsoever if you accept his hypothesis --

A If you accept --

Q -- that the First Amendment has nothing to do with it.

A If you accept the hypothesis that you can utter in the public dialogue a defamation concerning a candidate for high office that is irrelevant to his fitness --

Q Then the law of New Hampshire is of absolutely no interest to this court.

A I suggest, if the Court please, that it is a constitutional impossibility to utter a defamation about a candidate for high office that is irrelevant because the mere fact that damage flows to him, as he alleges, makes it relevant if it influences the electorate.

Q Right.

A If the Court please, counsel said, in quoting the record, that the columnist Pearson did not write this to influence the electorate but rather wrote it in a purely private vein. This does violence to the record because at page 194, the very page which he cites, the witness Pearson said that he wrote this to let the voters -- because the voters had a right to know the background of every candidate, which is the precise reason for the constitutional rule articulated in Times vs. Sullivan.

Thank you, Your Honors.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Williams.

Thank you, Mr. Brown. The case is submitted.

(Whereupon, at 10:58 o'clock a.m., argument in the above-entitled matter was concluded.)

- - -