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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 150.

THE ASSOCIATED PRESS,
Petitioner,

vs.

EDWIN A. WALKER,
Respondent.

On Writ of Certiorari to the Court of Civil Appeals for the Second Supreme Judicial District of Texas or, in the Alternative, to the Supreme Court of Texas.

BRIEF FOR THE RESPONDENT.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

U. S. Constitution, Amendment VII.

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Vernon's Texas Civil Statutes, Article 5430.

"A libel is a defamation expressed in printing or writing, or by signs and pictures, or drawings, tending to

blacken the memory of the dead, or tending to injure the reputation of one who is alive, and thereby expose him to public hatred, contempt or ridicule, or financial injury, or to impeach the honesty, integrity, or virtue, or reputation of any one, or to publish the natural defects of any one and thereby expose such person to public hatred, ridicule, or financial injury."

Vernon's Texas Rules of Civil Procedure,
Rule 274. Objections and Requests.

"A party objecting to a charge must point out distinctly the matter to which he objects and the grounds of his objection. Any complaint as to an instruction, issue, definition or explanatory instruction, on account of any defect, omission, or fault in pleading, shall be deemed waived unless specifically included in the objections. . . ."

Vernon's Texas Rules of Civil Procedure,
Rule 279. Submission of Issues.

". . .

"Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and upon which no issue is given or requested shall be deemed as waived; but where such ground of recovery or of defense consists of more than one issue, if one or more of the issues necessary to sustain such ground of recovery or of defense, and necessarily referable thereto, are submitted to and answered by the jury, and one or more of such issues are omitted, without such request, or objection, and there is evidence to support a finding thereon, the trial court, at the request of either party, may after notice and hearing and at any time before the judgment is rendered, make and file written findings on such omitted issue or issues in support of the judgment, but if no such written findings are made, such omitted issue or issues shall be deemed as found by the

court in such manner as to support the judgment. A claim that the evidence was insufficient to warrant the submission of any issue may be made for the first time after verdict, regardless of whether the submission of such issue was requested by the complaining party."

QUESTIONS PRESENTED.

The questions framed by Petitioner are to some extent misleading because of the tendency of the authors of the Brief to engage in personalities not warranted by the particular issue presented. It does not contribute to the clarity of the argument in this case to deprecate the Respondent by using terminology such as "persons like General Walker", "one like General Walker" and "at the behest of one like General Walker".

1. Where there is evidence that a purported eye-witness account is not substantially true, and when the purported eye-witness account charges the plaintiff with having committed Federal felonies, can it be ruled that evidence of knowledge of falsity or reckless disregard of truth, as required by **Times v. Sullivan**, is lacking?

2. Does **New York Times v. Sullivan**, in definition of "actual malice", require more than knowledge of falsity or reckless disregard of truth?

3. Does the Texas definition of malice, as required to sustain a verdict for punitive damages, differ from the **New York Times v. Sullivan** definition of malice, as required to sustain any recovery for libel; and, if so, is the Texas definition the more stringent in the sense of requiring more?

4. Did Petitioner under Texas law waive its now asserted defense of no known falsity or no reckness disregard of the truth by failing to submit a special issue to the jury for its decision on these factual questions?

STATEMENT OF THE CASE.

As part of its reporting of events involved in the riot upon the campus of Mississippi University on the night of September 30, 1962, Petitioner published, over its world wide wire service, reports that Respondent had committed criminal acts . . . assuming command of a riotous mob and leading a charge against U. S. Marshals. These reports by a self-styled eye-witness, employee of Petitioner, were found by the jury to be false.

The defamatory reports, quoted in full in the Associated Press Brief (pp. 7-11), included the following sensational and dramatic statements:

> "October 2, 1962. 'Walker, who Sunday night **led a charge of students against federal marshals** on the Ole Miss Campus, was arrested on four counts including insurrection against the United States.'
>
> "October 3, 1962. (Editors Note: Former Maj. Gen. Edwin A. Walker, . . . was eating dinner Sunday night . . . was told there was a 'scene of considerable disturbance' on the University of Mississippi Campus. He went there. Here is the story of Van Savell, 21, Associated Press newsman, **who was on the scene and saw what happened)** (Emphasis added).
>
> "By Van Savell: Oxford, Miss., October 3, 1962 (AP) 'Utilizing my youth to the fullest extent, I dressed as any college student would and easily milled among the several thousand rioters on the University of Mississippi Campus Sunday night.
>
> "This allowed me to follow the crowd—a few students and many outsiders—as they charged federal marshals surrounding the century old Lyceum Building. It also brought me into direct contact with former Army Maj. Gen. Edwin A. Walker, who is now under arrest on charges of inciting insurrection and seditious conspiracy.

"Walker first appeared in the riot area at 8:45 p. m., Sunday near the University Avenue entrance about 300 yds. from the Ole Miss Administration Building.

* * * * * * *

"The crowd welcomed Walker, although this was the man who commanded the 101st Airborne Division during the 1957 school integration riots at Little Rock, Arkansas.

" 'One unidentified man queried Walker as he approached the group. "General, will you lead us to the steps?"

" 'I observed Walker as he loosened his tie and shirt and nodded "Yes" without speaking. He then conferred with a group of about 15 persons who appeared to be the riot leaders.

" 'The crowd took full advantage of the near-by construction work. They broke new bricks into several pieces, took survey sticks and broken soft drink bottles.

" '**Walker assumed command of the crowd,** which I estimated at 1,000 but was delayed for several minutes when a neatly dressed, portly man of about 45 approached the group. He conferred with Walker for several minutes and then joined a group near the front.

" 'Two men took Walker by the arms and they headed for the Lyceum and the federal marshals. **Throughout this time, I was less than six feet from Walker.**

" 'This march toward tear gas and some 200 marshals was more effective than the previous attempts. Although Walker was unarmed, the crowd said this was the moral support they needed.

" 'We were met with a heavy barrage of tear gas about 75 yards from the Lyceum steps and went a few feet further when we had to turn back.

" 'Before doing so, many of the rioters hurled their weapons—the bricks, the bottles, rocks and wooden stakes toward the clustered marshals.

" 'We fled the tear gas and the charging marshals —the **crowd racing back to a Confederate soldier's statute** near the grove entrance below the Lyceum.

" 'I went to a telephone. A few minutes later I returned and found Walker talking with several students. Shortly thereafter, Walker climbed half-way up the Confederate monument and addressed the crowd.

" 'I heard Walker say that Gov. Barnett had betrayed the People of Mississippi. "But don't let up now," he said, "You may lose this battle, but you will have been heard."

* * * * * * *

"There were cheers. It was apparent that Walker had complete command over the group.

" 'By this time, it was nearly 11:00 p. m. and I raced to the telephone again. Upon my return, Walker was calmly explaining the "New Frontier Government" to several bystanders. He remained away from the rioting throughout the next few hours, but advised on several tactics" (R. 11-25).

[The timing of the above reported charge . . . **before** the speech from the Monument . . . is in direct conflict with the first telephone report by Savell to the AP news room in New Orleans, which stated that the charge was **after** the speech on the monument.]

The above Associated Press report is in direct conflict with the United Press report (R. 1495-6), which included the following:

"UPI—A 66 Students were waving the Confederate flag during a lull in the rioting. Edwin A. Walker, former Maj. Gen. who commanded troops at

Little Rock mounted a Confederate statue and advised the students to cease their violence."

"'This is not the proper route to Cuba', Walker, who was wearing a big Texas hat said." "The crowd jeered."

"Later, Walker mounted the statue again and said: 'I want to compliment you all on the protest you make here tonight. You have a right to protest under the Constitution'."

The jury, in answer to questions under "Special Issues" held that the reports that "Walker assumed command of the crowd" and "led a charge of students against federal marshals" were not "substantially true", not "fair comment", and not "made in good faith" (R. 59-62).

At pages 11 through 13 of its Brief, Petitioner asks the "naggingly persistent" question: "Why was General Walker, of Dallas, Texas, at the campus of the University of Mississippi?", and thereupon proceeds to answer its question with public statements of Respondent, which were offered to the jury in an obvious attempt to prejudice the jury's consideration of the evidence as to what General Walker actually did, after arriving on the campus.

The answer to Petitioner's nagging question had been given by Walker on cross-examination:

"Q. (by Mr. Gooch) Now, General, just what was your purpose in going to Mississippi?

"A. I thought it was absolutely wrong to use military forces, troops, American troops in a strictly civilian problem.

"Q. All right.

"Mr. Watts: Let him finish.

"A. And I wanted to see for myself exactly what happened. I wanted to know from first hand infor-

> mation. And I did not trust the press reporting of it in any form, since I had been at Little Rock and seen that exaggerated out of all proportions, and I intended to see for myself'' (R. 561).

The answer was also given by the Texas Court of Civil Appeals:

> ''. . . His [Walker's] presence there was not illegal or unlawful. He had the same right to come upon the campus and observe the activity as did the various members of the press who were there to observe and report.'' **Associated Press v. Walker**, 393 S. W. 2d 671, 675 (1965).

With the sole Constitutional question involving whether the Associated Press is to be immune from liability for falsely reporting that its newsman saw Walker commit several very serious crimes, it is hoped that principle of Equal Justice Under Law will keep the examination of the factual record upon an objective basis.

Petitioner claims that ''beyond question'' and ''giving to General Walker the benefit of every reasonable inference, the evidence in this case plainly establishes'' that General Walker led a charge and assumed command of the crowd. The summary of the evidence in support of the findings of the jury and the judgment of the trial court by the Texas Court of Civil Appeals, is just the opposite:

> ''He (Walker) was not in the forefront, never in front of the crowd. He never hurled any rock, brick or other missile in the direction of the marshals or otherwise. He did not participate in the riot. He never directed or suggested that others do so. He issued no directions nor did he counsel or suggest to others that they charge the marshals or take any other offensive action toward them. The crowd was

> disorganized. It was a leaderless group. Groups were milling aimlessly. No one, including Walker, made any effort to assume leadership. Walker did not run. He never got out of a slow walk, described as strolling, ambling, or 'moseying' along. He never participated in the riot or violence in any manner. He made no effort to incite or move others to action or violence. When asked how to drive the marshals out, he said: 'You don't'." **Associated Press v. Walker**, 393 S. W. 2d 671, 675 (1965).

In order to conclude that Walker "assumed command" and "led a charge", completely overturning the jury's verdict, this Honorable Court must disregard evidence as follows:

> (a) Walker (R. 434-670): Testified in great detail as to his every action on the campus; and, in answer to repeated questions as to whether he "led anybody" his answers were, "No, I certainly did not". His answers to extensive questions on direct, and piercing cross-examination, were consistently that he was on the campus only to observe and not to participate in the activities of the crowd. He refused requests of the students to "be our leader". He never got out of a walk during the entire night. In his language, "I never have had anything to do with the activities of the students toward the Marshals". When the Highway Patrol started to leave, the students became excited, with cries, "Barnett has sold us out". At this point, he agreed, for the first time, to speak, and advise the crowd that Barnett had not sold them out, that the Highway Patrol Chief, Birdsong, had let Meredith on the campus. He further advised them that "Nobody came to Mississippi for violence, no violence was intended." (At which time, the students began to "boo".) He further told them, "You can protest, you have a

right to protest, but this is not the place for violence". (All of which was in accord with the United Press report.) After the speech, the crowd dispersed, and he moved slowly up near the flagpole in the center of the University Circle (R. 489). He specifically described the "sporadic" activity of the crowd at the times when Petitioner contends that "it is beyond dispute that Walker, did in fact, lead two charges"; and, when asked "Did you participate in any activities of the crowd", his answer was, "I certainly did not" (R. 493). In order to accept Petitioner's assertion that Walker, beyond dispute led two charges, this Honorable Court must assume that he deliberately lied, under oath, in the presence of the jury, and that the testimony of defendant's witnesses, which included neither Savell nor any other employee of Petitioner, "corroborated and amplified the conclusion that Walker did, in fact, lead a charge and assume command of the crowd, as argued at page 21 of its Brief, and this without hearing such witnesses, observing their demeanor, and feeling the impact of conflicts in their evidence.

(b) Gwinn Cole: Assistant Director, Miss. Highway Patrol, testified that there was no violence until the U. S. Marshals fired tear gas into the backs of the Highway Patrol, who were separating students from the Marshals, and into the face of the students; and that, thereafter, there was no "organized charge", but only sporadic activity, with small groups, not more than 7 or 8, coming out of the crowd and throwing missiles toward the Marshals, until the time he left at 9:50, which was coincident with the timing of Walker's speech from the Monument (R. 871-884).

(c) Louis Leman: A responsible young businessman of Houston, Texas, who was with Walker the entire evening, and testified, positively, that Walker,

at no time, participated in the activity of the crowd, assumed command, or led a charge. He covered the speech on the Monument, and described Walker's actions, both before and after, including his refusal to "lead the students", and his demeanor, which included at no time any movement faster than a slow walk (R. 871-885).

(d) Cecil Holland: A reporter for the Washington Star, with 30 years experience. Testified that he was in the vicinity of the Campus Circle, and near the Marshals. He described sporadic activity of the crowd. He saw Walker at one time southwest of the Monument. He saw him lead no charge, or participate in any other activity of the crowd. In fairness, however, the witness did not testify that his visibility was such that he must necessarily have seen him (R. 360-397).

(e) Al Kuettner: Testified that he was United Press newsman, at a point east of the Monument on University Avenue as Walker was entering the Campus about 9:00 p. m. He saw him again on the Monument, and heard his speech. After hearing the speech, he reported, over the United Press Wire Service that, "during a lull in the rioting, General Edwin A. Walker mounted a Confederate Statue on the Campus and begged the students to avoid their violence." He also stated that Walker's speech was met with jeers (R. 831). He described the events involved in the riot, but saw Walker take no part therein. (Again, he was not keeping a constant watch; but it is significant that, if anything so sensational as a charge having been led by a former Major General in the United States Army had occurred, no such report appeared upon the wire service of United Press.) (R. 827-867). When he saw Walker come on the Campus, with two men abreast,

it was when he first arrived, and the witness did not say that the other persons, ahead of him and behind him, appeared to be in his party (R. 827-829).

(f) Talmage Witt: A Deputy Sheriff of Pontotoc County, Mississippi, was with Walker practically all of the time involved. He testified positively that Walker took no part in any of the violence (R. 292). He also described Walker's activities, as walking slowly about the Campus, without leading the charges on the Marshals or participating in the activities of the crowd. He refuted a portion of a written statement that had been given to one of the AP counsel, at a time when that counsel was representing him in a legal matter, and testified, positively, under oath, that Walker never did lead a charge, or participate in any act of violence (R. 219-292).

(g) Other witnesses: Plaintiff offered the testimony of witnesses, Sweatt (R. 136), Cox (R. 204), May (R. 397), Hunter (R. 694), Carrington (R. 397), MacFarland (R. 401), Watkins (R. 407), McRae (R. 415), Snyder (R. 419), Edwards (R. 420), whose testimony completely accounted for all of the time that Walker was on the Campus, and effectively refuted defendant's contention that Savell was "substantially" telling the truth when he reported that he had seen Walker assume command of the crowd and lead a charge. Although the Savell report, and his testimony by deposition, fixed the time of the charge as before Walker's speech from the Monument, the witnesses all testified positively that Walker led no charge and had no command over the crowd, either before or after the speech.

Associated Press did not bring to Court its "eye-witness", Van Savell, so that the jury could compare, from

the witness stand, his sincerity, demeanor, and candor with that of the respondent, Walker, as part of its necessary evaluation as to who was telling the truth. It is generally held that when a party fails to produce a witness who is under its control, that failure may be considered as evidence against it, and the jury may properly infer that he was not produced because his testimony would have been harmful, and that general rule prevails in Texas. **Davis v. Etter & Curtis** (Tex. Civ. App., no writ history), 243 S. W. 603.

Van Savell's news report is in irreconcilable conflict with the telephone report which the operator of the Associated Press news room in New Orleans, Ben Thomas, testified that Van Savell gave him. Thomas testified that he "was working the 'night re-write shift'" at New Orleans communicating with Associated Press newsmen at Oxford, Van Savell, Edmund Lebercon and Gavin Scott, also two Mississippi U. students, John Perkins and John Hall, who were AP correspondents, and James Boudier, AP photographer. The only newsman who reported that Walker was leading a charge was Savell, who was quoted by A. P. witness Thomas as follows (R. 123-128):

> "He said that Walker had climbed on the Confederate Monument and talked to the students, and said something to them about if they retreated and went home, they would be cowards, that they should stand up and fight.
>
> "**And then he got down from the Monument and started walking toward the Marshals,** and the students followed behind him, and he led the group of yelling, screaming, brick-throwing group with him as close to the Marshals as they could get, until they were turned back by tear gas" (R. 132).

He further testified that Savell said that the students seemed in agreement with Walker and ready to follow him,

after the speech on the Monument, and that **before the speech, there was only sporadic activity.** When Walker entered the group, "it seemed more organized" (R. 132-133). The record further contained specific answers fixing the time of the first charge reported by Savell as **after the speech, rather than before the speech,** as follows:

> "Q. Now, he then reported to you on this occasion when he first reported that Walker had led the charge, that Walker had made a speech from the monument, and that that speech seemed to give the boys more organization. Then, after the speech, he led the charge?
>
> A. Yes, to the best of my knowledge.
>
> Q. He made this report to you about the speech and the charge in the same telephone conversation and not in two?
>
> A. In the same conversation" (R. 135).

Savell's report also conflicts with that of another of Petitioner's witnesses, the Reverend Duncan Gray (R. 719-795). The above conflict between the report of Savell and the testimony of Thomas and Gray probably explains the failure of Petitioner to produce Savell at the Texas trial. When he appeared at the Shreveport trial, the verdict in favor of Walker was much larger than at Fort Worth.*

Throughout its Brief, Petitioner makes frequent use of the terms "uncontradicted", "beyond dispute", etc., concerning the evidence. Respondent challenges every such use. The evidence was disputed but the preponderance of the evidence supports the jury verdict.

Petitioner insinuates (Brief, p. 21) that Walker led a mob "demanding that 'nigger' under a flag of truce."

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* See Petitioner's Brief, p. 43.

There is absolutely no evidence to connect Walker with such a statement and this, again, is obviously offered for a prejudicial effect.

Notwithstanding Petitioner still tries to retry the evidence. On pages 18-21 of its Brief Petitioner relies on statements that "Walker advanced toward the flagpole on two occasions."

Keeping in mind that the University of Mississippi Plot Plan, attached to Vol. 3 of the Record and reproduced in the Appendix to Respondent's Brief, reflects that the flag pole near the center of the Circle is approximately 250 feet from the Lyceum Building, where the Marshals were standing, and that the Confederate Monument at the east end of the circle is about 550 feet from where the Marshals were standing, and that many witnesses* have further fixed that distance by sworn testimony, the numerous quotations by Petitioner of Respondent's witnesses as alleged proof that Walker led a charge when they saw Walker "walking toward the flag pole" is not significant. We invite the attention of the Court to check every reference to the Record in Pages 18-21 of Petitioner's Brief. Not one of them establishes that Walker either assumed command of a crowd or led a charge. (As a simple test of the veracity of the Associated Press report, it is respectfully suggested that had the report honestly stated that Walker was seen "walking toward the flag pole in the center of the Circle, some 250 feet east of the U. S. Marshals," there would certainly have been no resulting false arrest and imprisonment.)

Petitioner's slanted version of Walker's own testimony at Pages 15-17 of its Brief is more ingenious than ingenuous. They have built up as a violent prelude to

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* Savell's Report fixes the distance from Lyceum to entrance of Campus as 300 yards. Petitioner's Brief, p. 8.

Walker's appearance on the campus isolated acts of violence (with which Walker admittedly had no connection), largely out of sequence and out of connotation, which occurred over a period of several hours, and compressed into a dramatized "conflagration", with the inference that Walker was a part of it all (R. 147, 176, 285, 385, 401, 636, 858, 859).

A far more reliable approach would be a careful review of the entire testimony of Cecil Holland, the highly responsible newspaper reporter for the Washington Star (R. 360-400), whose testimony is used out of context at Page 15 of Petitioner's Brief after "gun fire eventually broke out" (R. 353, 386, 402, 896). The entire testimony of this witness shows that the activity was sporadic ("I couldn't see any movements of people except small groups") (R. 365). He described a meeting with Walker (R. 372-374), which indicated no contact between Walker and the mob. It is obvious that, had so sensational an occurrence as Walker leading a 1,000 man charge taken place, this experienced newsman would certainly have known something about it, and reported it to his paper. In this connection, it is singular that the Associated Press did not bring even one U. S. Marshal to Court. (They were as conspicuous by their absence as were employees of Associated Press.) Had Walker, with his big white Texas hat, led a 1,000 man charge, an awesome thing to contemplate, one or more U. S. Marshals would certainly have appeared at the trial, or, perhaps before the Grand Jury.

Another typical example of the slanting of the testimony in Petitioner's Brief appears at Page 21, where the witness, Kuettner, is quoted as, "personally saw Walker advance on the Lyceum with two men on each side of him (R. 846-847). A review of the actual testimony of this witness will reveal that the witness was describing an

incident **when Walker first entered the campus,*** separated in distance and time from the alleged charge.

> "Q. Now, when you first saw Gen. Walker, I believe you said it was about 9 o'clock, was he walking toward the Lyceum when you saw him?
> A. Yes, sir."

Respectfully directing the attention of the Court back to Record pages 828-830, this alleged movement dramatized in Petitioner's Brief as an "advance on the Lyceum with two men", occurred completely out of the riot area and 200 feet east of the Monument (R. 828).

Petitioner weaves selected quotations from its own witnesses (Brief, 22-28) into a fabric that would picture Walker leading "at least two charges". The most flagrant example of conflicting and incredible testimony in the entire record is the witness, Gregory, who is relied upon as placing Walker within twenty yards of the driveway that circles the Lyceum Building (R. 1135). The performance of this witness alone, could have convinced the jury that Petitioner's entire defense was fabricated. He related that he saw Walker about 9:00 when Van Savell came up and said "Gen. Walker's on the campus" (R. 1133).

He then relates continuous conversations with students and finally Rev. Duncan Gray (one of Petitioner's witnesses), and, "very shortly thereafter" (R. 1134) he saw a large group forming around Walker with cries, "he's going up to the Monument". (550 feet from the Lyceum) —"he's going up to the Marshals"—"Gen. Walker won't let the Marshals stop him, -gas- won't stop Gen. Walker"; after which he described Walker, striding at a fast clip in the direction of the Lyceum, with 200 men behind him,

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* Approximately, 1200 feet east of Lyceum. See Mississippi U. Plot Plan in Appendix to this Brief.

and, after they arrived within 20 yards of the driveway that circles the Lyceum Building, tear gas was fired and they all ran. This conflicts directly with the testimony of both Rev. Gray (who testified that he was in the area near the monument for a considerable time before Walker's speech, and that no generalized charge across the north side of the Circle took place during that period of time, and further testified that he had a conversation with Walker just southwest of the monument shortly before Walker's speech (R. 1033-1044). At the recess, Gregory was seen talking with counsel for Petitioner, contrary to the caution that he had received in open court (R. 1038-1040). He thereafter endeavored to change the timing of his testimony, in a most clumsy manner (R. 1138-1152). At the end of his cross-examination, it would have been impossible for the jury to believe the testimony of Gregory unless it completely rejected the testimony of both Rev. Gray and Savell.

Apparently, the jury elected to believe the testimony of Rev. Gray, that he was in the immediate area to the NW of the monument, which included the NE quadrant of the circle, from about 7:50 until Walker's speech on the monument (except for about 5 minutes when he went in the YMCA). He first talked with Walker a short distance SW of the monument and a few minutes before Walker's speech,* and again after the speech. From the time of his arrival, until after the speech, there was no charge formed up near the monument and **which moved westward across the Circle.** If there had been such a charge, he would have seen it (R. 1025-1054). He did not see Walker lead a charge (R. 1053).

We respectfully commend to the Court a careful comparison between the testimony of Rev. Gray with the tes-

* This is the time of the charge described by Gregory (R. 1135).

timony of Gregory and particularly with the news report of Savell. This will result in the inevitable conclusion that Savell's alleged 1,000 man charge **before** Walker's speech on the monument could not have occurred without physically running over Rev. Gray, who was in the same area at the same time and saw no charge.

Of the four witnesses quoted on Page 23 of Petitioner's Brief as testifying that Walker led a charge, their testimony is in complete conflict as follows:

> Doy Gorton (R. 1094-1108): Testified that Walker had stepped down from the Monument, after making a speech, and that a charge was started off with a "rebel yell" (R. 1104-5). (This is in conflict with the testimony of Savell that the charge was before the speech on the monument, and in conflict with the witness, Buckley, that the students were yelling, "lead us on, Gen. Walker, be our Leader", and Walker nodded his head and said, "Alright, alright, I will."
>
> The witness Gorton testified that he did not hear the sensational statements attributed by Savell to Walker, namely: "don't let up now, you may lose this battle but you will have been heard", "you must be prepared for possible death. If you are not, go home now" (R. 1102).
>
> Travis Buckley (R. 1109-1130): Testified that he heard Walker, in response to cries of "lead us on Gen. Walker, be our leader," say, "Alright, alright, I will", and started off toward the flag pole, all of which occurred **after the speech on the monument.** The last Buckley saw Walker was at a point 50 feet east of the flag pole (which would still be approximately 300 feet from the Marshals).
>
> John Charles Hill (R. 1054-1077): A cub reporter for CBS, testified to substantially the same charge that Savell had related, also stated that he had a tape

recording (not produced in evidence), and had made the same report to his superiors with CBS (which was not reported to the world by that news media).

Kingsby Kingsley (R. 1122-1125): The reference by Petitioner to the testimony of this witness (Brief p. 23) as supporting its report that Walker "led a charge" is very deceptive. The incident described by this witness was completely out of the area where the riot occurred. The witness testified that he "saw Gen. Walker walk toward the Lyceum Building, wave his arms and motion to a large group of students to come with him (R. 1122-24). The testimony of this witness, a reporter for the Memphis Commercial Appeal (who incidentally did not report to his paper that Walker had "led a charge") was in reference to the time when Walker first entered the Campus, some 600 feet (2 city blocks) from the Lyceum and before the riot occurred. This is typical of the type of evidence relied upon by Petitioner to establish that Walker "led a charge", and quoted, apparently for its sound rather than substance (Walker's actions at a point in front of the Journalism Building shown on the University Plot Plan at the end of this Brief as South of University Avenue, on Fraternity Row), could have no conceivable relationship with the leading of a charge. This mature reporter was in the area during the critical time that Savell claims to have seen Walker assume command of the mob, and although Kingsley was produced as a witness by the Associated Press, it is significant that he did not testify that he saw or reported to his paper, that Walker had conducted himself as described in the AP article.

FINDINGS IN THE COURTS BELOW.

This case, under Texas law, was presented to the jury under "Special Issues", preceded by Court "Definitions". These Definitions and Issues are as follows:

Definitions.

In answer to Special Issue No. 1 you are instructed that by the term "led" is meant activities by a person who directs, moves to action, or encourages in some action or movement, and that by the term "charge" is meant a movement toward the marshals, or a group or body of people moving toward an objective.

In answering the issues in this charge in which the term "substantially true" is used, you are instructed that in order for a statement to be "substantially true" it is not necessary that the exact facts or the most minute details of the plaintiff's activities be completely accurate. Mere inaccuracies not affecting the substance of the report of plaintiff's activities are immaterial. You are further instructed that in answering special issues in which the term "substantially true" is used that the publication must be considered as a whole, giving to all the words contained therein (except those hereinabove defined for you) their ordinary meaning as read and understood by the average reader.

In answering the issues in these instructions in which the term "fair comment" is used, you are instructed that the interest of the public requires that all acts and matters of a public nature, and of public concern published for general information may be freely published and discussed with reasonable comments thereon. You are further instructed that by said term is meant **a statement which represents the**

honest opinion of the writer and constitutes reasonable inferences to be drawn from the attendant facts and circumstances whether literally true or not, or whether all reasonable persons would agree with the opinions or conclusions based thereon (Emphasis added).

Special Issue No. 1:

Question: Do you find from a preponderance of the evidence that the statement "Walker, Who Sunday led a charge of students against Federal marshals on the Ole Miss campus" was substantially true?

Answer "Yes" or "No".

Answer: No.

Special Issue No. 2:

Question: Do you find from a preponderance of the evidence that the statement "Walker, who Sunday led a charge of students against Federal marshals on the Ole Miss Campus", complained of by plaintiff, constitutes fair comment describing the plaintiff's activities on or about September 30, 1962, at the places described in the evidence and under the then attendant circumstances?

Answer "Yes" or "No".

Answer: No.

Special Issue No. 3:

Question: Do you find from a preponderance of the evidence that the statement inquired about in special issue No. 1 was made in good faith in reference to a matter in which the defendant had a duty to report to its members and thence to the public?

Answer "Yes" or "No".

Answer: No.

Special Issue No. 4:

Question: Do you find from a preponderance of the evidence that in publishing the statement set forth in special issue No. 1 the defendant, Associated Press, was actuated by malice as that term is hereinafter defined?

In connection with the above issue, you are instructed that by the term "malice" is meant ill will, bad or evil motive, or that entire want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the right or welfare of the person to be affected by it.

Answer "Yes" or "No".

Answer: Yes.

Special Issue No. 5:

Question: Do you find from a preponderance of the evidence that the statement "Walker assumed command of the crowd" was substantially true?

Answer "Yes" or "No".

Answer: No.

Special Issue No. 6:

Question: Do you find from a preponderance of the evidence that the statement "Walker assumed command of the crowd" complained of by plaintiff, constitutes fair comment describing plaintiff's activities on or about September 30, 1962, at the places described in the evidence and under the then attendant circumstances?

Answer "Yes" or "No".

Answer: No.

Special Issue No. 7:

Question: Do you find from a preponderance of the evidence that the statement inquired about in special issue No. 5 was made in good faith in reference to a matter in which the defendant had a duty to report to its members and thence to the public?

Answer "Yes" or "No".

Answer: No.

Special Issue No. 8:

Question: Do you find from a preponderance of the evidence that in publishing the statement set forth in special issue No. 5 the defendant, Associated Press, was actuated by malice as that term is hereinafter defined?

In connection with the above issue, you are instructed that by the term "malice" is meant ill will, bad or evil motive, or that entire want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the right or welfare of the person to be affected by it.

Answer "Yes" or "No".

Answer: Yes.

Special Issue No. 9:

Question: If you have answered either special issue No. 1 or special issue No. 5 "No", then answer:

What sum of money, if paid now in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate the plaintiff for the damages, if any, sustained by him as a direct and proximate result of the statements inquired about in special issues Nos. 1 and 5?

In connection with this issue you are instructed that you may only award damages, if any, for statements, if any, inquired about herein which you have found to be false.

In connection with the foregoing issue you are instructed that you may take into consideration such damages, if any, to the reputation of the plaintiff and such mental anguish, if any, and humiliation, if any, and embarrassment, if any, which plaintiff may have sustained directly and proximately solely as a result of the statements hereinabove set forth, if you have found the same to be false.

Answer in dollars and cents, if any.

Answer: $500,000.00.

Special Issue No. 10:

If you have answered either special issue No. 4 or special issue No. 8 "yes", then answer:

Question: Do you find from a preponderance of the evidence that this is a case in which exemplary damages should be awarded to plaintiff?

In connection with the above issue you are instructed that the term "Exemplary damages" as used herein means a sum of money awarded as a punishment for any malice, if any, you have found to exist in this case. "Exemplary damages", if any are allowed, are to be no part of the damages which may be allowed as compensation (if compensation has been allowed) but only in the nature of a penalty allowed by law at your discretion, and any amount which you find hereunder, if you see fit to make such a finding, should be reasonably proportionate to the actual damages, if any, you may allow plaintiff herein.

Answer "Yes" or "No".

Answer: Yes.

Special Issue No. 11:

If you have answered the above special issue No. 10 "Yes", and only in that event, then answer:

Question: From a preponderance of the evidence, what amount of money, if any, do you find should be awarded to plaintiff as exemplary damages?

Answer in dollars and cents, if any.

Answer: $300,000.00.

/s/ Charles J. Murray,
Judge Presiding.

Verdict of the Jury.

We, the jury, have answered the above and foregoing special issues, as herein indicated, and herewith return same into court as our verdict.

Waverly S. Johnson,
Foreman.

SUMMARY OF ARGUMENT.

There was ample evidence of known falsity or reckless disregard of whether the statement sued upon was false, as required by the **New York Times** case; hence even if the scope of the **New York Times** case should be extended to include not only public officers, but private persons participating in public affairs, the judgment below should be affirmed. Where a purported eye-witness account was shown to be fabricated (and is found by the jury to have been fabricated), then the report must be held to have been knowingly false.

The Texas definition of malice necessary to sustain a verdict for punitive damages is not the same as the definition of malice in the **New York Times** case necessary to sustain any verdict for libel; it is in fact more stringent, and the Texas courts, with all required deference to this Court's rule in the **New York Times** case, could find insufficient proof of malice to warrant punitive damages but sufficient proof of malice to warrant general damages; and it is the duty of this Court so to interpret the record.

The **New York Times** rule should not be extended to exclude private persons from redress for libel to the same extent as public officers. To so extend the rule will be substantially to discourage, rather than encourage, public participation in government, for the difficulties and expense of redress will become such that litigation, except for the very wealthy, will be almost impossible. The **New York Times** rule was designed to encourage free comment about public officials; the extension of the rule now sought by Petitioner will be to enfilade the private person who would utilize the freedom that the original Times doctrine extended.

ARGUMENT.

Point I.

The Judgment Against the Associated Press Satisfies All Constitutional Requirements.

A. *The findings of the trial jury and the rulings of the Texas courts are in accord with New York Times v. Sullivan, even if it is extended to public figures.*

The jury found in its answers to Special Issues 1, 2, 3, 5, 6, 7 and 9 that the statements by the Associated Press that Walker "led a charge of students against Federal marshals" and "assumed command of the crowd" were not "substantially true", were not "fair comment", and were not "made in good faith." The jury's verdict of $500,000 for general damages was approved by the Texas trial and appellate courts **after** consideration of the decision of this Court in **New York Times v. Sullivan,** 376 U. S. 254.

Petitioner argues that since the trial judge held there was insufficient proof of "actual malice" to sustain the verdict of $300,000 for exemplary damages that the judgment for general damages is also defective. Petitioner makes the error of equating the malice required by the **New York Times** case with the malice necessary to justify exemplary or punitive damages under Texas law. They are not the same.

In **New York Times** this Court defined "actual malice" as a statement "with knowledge that it was false or with reckless disregard of whether it was false or not." See 376 U. S. 254 at 279-280.

Texas law imposes a more severe definition of malice where punitive damages are sought. The Texas require-

ment for punitive damages of a "conscious indifference to the welfare of the person to be affected" obviously goes far beyond the simple "reckless disregard of whether it was true or false" of **New York Times.** The trial court instructed the jury in this case:

> ". . . by the term 'malice' is meant ill will, bad or evil motive, or that entire want of care which would raise the belief that the act or omission complained of was the result of a **conscious indifference to the right or welfare of the person to be affected by it"** (Emphasis added) (R. 61).

The jury so found but the trial court and the Texas Court of Civil Appeals held that Walker "failed to prove **malice as defined** and that the trial court was correct in setting aside said findings." (Emphasis added.) See **Associated Press v. Walker,** 393 S. W. 2d 671 at 682-683, where this part of the opinion is under the heading "Exemplary Damages".

The Texas courts did not question the sufficiency of the evidence to support the verdict for general damages. Therefore, this Court should not be misled into thinking there was no proof of "known falsity" or "reckless disregard of whether it was false or not" required by **New York Times.**

Known Falsity. The proof of "known falsity" includes:

The AP libelous story began with:

> "(Editor's Note . . . Here is the story of Van Savell, 21, Associated Press newsman, who was on the scene and saw what happened.)
>
> ". . .
>
> "Throughout this time he was less than six feet from Walker."

The jury found that Van Savell's statements, "Walker assumed command of the crowd" and "led a charge of students against Federal marshals" were: 1) False, 2) Not fair comment (defined as a "statement which represents the honest opinion of the writer", and 3) Not "made in good faith".

Clearly a report of what was seen less than six feet from the eye-witness when found by the jury to be false could not be other than knowingly false.

Reckless Disregard. The proof of "reckless disregard of whether it was false or not" includes:

1. Disregarding the United Press dispatch that "General Edwin A. Walker mounted a Confederate statue on the campus and begged the students to cease their violence" (R. 831, 1174).

2. Disregarding the fact that none of the hundreds of pictures taken and other wire service reports filed that night showed or referred to Walker as charging, running, throwing, assuming command of the crowd, or doing anything other than observing.

3. Sending out to the 8460 Associated Press subscribing newspapers, radio and television stations throughout the world the criminal charge that a retired Major General committed insurrection against his country, based solely on the contradictory reports filed by a newly-hired 21-year-old cub reporter.

4. Failing to check the Van Savell story with any of the other parties on the university campus such as the Federal marshals, the state highway patrol, with Leberon, Scott, Perkins, and Hall, the other AP correspondents on the scene, with Boudier, the AP photographer on the scene, or with Edwin Walker himself, to see if the criminal charges were accurate. (No Federal marshal or state highway patrolman or

AP reporter or photographer on the campus that night testified for the AP.)

5. Disregarding the clear conflict, in Van Savell's two reports, the first by telephone to the New Orleans AP office saying that Walker led the charge after giving a speech on the Monument (R. 125-128, 132), the second in Van Savell's AP article saying that Walker led the charge before climbing the Monument and addressing the crowd (R. 11-14, 776-784).

It is sufficient that the trial court and the Texas appellate courts approved the findings supporting general damages, including that the Van Savell AP story that Walker "led a charge" and "assumed command of the crowd" were false, not fair comment and not published in good faith. **United Press International v. Mohs,** 381 S. W. 2d 104 (Texas Court of Civil Appeals, July 24, 1964), holds that "fabrication" of a "libelous story" will support verdicts for both general and exemplary damages.

B. *Under the Seventh Amendment this Court cannot substitute its opinion of the evidence for that of the jury.*

This Court has often said that the "Seventh Amendment is applicable to state cases coming here".*

> "Even if we were of opinion in view of the evidence, that the jury erred in finding that no property right, of substantial value in money, had been taken from the railroad company, by reason of the opening of a street across its right of way, we cannot on that ground, reexamine the final judgment of the state court. We are permitted only to inquire whether the trial court prescribed any rule of law for the guid-

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* See **New York Times v. Sullivan,** 376 U. S. 254, 285, footnote 26.

> ance of the jury that was in absolute disregard of the company's right to just compensation." **Chicago, B. & Q. R. Co., v. Chicago,** 166 U. S. 226, 246, 41 L. Ed. 979, 988 (1897), cited with approval in **New York Times v. Sullivan,** 376 U. S. at 285.

This Court has recognized that it should not redetermine facts found by the jury and that "it is the Seventh Amendment that fashions 'the Federal policy favoring jury decisions of disputed fact questions.'" **Atlantic & Gulf Stevedores v. Ellerman Lines,** 369 U. S. 355, 360, 7 L. Ed. 2d 798, 804 (1962). "Only where there is a complete absence of probative facts to support the conclusion reached does a reversible error appear." **Lavender v. Kurn,** 327 U. S. 645, 653, 90 L. Ed. 916, 923 (1946).

Petitioner argues that the statements by the trial court that "there is no actual malice in this case" should compel this Court to vacate the general verdict "with respect to special issues Nos. 1, 2, 3, 5, 6, 7, and 9." This argument ignores the Seventh Amendment.

> "Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. For a search for one possible view of the case which will make the jury's finding inconsistent results in a collision with the Seventh Amendment. **Arnold v. Panhandle & S. F. R. Co.,** 353 U. S. 360, 1 L. Ed. 2d 889, 77 S. Ct. 840. **Cf. Dick v. New York Life Ins. Co.,** 359 U. S. 437, 446, 3 L. Ed. 2d 935, 942, 79 S. Ct. 921." **Atlantic & Gulf Stevedores v. Ellerman Lines,** 369 U. S. 355 at 364, 7. L. Ed. 798 at 807 (1962).
>
> "But it is the duty of the courts to attempt to harmonize the answers, if it is possible under a fair reading of them: 'Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way.' **Atlantic**

> **& Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.**, 369 U. S. 355, 364, 7 L. Ed. 2d 798, 807, 82 S. Ct. 1134." **Gallick v. Baltimore & Ohio R. Co.**, 372 U. S. 100, 119, 9 L. Ed. 2d 618, 627 (1963).

The jury verdict for general damages is entirely consistent with the Federal rule in **New York Times** when the evidence of "known falsity" and "reckless disregard" is considered. The Seventh Amendment forbids taking a "**possible** view of the case" which would make the jury finding inconsistent with **New York Times.**

There is an important distinction between the standard of care required of a newspaper when it is serving as an important outlet for those who do not have publishing facilities and the care required of one who both originates and disseminates false criminal charges. Thus in **New York Times**, the Court was concerned with what "might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press." **New York Times Co. v. Sullivan**, 376 U. S. at 266. Where the newspaper is merely serving as an outlet for an editorial advertisement or letters column, there is implied a less strict standard of liability. **Cf. Farmers Educ. and Co-op. Union v. WDAY, Inc.**, 360 U. S. 525, 3 L. ed. 1407 (1959). See Pedrick, **Freedom of the Press and the Law of Libel: The Modern Revised Translation**, 49 Cornell L. Q. 581, 597-600 (1964). "The first amendment is concerned with protecting the free flow of information—not slipshod reportorial work." *Id.* at 600. In this **Walker** case, the AP is both originator and disseminator.

In **Pape v. Time, Inc.**, 354 F. 2d 558, 561 (1965), cert. denied, 384 U. S. 909, the court held:

> "We hold that a sufficient showing has been made so that a jury could find Time, Incorporated acted with reckless disregard as to whether or not the reworded statements, hereinbefore described, were true or false."

In **Hogan v. New York Times**, 313 F. 2d 354, 355-356 (1963), the court held that sufficient evidence existed to sustain the jury's verdict on "reckless disregard for the truth or falsity of the story, amounting to bad faith." There the **Times** relied "on a single telephone call to a reporter other than the author of the story." The court further held that "it is within the providence of the jury to determine if the precaution taken . . . was adequate." In the **Walker** case, the AP was far more reckless and did not rely on **any** telephone calls to other reporters or even to one of its five other employees who were on the university campus covering the riots. Any one of the five foregoing acts of "reckless disregard" would clearly justify the jury's verdict for general damages under the **New York Times** rule.

Point II.

Where AP's Purported Eye-Witness Report Is Found by the Jury to Be a Fabricated Falsehood, Not Made in Good Faith and Not the Honest Opinion of the Writer, Then the Report Is Knowingly False.

Either Walker came upon the University campus, conferred with riot leaders, assumed command of a 1,000-man mob and led them in a charge against U. S. Marshals around the Lyceum building as charged in Savell's report, or he came and acted only as an observer, as described by Walker's witnesses and by his own testimony.

Either Walker committed the acts as charged, or he did not. The jury found that he did not, and that Re-

spondent's report to the contrary was not made in good faith and not fair comment (R. 59-61).

The trial court's instructions to the jury were generous to AP. The court instructed that in order for a statement to be "substantially true" it is not necessary that it "be completely accurate" (R. 59).

The court instructed that by fair comment "is meant a statement which represents the honest opinion of the writer and constitutes reasonable inferences to be drawn from the attendant facts and circumstances" (R. 59). Since the jury found that the AP statements about Walker were not "fair comment" (R. 59-61), the jury really found that in addition to being false that the statements were not the "honest opinion" of Van Savell. The jury also found that the statements were not "made in good faith" (R. 60-61). Such specific issue jury findings are equivalent to, if not stronger than, a finding that the Savell statements were "knowingly false."

Where, as here, the AP report, prepared by one who said "Throughout this time I was less than six feet from Walker" (R. 121), was found to be false, not "made in good faith" (R. 60-61), and not the honest opinion of the writer (R. 59-61), it can not be other than "knowingly false."

Point III.

The Definition of "Actual Malice" Under Texas Law Respecting Punitive Damages Is More Stringent Than the Definition of "Actual Malice" Under the Sullivan Decision of This Court, and a Ruling That There Was Insufficient Proof of "Actual Malice" Under Texas Law to Warrant Punitive Damages Cannot Be Taken as Compelling the Conclusion That There Was Insufficient Evidence Under the Sullivan Decision to Warrant Any Recovery at All.

The jury returned a verdict in favor of Respondent and against Petitioner for $500,000 in general damages and $300,000 in punitive damages (R. 62, 63). The trial court found that the evidence did not meet the Texas requirements of actual malice to sustain punitive damages (R. 60, 61), and set aside the punitive award, permitting the $500,000 verdict to stand (R. 78). The Texas Court of Civil Appeals sustained the trial court (393 S. W. 2d 671), and further review by the Texas Supreme Court was refused (R. 1553).

This, however, furnishes no basis for the application to this case of the doctrine of **New York Times v. Sullivan.** Petitioner itself concedes that the Texas definition of "actual malice" necessary to sustain punitive damages differs from the **New York Times v. Sullivan** definition of "actual malice" necessary to sustain any recovery at all (Brief, p. 27). Petitioner takes the position that the Texas definition is "more favorable" to Walker, the Respondent here, but a comparison of the two shows that the reverse is true:

> **New York Times v. Sullivan** (376 U. S. 279, 280)— " 'actual malice,'—that is, with knowledge that it [is] false or reckless disregard of whether it [is]

false or not." (This Court itself affirmed this definition in **Garrison v. Louisiana,** 379 U. S. 64, 74, 1964, and in **Rosenblatt v. Baer**, 383 U. S. 75, 84, 1966.)

Texas (charge to jury in the case at bar; R. 60, 61)—"by the term 'malice' is meant ill will, bad or evil motive, or that entire want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the right or welfare of the person to be affected by it."

Hence it is quite possible, and consistent with logic, that the Texas courts determined that Walker showed that the statement libelling him was made "with knowledge that it was false or reckless disregard of whether it was false or not" (the Sullivan decision on general damages) but failed to show that the statement was made as the result of ill will, or from bad or evil motive, or as a result of that entire want of care which would raise the belief that the statement was the result of a conscious indifference to the right or welfare of Walker, the person to be affected by it. The legal result would be, and is, a judgment impervious to attack under the **New York Times v. Sullivan.**

Point IV.

Under Texas Law Petitioner Has Waived Its Contentions That It Still Has a Defense of Fair Comment.

Petitioner did not request or submit a special issue to the jury incorporating Petitioner's theory of the "fair comment" defense now urged by Petitioner. Petitioner did not even specifically object to the two fair comment issues submitted by the trial court (No. 2, No. 6; R. 59-61). Under Texas Rules of Civil Procedure 274 and 279, Petitioner has waived its new contention that the jury was improperly instructed on fair comment. Under Rule

279 Petitioner has also waived its alleged defense of no proof of the "reckless disregard" required by **New York Times** because this is a "defense not conclusively established under the evidence and upon which no issue is [was] given or requested." Rule 279 says that under such circumstances, the defense "shall be deemed as waived." See: **Grant v. Marshall**, 280 S. W. 2d 559, 563, 154 T. 531 (Texas Supreme Ct. 1955); **McCarver v. Corpus Christie**, 284 S. W. 2d 142, 143, 155 T. 153 (Texas Supreme Ct. 1956).

Under Rule 279 the omitted issues which Petitioner failed to submit "shall be deemed as found by the Court in such manner as to support the judgment."

Point V.

The New York Times Privilege Does Not Extend to Defamatory Statements About Persons Outside of Government.

A civil libel is a defamation which exposes the victim to public hatred, contempt, ridicule, or financial injury. **Vernon's Texas Civil Statutes**, Article 5430. The jury found that the AP statements were false and the Texas courts found that they were defamatory per se. That these statements injured Walker and exposed him to hatred, contempt, and ridicule is beyond doubt.*

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* A criminal complaint charging insurrection, assault of U. S. Marshals, etc., was filed against Walker in the United States District Court for the Northern District of Mississippi on Oct. 1, 1962, admittedly based upon "information obtained from Van H. Savell," the reporter who wrote the story which formed the basis of the libel suit at bar. On the strength of it, Walker was arrested, given no opportunity for bail, hearing or consultation with counsel, and without court order flown as a prisoner to a distant prison, and there stripped of his clothes, thrust into a criminal lunatic's cell and fed through a hole in

In **New York Times v. Sullivan,** 376 U. S. 254, the Court repeatedly expressed the issue before it as one involving the constitutional protection, under the First Amendment, of attacks by the press on "public officials" in the performance of their "official" duties. See *Id.* at 256, 268, 279. The holding was likewise expressed. "We hold today that the Constitution delimits a State's power to award damages for libel in **actions brought by public officials against critics of their official conduct.**" (Emphasis added.) *Id.* at 283.

In **Rosenblatt v. Baer,** 383 U. S. 75, 15 L. ed. 2d 597, Mr. Justice Stewart, in his concurring opinion, said:

> "That Rule **[New York Times]** should not be applied except where a State's law of defamation has

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the door. Six days later he was released. **United States of America v. Edwin Walker,** United States District Court, Northern District of Mississippi, Western Division, Commissioner's Docket No. 1, Case No. 61, Complaint and Affidavit of H. M. Ray, United States Attorney; Commitment of Omar D. Craig, Oct. 1, 1962. Further exemplification of the damage that can be done by dishonest reporting of the news may be found in the distorted reporting by the Associated Press of the speech of Sen. Robert M. LaFollette, Sr., at St. Paul on September 21, 1917. The stenographic transcript showed that LaFollette actually said: "Now . . . we are in the midst of a war. For my own part I was not in favor of beginning the war. I don't mean to say we hadn't suffered grievances; we had—at the hands of Germany. . . ." The Associated Press reported that he had asserted: "We had no grievance against Germany." The falsity was wired by the AP to all its member newspapers. They printed it, and on the basis of it, LaFollette was called a traitor, and a motion was made to expel him from the Senate. But the AP refused to correct its story for eight months, even though confronted with proof of the wrong. See "The Wisconsin Story" (1958 Ed.), published by the **Milwaukee Journal,** p. 276. In 1966 the AP reported a murder after misunderstanding the words of an oral report and failing to verify its conclusion. The supposed victim had not been killed. See "The Death Blunder," **Time,** June 17, 1966, p. 62. The story concerned Meredith, whose efforts to enroll in "Ole Miss" resulted in the tumult mentioned in the instant record, in a later demonstration in Mississippi.

been unconstitutionally converted into a law of seditious libel. The First and Fourteenth Amendments have not stripped **private citizens** of all means of redress for injuries inflicted upon them by careless liars." (Emphasis added.) *Id.* at 93.

An intimation that the **New York Times** rule is not to extend to defamatory falsehood against private persons engaged in public controversies is seen in **Linn v. United Plant Guard Workers Local,** 383 U. S. 53, 15 L. ed. 2d 582 (1966), decided on the same day as **Rosenblatt. Linn** concerned libelous statements about an official of a corporation, made during a union organizing campaign. The issue was whether the National Labor Relations Act preempted recovery under state libel law. That labor organizing campaigns are of public interest is manifest. The Court applied the **New York Times** malice rule, but "by analogy, rather than under constitutional compulsion," *Id.* at 65, as would be required were the **New York Times** rule extended to persons who thrust themselves into the vortex of controversy.

Other intimations that the **New York Times** rule does not extend to defamatory falsehoods about public figures are found in the cases involving public figures who recovered large judgments for libel, after which petitions for certiorari to reverse these judgments were denied by this Court. **Cf. Faulk v. Aware, Inc.,** 19 App. Div. 2d 464, 244 N. Y. S. 2d 259 (1963), **aff'd mem.** 14 N. Y. 2d 899, 202 N. E. 2d 352, 252 N. Y. S. 2d 95 (1964), **cert. denied** 380 U. S. 916 (1965) (the issue whether the successful plaintiff, a prominent radio and television personality and union official, was a "public figure" under **New York Times,** was extensively discussed in the briefs on petition for certiorari). Thus the rule in **New York Times** does not extend "to public figures outside the sphere of government." Note, 18 Vanderbilt Law Rev. 1429, 1444 (1965).

On page 38 of its brief, Petitioner cites cases involving Linus Pauling and Edwin Walker which said obiter dicta that the doctrine of **New York Times** should be extended to non-officials who participate in issues of public importance. It is submitted that the more logical reasoning is found in the cases which have declined to extend the **New York Times** doctrine to prominent non-officials, such as **Clark v. Drew Pearson,** 248 F. Supp. 188 (D. D. C. 1965); **Fignole v. Curtis Publishing Co.,** 247 F. Supp. 595, S. D. N. Y. 1965); **Harper v. National Review, Inc.,** 33 U. S. L. Week 2341 (N. Y. Sup. Ct., December 22, 1964), aff'd 263 N. Y. S. 2d 292; **Warren Spahn v. Julian Messner, Inc.,** 250 N. Y. S. 2d 529, aff'd 260 N. Y. S. 2d 451 (1965); **Jack Dempsey v. Time, Inc.,** 43 Misc. 2d 754, 252 N. Y. S. 2d 186, aff'd mem. 254 N. Y. S. 2d 80 (1964); **Orlando Cepeda v. Cowles Magazines,** 328 F. 2d 869 (C. A. 9, 1964).

In **Clark v. Drew Pearson,** 248 F. Supp. 188, Judge Holtzoff wrote a scholarly analysis of the law of libel as of the date of his opinion on December 20, 1965. His pertinent language is as follows:

> "The arguments . . . included a plea for drastic changes in the law of libel, in a manner that would radically devitalize and impair the protection that it affords against defamatory publications. In view of this circumstance, it seems appropriate to make a few observations on the basic status of the law of libel in Anglo-American jurisprudence.
>
> "The common law sedulously guarantees to every individual various civil rights, such as the right of personal freedom, the right of personal safety, and the right of property. Another civil right safeguarded by the common law is the right to one's reputation. Although it is more intangible and more imponderable than the others, it is equally fundamental and

vital, and its protection is equally efficacious and vigorous . . .

"The current trend in the law is to enhance and augment the protection of individual civil rights. No reason appears for making an exception as to the right to reputation . . . most civil actions relate only to money, while actions for libel or slander involve honor and reputation, which are to be considered on a higher level. (248 F. Supp. at 190-191.)

* * * * * * *

"Counsel for the defendants in this case urge the Court, however, to apply the principle of the Sullivan case to all public figures or public persons, including those in private life, and to abrogate the limitation to public officials. In effect, they seek to transform two specific exceptions carved out by a process of erosion into an extensive demolition and destruction of the law by an act of avulsion. This Court perceives no reason in principle or in justice for radically undermining the law of libel, in this manner, nor dies it find any precedents for doing so. The law of libel, as has been shown, is a vital and important aspect of the law of torts. It is one of the branches of law that safeguard individual civil rights. It should not be whittled away." (248 F. Supp. at 195).

We have quoted at length from Judge Holtzoff's opinion because it answers most of Petitioner's arguments. In addition it and the opinion of Judge McLean in the **Fignole v. Curtis Publishing Co.** case give the logic of why the just privilege conferred by **New York Times** should not be extended.

"The basic philosophy underlying the . . . [New York Times] case is that the privilege of every citizen, no matter how well informed he may or may

not be, to criticize his government freely, should be safeguarded . . . Such a right is regarded as indispensable in a popular form of government . . . **Manifestly this theory has no logical application to criticisms or attacks on private individuals.** The fact that some persons are better known than some others should not lead to any far-reaching distinction in their civil rights [to be secure in their reputations]. Consequently, there is no reasonable connection between a right to criticize one's Government and the right to disparage one's neighbors." (Emphasis added.) **Clark v. Pearson**, 248 F. Supp. 188, 195 (D. D. C. 1965).

"I am less willing than was the court in **Walker v. Courier-Journal**, supra, to take this additional step. On the contrary, New York Times, to my mind, indicates that it should not be taken. The rationale of that decision appears to be that since a public official enjoys a privilege, either absolute or qualified, against liability for libelous statements which he makes in the course of his official duties, so a critic of a public official's conduct should possess an equal privilege.

> 'It would give public servants an unjustified preference over the public they serve, if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves.' (376 U. S. at 282-283, 84 S. Ct. at 727.)

"If this is the basis of the New York Times rule, then there is no reason to grant immunity to critics of mere candidates for office or of public figures in general, for the candidates and the miscellaneous public figures possess no corresponding immunity for their own defamatory utterances. On the facts of the present case, therefore, and on the present state of

the law, I hold that defendant is not entitled to a dismissal of the libel count." **Fignole v. Curtis Publishing Company,** 247 F. Supp. 595 at 597 (S. D. N. Y. 1965).

Point VI.

The Trial Court Granted Petitioner Every Possible Benefit of Its Defense of "Fair Comment".

The trial court extended every consideration to Petitioner's defense of fair comment except to force the jury to believe it. The instructions given by the trial court on fair comment were so favorable to Associated Press that it did not specifically object to the fair comment issues submitted by the trial court, namely special issues Nos. 2 and 6 (R. 64-55, 59, 61), and waived its right to submit instructions embodying the definition of fair comment that it now wants this court to adopt (R. 54-57). Having gambled that the jury would find in accordance with the generally-favorable-to-defendant fair comment instructions given by the trial court, the Petitioner cannot now be heard to complain of alleged error. See Rules 274 and 279 of Vernon's Texas Rules of Civil Procedure. A party who fails to request or submit a definition of fair comment cannot allege error in the definition as submitted by the trial court.

It is submitted that the following fair comment instruction given by the court was if anything more than fair to the Associated Press:

> "In answering the issues in these instructions in which the term 'fair comment' is used, you are instructed that the interest of the public requires that all acts and matters of a public nature, and of public concern published for general information may be freely published and discussed with reasonable com-

> ments thereon. You are further instructed that by said term is meant a statement which represents the honest opinion of the writer and constitutes reasonable inferences to be drawn from the attendant facts and circumstances whether literally true or not, or whether all reasonable persons would agree with the opinions or conclusions based thereon'' (R. 59).

When a jury answers special issues to the effect that the AP statements that Walker ''led a charge of students against Federal marshals'' and ''assumed command of the crowd'' were not the honest opinion of the writer and did not constitute a reasonable inference to be drawn from the attendant facts and circumstances, what Constitutional right of Free Speech of the Associated Press could conceivably be violated? Just as there is no Constitutional right of Free Speech to yell ''Fire'' in a crowded theatre, so there is no Constitutional right of Free Speech to falsely say that you saw a person committing a crime. Otherwise fair comment would become a loophole which would destroy the incentive for accurate, responsible reporting, especially when cherished reputations are involved.

Point VII.

The Amount of the Verdict Does Not Violate Petitioner's Freedom of the Press.

Petitioner's ''shock'' at the amount of the verdict in this case would suffer by comparison with the shock suffered by Respondent, who had gone in good faith to Mississippi to protest by his presence, as the former Military Commander of Federal troops in Little Rock, what he considered to be a misuse of military power. He was sincerely convinced (and the Cuban missile crisis three

weeks later confirmed this) that Soviet power in Cuba was a greater threat to the security of the United States than Governor Ross Barnett. He found himself falsely accused around the world of crimes that he knew he had not committed; and in rapid sequence, found himself 1) arrested, 2) transported to another state without a Court Order, 3) committed to Federal Prison hospital for criminal insane, 4) all without notice, counsel, hearing, or opportunity to post bail, 5) upon an affidavit of a Government psychiatrist who had never seen him and who based his diagnosis on what he had read in the newspapers.*

Petitioner is a news merchant who sold for profit to its 4160 newspaper, radio and television subscribers in the United States and to its 4300 similar subscribers in 87 foreign countries a sensational story that a former Major General of the United States Army had assumed command of a mob and led a charge against the representatives of the Government he had sworn to defend. This attention-arresting story was distributed for profit by the AP to millions of readers of newspapers and even more millions of radio listeners and television viewers.

Petitioner was so anxious to merchandise its very salable but scandalous product** that AP put it on the market

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* Associated Press Exhibit 18 (R. 1487); also testimony of Dr. Charles E. Smith in **U. S. v. Edwin Walker,** Case No. 61 in U. S. D. C., Northern District of Mississippi, Western Division, dismissed Jan. 21, 1963 (R. 1425).

** On April 10, 1963, Lee Harvey Oswald "attempted to kill Major General Edwin A. Walker (Resigned U. S. Army) using a rifle he had ordered by mail one month previously under an assumed name". (Report of the Warren Commission, New York Times paperback edition, pp. 33, 39, 42, 113, 121, 170-175). Since Oswald had never met Walker, and had no known quarrel with him of any kind, it is a fair inference that the widespread

without any testing, checking or research. Had Walker been found criminally insane by the Federal Court instead of "functioning currently at the superior level of intelligence"** or had Walker been convicted of insurrection, etc., the gamble would have paid off and Petitioner would have felt that the profits it made justified the terrific risk it took. Unfortunately, the gamble failed. Like any other manufacturer of a defective product Petitioner must now face the consequences of its recklessness. In fairness, there should be some relation between the size and distribution of the "story" and the amount of damages where the story is false, not made in good faith, and does not represent the honest opinion of the writer.

Suppose, for example, that the Reverend Martin Luther King had been falsely charged by the Associated Press with a series of vicious crimes which resulted in his being arrested at the order of the U. S. Attorney General and thrown into a Federal prison for the criminally insane and Government psychiatrists had filed affidavits in Federal Court that Reverend King was insane. Under such circumstances, would anyone seriously contend, as the Associated Press now does, that the punishment is "so burdensome and oppressive that the Court should not, consistent with the First Amendment, permit its imposition"?

In libel, the financial standing of the wrongdoer is a factor to consider in assessing damages. On page 46 of its Brief, the Associated Press concedes that the expenses it

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defamatory reports about Walker, published by the AP, were a contributory factor to Oswald's attempt, a bare six months later, to murder Walker.

** As reported November 21, 1962 by Dr. Robert L. Stubblefield, the psychiatrist who was appointed by the Federal Court at Oxford, Mississippi to examine Walker (R. 1685).

has incurred in opposing relief for Edwin Walker "has already greatly exceeded the judgment in this case." Obviously because of the vast resources which Petitioner has hurled against Walker, his own expenses, while not of equal magnitude, are extremely heavy. The judgment of the Court below will not compensate Walker for very much more than his expenses, let alone for defaming him throughout his native state of Texas. For a fraction of the costs Petitioner claims to have expended resisting justice in this case, it could have paid the salary of a "back-up newsman" to check and double-check, before printing, the truth of defamatory reports of the type submitted by Van Savell. Compensation must be commensurate with the financial responsibility of the defendant and the enormity of the wrong it caused. Equal Justice Under Law requires that conservatives like Walker recover for wrongs to their reputation to the same extent that liberals are permitted to do so. Cf. **Quentin Reynolds v. Westbrook Pegler,** 223 F. 2d 429, cert. denied 350 U. S. 846, 100 L. Ed. 754 (1955); **John Henry Faulk v. Aware, Inc.,** 14 N. Y. 2d 954, 202 N. E. 2d 372, cert. denied 380 U. S. 916, 13 L. Ed. 2d 801 (1965).

CONCLUSION.

Petitioner seeks to extend the First Amendment so as to reverse a judgment for a news report accusing Respondent of insurrection and assaulting Federal marshals, etc., which report the jury found was false, not fair comment, and not published in good faith. Unless this Court, remote from the trial and by a procedure without precedent under the Seventh Amendment, should re-weigh the evidence and reverse the jury's verdict, Petitioner's defamatory report must be considered as knowingly false or made with reckless disregard of whether it was false or not.

The creation of a rule of law to fit this case, that would insulate the press from responsibility for such defamation, will produce a "two-edged sword", so far as freedom of both speech and press under the First Amendment are concerned.

Such a new rule of law would discourage, not encourage, free speech for the vast majority of citizens who do not own a newspaper, magazine, radio or television station. These citizens will be most reluctant to discuss public issues and controversies because they could then be subjected to vicious and defamatory lies on the excuse that they had voluntarily injected themselves into the vortex of a question of public concern. Such a rule would discourage housewives from speaking out at PTA meetings and handicap our Government in obtaining the advice of distinguished private citizens of the stature of Bernard Baruch, Herbert Hoover, Admiral Hyman Rickover, etc.

The genius of American Constitutional Government is our system of checks and balances and our denial of special privileges to any class or group. "The press is not above the reach of the law" and "to immunize the press . . . would be no service to freedom of the press."* The Canons of Journalism (adopted 1923) state:

> "By every consideration of good faith a newspaper is constrained to be truthful. It is not to be excused for lack of thoroughness or accuracy within its control, or failure to obtain command of these essential qualities."**

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* Mr. Justice Fortas, dissenting in **Time, Inc. v. Hill**, No. 22, decided January 9, 1967.

** Article IV of the Canons of Journalism of the American Society of Newspaper Editors quoted in 2 United Nations Freedom of Information 213.

The press should not, and most of the press does not, demand a privilege to harm a private citizen through violation of its own canons of good faith, truthfulness and accuracy, and then escape liability. A manufacturer of false news should be as responsible as a manufacturer of any other defective product.

Petitioner had a fair trial under due process of law with all its Constitutional rights protected, and the judgment should not be disturbed.

Respectfully submitted,

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Detail of plat in evidence (Plaintiff's Exhibit No. 11, original record page 1997a).