A. I guess so.

Mr. Gooch: We object to that last question and the answer that nobody paid any attention to it.

The Court: Yes, it is sustained. This juror may not testify as to whether someone did or did not pay any attention to it.

By Mr. Andress:

Q. Let me ask you another question if I may, Mr. Meriweather. When this remark was made about the Georgia Football coach in reply to the remark that you made, was there any further discussion about it?

A. Oh, I don't think there was any long discussion. There may have been a few words said here and there, something on that order.

[fol. 2099] Q. Just a casual remark as you discussed things in the jury?

A. Yes.

Mr. Gooch: We object to the "casual remark".

The Court: Sustained. Just give it in the context in which it occurred.

A. Well, that's about how it happened.

Mr. Andress: That's all.

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Mr. Wm. J. Martin Tarter called as a witness by the defendant, being first duly sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination.

By Mr. Gooch:

Q. Please state your name.

A. William J. Martin Tarter.

Q. Where do you live, Mr. Tarter?
A. Route one, Keller.
Q. And were you one of the jurors in the case of General Edwin A. Walker versus the Associated Press that was tried in this court in June of 1964?
A. Yes, sir.
Q. Have you executed an affidavit in connection with this case, Mr. Tarter?
A. Yes, sir. I know what it says.

Mr. Andress: We have the same objection to the
[fol. 2100] The Court: Same ruling.

By Mr. Gooch:

Q. Would you like to refresh your memory with it?
A. No, sir, I know what it says.
Q. All right. Now do you recall that the jury spent some several hours in deliberations before a verdict was reached?
A. About two hours I believe.
Q. Now prior to the time the jury reached its verdict and brought it into open court—
After you got into the jury room I assume that you elected a foreman. Is that correct?
A. That's right.
Q. Then did a general discussion of the case take place?
A. Yes, sir.
Q. Prior to answering any issues in the case was there some discussion in the jury-room?
A. Yes, sir, the whole case was debated in general.
Q. That's prior to the time you answered any issues?
A. Yes, sir.
Q. Was there anything said by anybody, and name if you can, as to whether or not news media in the past had been guilty of irresponsible and malicious reporting?

Mr. Watts: Objected to as leading.
The Court: Sustained.

By Mr. Gooch:

[fol. 2101] Q. Please state whether or not there was anything said about the news media in general prior to the time you voted on the issues and prior to the time you brought in a verdict.

A. Yes, sir, there was.

Q. What was that?

A. Well it was said I believe—excuse me for saying I believe— It was said that the news media had been malicious in their reporting in the past in some cases.

Q. All right. Was that prior to the time you started voting on the issues?

A. Yes, sir, I believe it was.

Q. Was it said prior to the time that the verdict was actually brought into open court?

A. Would you please rephrase that?

Q. Was that said prior to the time the verdict was actually brought into court—before you were discharged?

A. Yes, sir.

Q. Now, do you know which juror made the statement that you have just attributed to him?

A. No, sir, I don't. I don't recall.

Q. Do you recall that a man by the name of Johnson was foreman?

A. Yes, sir, he was.

Q. Do you recall whether or not he made that statement?

Mr. Watts: We object to that as leading and suggestive, [fol. 2102] putting the words in the witness' mouth.

The Court: Sustained.

By Mr. Gooch:

Q. Do you now recollect as to who might have made the statement that you have mentioned?

A. No, sir, I can't.

Q. Do you know how many of such jurors might have made the statement that you have attributed to the irresponsibility and malicious reporting.

Mr. Andress: We object to how many might have; we want to know how many did.

The Court: I sustain the objection in that form.

By Mr. Gooch:

Q. Do you know how many?

A. Sir, everyone has an opinion on that subject.

The Court: That isn't what he asked you. He asked you how many expressed that opinion in the jury-room.

A. No, sir, I couldn't give you an exact number. There were several of us.

Q. Were you one of them?

A. Yes, sir, I was.

Mr. Gooch: That's all. Thank you.

Cross examination.

By Mr. Andress:

Q. Mr. Trotter, was there any continued discussion of [fol. 2103] anything of that sort with respect to the Associated Press itself?

A. No, sir, there wasn't.

Q. In other words it was a general conversation rather than one directed to the Associated Press?

A. That's right.

Q. Now when you came to pass upon the issues here so far as you were aware was anything considered other than the evidence that had been heard from the witness stand?

Mr. Gooch: If the Court please, we object to that.

The Court: You may not answer that question. That's going into his mental processes.

Mr. Andress: I think we can find some law in connection with that, Judge.

Q. I believe, Mr. Trotter, I am correct. This is the first time you had served on a jury isn't it?

A. That's right.

Q. At any time when any of this conversation about the news media generally was under discussion did anyone say that, well you weren't interested in news media generally but in the Associated Press and you ought not to consider what the news media generally might or might not do?

A. I don't recall, sir.

Q. Do you have any idea how many people may have heard this remark that was made about news media being malicious in the past?

[fol. 2104] A. Everyone I imagine.

Q. Now in connection with the issues and the answering of the issues was there any sharp split in the jury or were they pretty well together the first time you took a ballot on the issues?

Mr. Gooch: We object to that as mental processes.

The Court: Re-read the question, Mr. Nuss, please.

(Whereupon the question was read)

The Court: Sustained in that form.

By Mr. Andress:

Q. All right. Now, Mr. Trotter, do you remember what the vote was the first time that you took a vote on the first special issue about whether or not—as to whether or not General Walker led a charge?

A. Yes, sir, I do. It was ten for Walker and Meriweather voted against and there was one person who didn't vote.

Q. All right. Now on special issue No. two as to whether that statement that Walker led a charge constituted fair comment was the vote about the same?

A. Now as I recall the question it was ten and one didn't vote, one of them.

Q. Would you say the first time the votes were taken that

they generally ran ten in favor of the way you finally answered the issues on the first ballot on each one of them?

Mr. Gooch: We object to that if the Court please as [fol. 2105] improper.

The Court: Overruled.

A. On about the third statement there you know on the paper it changed to eleven to one, and on the fifth I believe now that it changed to eleven and Meriweather quit voting.

By Mr. Andress:

Q. And it went that way all the way through?

A. Throughout the first reading of it.

Q. Now you didn't hear any comment about you ought to give a million dollars because the Associated Press had plenty of money, did you?

A. The statement was brought up I believe that the Associated Press had a lot of money but at that time I don't believe that the million dollars had been brought up in that statement.

Q. Was that after you had already voted on the $500,000.00 total one time like Mr. Meriweather remembered it?

A. I believe it had, sir.

Q. Did you hear any statement about the Georgia Football coach?

A. Sir, I am real sure that the Butts case was never discussed. Let me say something, I brought up now that in Germany there was a German news media, I believe now, I am not sure which one, or now that it was German, but they reported in the Spring I believe that Khrushchev had been killed, you know, if you recall that, but the Butts case I don't ever recall being discussed.

[fol. 2106] Q. Things like that were matters of pretty common knowledge in a discussion?

A. Yes, sir, it is.

Mr. Gooch: If the Court please, we object to that as improper examination.

The Court: Sustained.
Mr. Andress: That's all.
Mr. Gooch: That's all, thank you.

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Mr. R. A. Hobson, called as a witness by the defendant, being first duly sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination.

By Mr. Gooch:

Q. Please state your name.
A. R. A. Hobson.
Q. Where do you live, Mr. Hobson?
A. 1401 Boyce.
Q. Were you one of the jurors in the case of General Walker versus the Associated Press that was tried in this court-room in June of 1964?
A. I was.
Q. You have been in the court-room while Mr. Meriweather and Mr. Tarter have testified, have you not?
[fol. 2107] A. Yes, sir.
Q. Did you hear any statements made in the jury-room, and if so please state when, if you heard them, regarding the news media in general?
A. I don't recall just what was said at that time.
Q. Was there something said about the news media?
A. Well in the general discussion there was something said but I don't recall just what.
Q. Was there anything said about the news media had been guilty of false and malicious—

Mr. Watts: We object to that, Judge.
Mr. Gooch: Let me finish the question.
Mr. Watts: The damage is done. Regardless of starting out to lead the witness we object to even finishing the inquiry.
The Court: I think so, counsel.

By Mr. Gooch:

Q. Can you recall anything that was said about the news media in general?

A. Nothing more than that sometimes they had been at fault.

The Court: Sometimes what?

A. Had been at fault in printing falsified news.

By Mr. Gooch:

Q. Was there anything said concerning the amount of money that was to be awarded, concerning the ability of the [fol. 2108] Associated Press to pay?

A. Well, of course, when we started talking about the amount that we need give him, of course that had to be discussed. We couldn't all agree on the same amount the first go round.

Q. Was there any discussion as to whether or not the Associated Press had a lot of money?

Mr. Watts: We object to it as leading and suggestive and putting words in the witness's mouth.

The Court: Sustained.

By Mr. Gooch:

Q. Do you recall anything further about, that might have been said about the Associated Press' financial statement, or financial affairs?

A. Oh, nothing more than that the Associated Press probably had a lot of money.

Q. Now I will ask you whether or not there was any discussion as to what a large verdict against the Associated Press might do toward the news media in general.

Mr. Andress: We object to that, Your Honor, as being leading and suggestive.

The Court: Overruled.

Mr. Andress: It certainly goes into mental processes, a discussion of what the effect of it would be.

The Court: Read it to me again, Mr. Nuss.

(Whereupon the question was read)

[fol. 2109] The Court: Overruled.

A. I don't recall that any such statement was made.

By Mr. Gooch:

Q. Do you recall having discussed this matter with Mr. Settle and Mr. Blair shortly after the jury was discharged?

A. Oh, we exchanged a few words. I don't remember what was said.

Q. I will ask you if you made this statement at that time:

Mr. Andress: Just a minute. We object to his attempting any kind of statement in impeachment of what he is now testifying without laying the proper predicate.

The Court: Overruled.

By Mr. Gooch:

Q. "That a high award as damages in this case would act as a deterrent to false reporting by the entire Press in the future". Do you remember making that statement?

A. I don't recall.

Q. Would you say you did or didn't?

A. I still don't recall whether I did or not.

Q. Was anything like that said in the jury-room prior to the time the verdict was reached?

A. If it was I don't remember.

Mr. Andress: Now if the Court please, we are going to object to this line of questioning because this is in strict accordance with the charge of the Court defining what is [fol. 2110] meant by punitive damages to act as a deterrent, and we think that any such discussion, if it took place, is a perfectly proper discussion under the Court's charge.

The Court: It may be, counsel, but I have to hear it before I can determine that.

Mr. Gooch: I believe that an answer to that would be chronological.

The Court: I am going to let you go on into it.

By Mr. Gooch:

Q. Now the statements that you have recalled and testified here to as having recalled, were those statements made prior to the time the jury reached its verdict and brought it into open court?

A. Well, of course, it would have to have been before we reached a verdict.

Q. Was it also before any of the issues had been answered?

A. No, it was just during the process of reaching a verdict.

Mr. Gooch: That's all.

Cross examination.

By Mr. Andress:

Q. Mr. Hobson, this business about the Associated Press probably had a lot of money, was there any extended discussion on that?

A. No.

Q. Was that after you had already taken a vote on the [fol. 2111] amount and eleven people had voted on the amount of $500,000.00? Like Mr. Meriweather remembered it?

Mr. Gooch: Now, we object to comparing one witness' testimony with another.

The Court: Sustained. Just ask him what he recalls.

Mr. Andress: What we asked him is whether he heard the testimony of these other witnesses.

The Court: I heard it, and I sustain his objection.

A. Now what was the question?

By Mr. Andress:

Q. Was there any such discussion here about the A. P. having a lot of money after you had already taken one vote on the amount of money to be awarded?

A. Well I think it was, yes.

Mr. Andress: That's all.

Mr. Gooch: That's all. Thank you.

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Mrs. I. A. Smith, called as a witness by the defendant, being first duly sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination.

By Mr. Gooch:

Q. Mrs. Smith, please state your name?

A. Mrs. I. A. Smith.

Q. And your address please.

[fol. 2112] A. 3537 Ruth Road.

Q. Were you one of the jurors in the case of General Walker versus the Associated Press tried in this court-room in June of 1964?

A. Yes.

Q. Do you recall taking part in the deliberations leading to the verdict?

A. I recall doing it, yes.

Q. Did you hear any reference to the news media in general by word of mouth from any other jurors prior to the time you answered the questions and prior to the time you brought the verdict into the court-room?

Mr. Watts: Your Honor, we object to that as leading. He can ask her what she heard and when she heard it.

Mr. Andress: I don't think he can fix the time.

The Court: No, I don't think so, Mr. Gooch. You have asked three questions in one.

Mr. Gooch: The Court has sustained the objection so I will start over, Mrs. Smith.

Q. Do you recall a discussion at any time during the deliberations of the jury concerning news media in general?

A. Yes, I believe there was some discussion.

Q. Will you please tell us what it was?

A. That the news media had been in error in reporting news.

Q. Do you remember when with reference to answering [fol. 2113] the questions that statement was made?

A. No, I don't.

Q. Was it before the verdict was brought in to the Court? Was it during the jury's deliberations is what I am trying to ask.

A. Yes, I believe it was.

Q. Do you remember at what part of the deliberations that statement was made?

A. No, Mr. Gooch, I don't.

Q. Do you remember whether it was before or after you had answered any of the issues?

A. No, I don't recall.

Mr. Gooch: That's all.

Cross examination.

By Mr. Andress:

Q. Mrs. Smith was there any discussion about the Associated Press in particular or was it just news media in general?

A. There was discussion of A. P. and news media.

Q. That included the radio, television, newspapers, magazines and just everything. Is that right?

A. Yes, I believe so.

Q. Was there any extended discussion at that time?
A. No.
Q. Do you remember who made any remarks about it?
A. No, I'm sorry I don't.
[fol. 2114] Q. Would you say it was one person or more than one?
A. I would say it was more than one.
Q. Would you say it was just a remark and a reply and then it passed off?
A. Yes, more like small talk.

Mr. Andress: That's all.
Mr. Gooch: No further questions.

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MRS. T. E. TOMLINSON called as a witness by the defendant, being first duly sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination.

By Mr. Gooch:

Q. Please state your name and address, Mrs. Tomlinson?
A. My name is Mrs. T. E. Tomlinson.
Q. And your address please, ma'am?
A. 4001 Pershing.
Q. Were you one of the jurors in the case of General Walker versus the Associated Press that was tried in this court-room in June of 1964?
A. Yes, I was.
Q. Mrs. Tomlinson, did you hear any discussion in the jury-room at any time prior to the jury returned its verdict concerning news media in general?
A. Yes.
[fol. 2115] Q. Could you tell the Court what that discussion was?
A. Well it was just a general discussion of different medias.

Q. What was said, please, ma'am?
A. I don't recall just what was said.
Q. Was there anything said, any discussion about news media making false reports?

Mr. Watts: We object to it as leading and suggestive.
The Court: Sustained.

By Mr. Gooch:

Q. Do you recall anything that might have been said about the news media in general?
A. No, sir.
Q. Mrs. Tomlinson, I am not trying to trip you but do you recall talking to Mr. Blair and Mr. Settle shortly after the jury returned its verdict in this case?
A. Yes, I do.
Q. Do you remember stating to them in substance—

Mr. Andress: If the Court please, we are going to object to asking this lady what she said at some prior date to somebody not under oath. The question is what took place that she testifies to under oath, and we object to this form of interrogation.
The Court: Overruled.
[fol. 2116] Mr. Andress: May it go to the entire line?
The Court: No, just to this question.

By Mr. Gooch:

Q. Did you make this statement: "That because of the false and erroneous reporting of the news media in general in the past that the Associated Press had two strikes against it to begin with"?
A. I don't recall saying that.
Q. Would you say you did or didn't?
A. I didn't say that.
Q. But there was some discussion in the jury room of news media in general. Is that correct?
A. Yes.

Mr. Watts: We object to that as repetition.
The Court: I will let her go ahead and answer that.

By Mr. Gooch:

Q. Can you give the substance of it in any particular?
A. Of what, Mr. Gooch?
Q. Of what was said about the news media.
A. In the jury-room?
Q. Yes, ma'am.
A. Well it was discussed that A. P. and other forms of news media was at fault at times.

Mr. Gooch: That's all. Thank you.

Cross examination.

[fol. 2117] By Mr. Andress:

Q. Mrs. Tomlinson, was that discussion after you had voted on these first issues? In other words after the jury had already voted about all the issues except money?
A. Mr. Andress, I don't recall whether it was before. I presume it was before though.
Q. That's all you recall about the conversation?
A. Yes.
Q. And was it any extended discussion or just passing remarks?
A. Just passing remarks.

Mr. Andress: That's all.
Mr. Gooch: That's all. That's all we have, Your Honor, on that feature.
The Court: All right. Does the plaintiff have anything so far as jurors are concerned?
Mr. Andress: No, sir.

Mr. Gooch: We are not waiving any of the questions. The Court's attention is called specifically that most of the other objections or grounds for motion for new trial are based on the written record and the objections and exceptions to the Court's charge as the Court probably has noted. We have urged a complaint here to a portion of the evidence, and I believe the Court will recall that none of the witnesses were allowed to testify concerning the word [fol. 2118] "charge". General Walker, when he was on the stand, over our objection, was allowed by the Court to testify that he did not lead a charge and answered that question specifically.

The Court: Mr. Gooch, let me ask you this question: Don't you think that General Walker had, as part of his case, to deny that the story was true?

Mr. Gooch: No, I don't think so for the purpose of this argument, because you had not allowed any other witness to use the word "charge", and you did comment to the jury, Your Honor, "Mr. Gooch, I will allow this witness to answer that question with the word charge in it", which I believe was a comment in that you allowed this witness to use the word charge in connection with his testimony.

The Court: Did I use the word charge in my statement to you or did I just say, "I will permit this witness to answer that question"?

Mr. Gooch: I can't be specific now whether it was or not but I had an objection to him answering the question, the specific question, as to whether or not he led a charge. You said, "Mr. Gooch, I will allow this witness to answer that question". Whether or not you used the word charge in overruling my objection I can't be positive. I would have to look at the record, but you did say, "Mr. Gooch, I will [fol. 2119] allow this witness to answer that question", and complaint is made. No disrespect to the court.

The Court: I understand.

Mr. Gooch: But people raise these objections and lots of times the Court in the heat of the battle has made mistakes. Not this Court, but some courts have. But I don't want to take that as a waiver of the assignment of error.

Then the next thing we present is the unconscionable amount of this verdict. General Walker testified that his popularity had not waned, that he was still getting just as many calls to make speeches as he ever had. It's true that one witness testified that after having said on two or three occasions that the news report of General Walker including his insanity hearing and so on and so forth had damaged his character finally confined it and said that General Walker's reputation had been damaged in a particular area in Texas.

The Court: You say you are raising the question about excessiveness of the verdict?

Mr. Gooch: Yes, sir.

The Court: What part in your motion?

Mr. Gooch: It's in there about seven or eight times.

The Court: You don't ask for a remittitur do you?

[fol. 2120] Mr. Gooch: I believe under the rules, if the Court please, we are not required to ask for a remittitur. We raise the question of excessiveness because that's in the hands of the Court.

Mr. Andress: Only in connection with jury misconduct, Judge; I don't see anywhere else.

The Court: Let me hear from Mr. Gooch first, and then I will hear from you, Mr. Andress. I didn't find it when I read it over.

Mr. Gooch: "Damages found by the jury in answer to special issue No. nine, to-wit, the sum of $500,000.00 is so grossly excessive as to be manifestly wrong and unjust, and to show that the jury disregarded the evidence and was influenced by passion, prejudice and other improper motives," which is in the language of rule 328, paragraph J, under 10, and it's in there another three or four times. Maybe be considered that each and every point as raised in our amended motion for new trial has been presented?

The Court: Yes, sir.

Mr. Gooch: That's all.

The Court: I will tell you first, Mr. Andress, I am not going to rule today. I want to give you time, both of you, to prepare briefs so far as this jury misconduct is concerned.

[fol. 2121] Mr. Andress: Judge, there is a long motion there which has been presented in gross. There is no earthly use in taking up your time unless there is some particular thing.

The Court: The only thing I want the brief on is jury misconduct.

Mr. Andress: We also want to direct to your attention that we have here a motion to reform the judgment to give us back our exemplary damages.

The Court: Which is now overruled.

Mr. Andress: You will note our exception and in any order exception and notice of appeal.

The Court: I have already passed on that once.

Mr. Andress: Yes, sure you have, but I am not giving up on it.

The Court: Yes, I understand.

Mr. Andress: Your Honor, there is nothing in particular to reply to then so far as counsel are concerned and so far as this motion for new trial is concerned. Of course the permission of General Walker to testify to a charge the Court's point I think was well taken that it was necessary for the defendant who is charged with it to so speak. Furthermore he was the only person on the witness stand who, as a qualified expert from his long military career could testify to whether he did or did not lead a charge. He was [fol. 2122] an expert and the others weren't.

We will submit a brief.

The Court: All right, now, I would like to have it if it's possible by September 28th. Will that give you enough time?

Mr. Andress: That's ample time.

The Court: That's a non-jury week and I will have more time.

Mr. Andress: How do you want that handled? Do you want a brief from him and a reply brief from us, or just what do you want?

The Court: Do you want to submit anything, Mr. Gooch?

Mr. Gooch: We will submit you a brief.

The Court: All right. You submit one and send it to Mr. Andress as soon as you can, and you can reply to that, but I would like to have them both by the 28th if possible.

Mr. Andress: All right.

Mr. Gooch: All right, sir.

The Court: Now how much time has expired and how much more time do I have? Have you checked that Mr. Blair?

Mr. Blair: This motion was filed, Your Honor, on August 31st which means that we have 45 days from that [fol. 2123] date as I understand it.

The Court: Well you have 15 days after it is presented don't you?

Mr. Blair: Yes, sir.

The Court: Well it's presented today.

Mr. Andress: So far as I am concerned if the Court wants additional time I am perfectly willing to extend it.

Mr. Gooch: You can't extend it.

Mr. Andress: We can do this, we can argue this thing and present it on the 30th of September officially and then give you 15 days.

The Court: I can make a decision within 15 days if I can get your briefs by the 28th, both of them.

Mr. Watts: If Your Honor please, since this is the last appearance in person we will have in the court I would like to have about 30 seconds.

The Court: Yes, sir.

Mr. Watts: If your Honor please, after living thru this lawsuit I sincerely feel that deep in the conscious of the Court there rests a firm and abiding conviction that

this defendant had a fair trial, that the parties have had their day in court and that justice has been done, and it would be a tragedy for the Court after the type of a jury verdict that has come in here to upset the composite wis-[fol. 2124] dom and judgment of twelve American citizens.

The Court: Do you desire to reply to that, Mr. Gooch?

Mr. Gooch: All I can say is I don't think the Associated Press has had a fair day in court coupled with what has transpired here, the time in which it was tried, the obvious discussion of the jury of the news media as a whole, the outlandish award of the amount of damages, the finding of exemplary damages when there was no evidence whatsoever is in such a state as to cause me to believe very firmly and maybe just as firmly, if not more firmly than Mr. Watts, that the Associated Press has not had a fair trial, but has been subjected to undue influences, to the sins and alleged errors of the news media elsewhere, to statements that have drifted in as to what has happened in other cases, the overall picture is to me one that the Associated Press has not had the benefit of a fair and impartial trial at the hands of its peers.

The Court: All right, gentlemen.

Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 2126] AGREEMENT OF COUNSEL

It is hereby agreed by and between counsel representing the plaintiff and the defendant in the above numbered and entitled cause that the above and foregoing 2125 pages contain a full, true, and correct transcript of all proceedings had and evidence adduced upon the trial of the above numbered and entitled cause taken at the time and place set forth in the captions hereof, together with a full, true, and correct transcript of the proceedings had and evidence adduced upon the hearing of the defendant's motion for new trial; and

We further agree that this record containing eleven volumes may be filed in this case as the Statement of Facts.
This the 30th day of November A. D. 1964.

Looney Watts Looney Nichols & Johnson, C. J. Watts; Andress, Woodgate, Richards & Condos, Wm. Andress, Jr., Attorneys for Plaintiff.
Cantey, Hanger, Gooch, Cravens & Scarborough, Sloan B. Blair, Attorneys for Defendant.

Approved, Chas. J. Murray, Judge presiding.

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[fol. 2127]

IN THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS

No. 16624

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THE ASSOCIATED PRESS, Appellant,

vs.

EDWIN A. WALKER, Appellee.

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From the District Court of Tarrant County

PER CURIAM OPINION—July 30, 1965

This is a libel suit. The parties will be designated as they were in the court below or The Associated Press as the A. P. and Walker by name.

The following are the reports of which Walker complained:

"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, a key figure in the week-end battling over admission of a Negro to the University of Mississippi, was eating dinner Sunday night when he says he 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.)

"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 [fol. 2128] 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.

" 'He was nattily dressed in a black suit, tie and shoes and wore a light tan hat.

" '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 [fol. 2129] 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 statue 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 halfway 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."

" 'He continued: "This is a dangerous situation. You must be prepared for possible death. If you are not, go home now."

" '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.

" 'One Ole Miss student queried the former General,

"What can we use to make the tear gas bombs ineffective? Do you know of any way that we can attack and do some damage to those damn Marshals?"

" 'Walker suggested the use of sand to snuff out the tear gas.

" ' "This stuff works real well, but where can you get it?", he asked.

" 'At this time the rioters were using a University fire [fol. 2130] truck and fire extinguishers in an attempt to make the tear gas bombs ineffective.

" 'I left Walker and walked about 100 yards away where Molotov cocktails—gasoline, in bottles with a fuse—were being made.

" 'Again I left the area for a telephone. As I walked toward a Dormitory with George Bartsch of the Little Rock Associated Press Bureau, we were attacked by Marshals who mistook us for students. We were deluged by tear gas, manhandled, handcuffed and beaten with clubs during a 200 yard walk back to the Lyceum Building.

" 'Thanks to recognition from Chief Marshal James P. McShane, we were quickly released and given freedom in the Marshals' Headquarters.

" 'Within minutes rifle and shotgun fire erupted from the rioting crowd and two men—one a French newsman—were killed. We considered ourselves lucky to have been arrested and glad to be behind closed, heavily guarded doors.' "

The only two statements of the above quoted reports which were complained of by Walker as being libelous and which form the basis of special issues submitted by the Court were: (1) "Walker, who Sunday led a charge of students against federal marshals on the Ole Miss Campus" (October 2, 1962 report), and (2) "Walker assumed command of the crowd" (October 3, 1962 report). For the sake of brevity these two statements will hereinafter be referred to as the "charge" and "command" statements respectively.

In answer to special issues one through four, the jury found that the "charge" statement was not "substantially true", did not constitute fair comment, was not made in good faith and was actuated by malice. It found to the same effect in response to similar issues five through eight concerning the "command" statement.

In answer to issue No. 9 the jury found damages in the sum of $500,000.00 and having found that A. P. was actuated by malice in answer to special issues Nos. four and eight the jury, in response to special issues Nos. ten and eleven [fol. 2131] found that exemplary damages should be awarded and in the amount of $300,000.00.

Based upon the verdict of the jury, judgment was entered for Walker and against the A. P. in the sum of $500,000. The judgment recited that there is no evidence to support the jury's findings of malice and $300,000 for exemplary damages.

Appellant contends that the court erred in rendering judgment for appellee rather than it because (1) as a matter of law the evidence conclusively established that the "charge" and "command" statements were substantially true; (2) each statement was a fair comment about a matter of public concern published for general information and thus privileged under the provisions of Art. 5432, V. A. C. S.; (3) such statements made without malice are protected by the First and Fourteenth Amendments to the Constitution of the United States; (4) over objection appellee was permitted to testify that he did not assume command; (5) it held as a matter of law that the "charge" and "command" statements were libelous rather than submitting issues as to each; (6) the evidence conclusively established as a matter of law that the "charge" and "command" statements were made in good faith with reference to matters it had a duty to report to its members and thence to the public; (7) the amount of damages found was so grossly excessive as to be patently wrong and unjust and the findings in response to the damage issue No. 9 and to special issues one, two, three, five, six and seven

are so against the weight and preponderance of the evidence as to be manifestly wrong and unjust and thus insufficient to support such answers; and (8) the evidence conclusively established as a matter of law that the jury was guilty of material misconduct which probably resulted in injury to the defendant.

We affirm.

[fol. 2132] Evidence

In discussing the points relating to the quantity and quality of the evidence we have examined the complaints of the appellant in the light of the Article by Chief Justice Robert W. Calvert entitled, " 'No Evidence' and 'Insufficient Evidence' Points of Error", 38 Tex. Law Rev. 361 and authorities therein cited.

The evidence considered in its most favorable light in support of the findings of the jury and the judgment of the court is in essence as follows: At approximately 4:00 P. M. of the day in question, a ring of Federal marshals had encircled the Lyceum Building. Walker arrived on the campus about 8:45 P. M. At that time a loud, violent riot was in progress in an area of the campus known as the Circle. A crowd assembled in the Circle area, began taunting and jeering the marshals. By 8:00 P. M. a full scale riot had erupted which was to continue all night, destroy 16 automobiles, kill two people, injure 50. The rioters would form into groups and charge toward the marshals, throwing bricks, bottles, rocks, sticks and other missiles. The rioters attempted to charge the marshals with a fire truck and then with a bulldozer. "Molotov cocktails" were hurled at the marshals. Finally rifle fire erupted. The next morning the campus looked like a battlefield. Soon after his arrival, Walker, after some urging to say a few words, spoke from the steps of the Confederate Monument. While there is some dispute as to what he said, there is testimony that he told the assembled groups that while they had a right to protest that violence was not the answer. He was

"booed" or "jeered" at this time and again when urging a cessation of violence. He and others walked in the direction of the Lyceum Building where the marshals were stationed but he never came closer to the marshals than the monument or the length of a football field. He was there to watch what happened. He wanted a peaceful demonstration as a protest. His presence there was not illegal or [fol. 2133] 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 to report. He was one of the crowd. He 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."

Throughout the trial Walker maintained the firm position that because of his opposition to the use of Federal troops within a State, and his personal knowledge of the deviation between the occurrences at Little Rock where he was indeed in command and the newspaper stories of those occurrences, that he was at Oxford to see for himself at first hand what was actually going on. He maintained that he did not assume command of the crowd, did not lead a charge, and did not participate in the rioting. He was present for the sole purpose of observing. The jury saw him, observed his demeanor, heard what he said, and believed him.

" 'No evidence' points must, and may only, be sustained when the record discloses one of the following situations: (a) a complete absence of evidence of a vital fact; (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (c) the evidence offered to prove a vital fact is no more than a mere scintilla; (d) the evidence establishes conclu- [fol. 2134] sively the opposite of the vital fact." 38 Tex. Law Review, pp. 361, 362, supra.

Subdivisions (a) and (b) above have no application to the record or the facts in this case. As to (c) we have viewed the evidence in its most favorable light in support of the findings of the jury upon which the judgment of the Court is based, considering only the evidence and the inferences which support the findings and rejecting the evidence and the inferences which are contrary to the findings. In the application of this test we have determined that all of the findings of the jury, upon which the Court based its judgment, are supported by ample evidence. Having reached this conclusion it follows that we find no merit in the appellant's contention that the evidence establishes conclusively the opposite of what the jury found. We find that none of the situations discussed by Judge Calvert under (a), (b), (c) or (d) is disclosed by the record. Further we have concluded from our study and examination of the entire record that the findings of the jury upon which the Court based its judgment is not so contrary to the great weight and preponderance of the evidence as to be clearly wrong or unjust.

Jurors are the exclusive judges of the controverted issues of fact raised by the evidence, of the weight to be given the evidence, and the inferences to be drawn therefrom. They are the exclusive judges of the credibility of the witnesses. "The law does not attempt to tell jurors what amount or kind of evidence ought to produce a belief in their minds. They may believe a witness although he has been contradicted. They may believe the testimony of one witness and reject the testimony of other witnesses.

They may accept part of the testimony of one witness and disregard the remainder." McCormick & Ray, Texas Law of Evidence, § 3; Austin Fire Ins. Co. v. Adams-Childers Co., 246 S. W. 365 (Tex. Com. App. 1923).

"The mere fact that a verdict is against the preponderance of the evidence will not authorize a reviewing court [fol. 2135] to set it aside, if there is some evidence to support it, or evidence that would support a verdict either way. The court of civil appeals will set aside the verdict and findings of a jury only in cases where they are so against such a preponderance of the evidence as to be manifestly unjust or clearly wrong, or where they show clearly that the finding or verdict was the result of passion, prejudice, or improper motive, or in such obvious conflict with the justice of the case as to render it unconscionable." 4 Tex. Jur. 2d, p. 395, § 838, and authorities cited therein.

"Where evidence is conflicting, a reviewing court will not disturb the jury's verdict or findings if there is evidence of probative value to support them, unless the evidence is so overwhelmingly against the verdict or findings as to shock the conscience or show clearly that the conclusion reached was wrong or was the result of passion, prejudice or improper motive.

"The findings on conflicting evidence are usually regarded as 'conclusive,' 'binding,' or 'decisive,' and will be 'adopted' or 'accepted' as the findings of the appellate court, unless some good reason is presented that would justify the court in taking some other view.

"A jury finding on facts will not be set aside because it does not appear to be clearly right; it must appear to be clearly wrong before the appellate court will disturb it.

"The fact that the appellate court would not have found as the jury did is not the test to be applied on appeal. The true test is that made by the jury, on firsthand evidence, adduced before them from living witnesses whose credibility and the weight to be given their testimony were determinable by the jury. Where the jury's findings are in accord with the testimony of different disinterested wit-

nesses, the fact that there is other testimony to the contrary does not authorize the appellate court to overturn the verdict. . . . " 4 Tex. Jur. 2d 390, § 837, and authorities cited therein.

[fol. 2136] In the application of the rules of law and the authorities above referred to, we overrule all points of error relating to the quantity or quality of the evidence supporting the findings of the jury upon which the Court based its judgment.

We find no error on the part of the Court in permitting Walker to testify that he did not assume command of the crowd.

He testified that he became a professional soldier upon completing four years at West Point in 1931 when he was commissioned as a Second Lieutenant. He had combat experience in the Mediterranean, European and Asiatic Theatres during World War II and in Korea. He finally attained the rank of Major General. During the course of the trial Walker testified on several occasions without objection that during the Little Rock matter he took command of the troops, was assigned as commander or that the troops were under his command. In connection with the occasion in question at Ole Miss he was asked if he, "participated in any way in any activity of the crowd that was throwing things at the Marshals?" He answered without objection that he had not participated in any way. He was then asked if he assumed "any command over this crowd." Objection was made on the ground that the answer would be a conclusion on the part of the witness. The Court permitted Walker to answer and he stated, "I certainly did not," and in response to another question he answered without objection that he certainly knew what it meant to assume command. The news item in question had identified Walker as the former Major General who commanded the 101st Airborne Division at Little Rock followed by the statement, "Walker assumed command of the crowd."

The Article in question stated as a fact that Walker had "assumed command of the crowd." We think that Walker, subject of this remark, had the right to deny or affirm the truth of it. We think that the opinion in Goode v. Ramey, 48 S. W. 2d 719 (El Paso Civ. App., 1932, re-[fol. 2137] fused), is applicable. Therein it was stated, "We are not prepared to say under the record, as presented here, that it was error to admit the statement of the witness. The issue sought to be proved was not a mixed question of law and fact, but purely a fact question. We think the issue was one upon which a witness in possession of all the facts may properly state his opinion or conclusion to which such facts would fairly lead, notwithstanding the witness' answer may embrace the very issue to be submitted to the jury. The conclusion of the witness is then testified to like any other fact to be considered by the jury for what they may believe it to be worth. Scalf v. Collin County, 80 Tex. 514, 16 S. W. 314; Adkins-Polk Co. v. John Barkley & Co. (Tex. Civ. App.) 297 S. W. 757; International & G. N. R. Co. v. Mills, 34 Tex. Civ. App. 127, 78 S. W. 11."

If we are mistaken in holding that the testimony of Walker was admissible we nevertheless overrule the point of error because we are of the opinion that the error, if any, in admitting the testimony, was harmless within the meaning of Rules 434 and 503, T. R. C. P.; Dallas Railway & Terminal Co. v. Bailey, 250 S. W. 2d 379, 151 Tex. 359 (Sup. Ct., 1952).

## Fair Comment

The appellant contends that the "charge" and "command" statements constituted fair comment and thus were privileged under the provisions of Art. 5432, V. A. C. S. We find and hold that both the "charge" and the "command" statements were statements of fact and not of comment. *"Walker, who Sunday night led a charge of students against federal marshals . . . . "* and *"Walker assumed*

*command of the crowd . . . .*", (emphasis added) are positive statements of fact. Truth of the statements would constitute a complete defense. Appellant failed in its effort to establish this defense to the satisfaction of the jury which found that neither of the statements were substantially true.

[fol. 2138] In an article on "Fair Comment" by John E. Hallen, 8 Tex. Law Review 41 (1929-30), the author in discussing Art. 5432, V. A. C. S., states: "The 1927 Libel Law provides:

" 'The publications of the following matters by any newspaper or periodical shall be deemed privileged and shall not be made the basis of any action for libel . . .

" '4. A reasonable and fair comment or criticism of the official acts of public officials and of other matters of public concern published for general information.'

"Paragraph 4 was in no way changed by the 1927 amendments and has appeared exactly in that form since 1901.

" . . . the right of fair comment was not created by the statute. It is well recognized by the common law. Every one has the right to comment on matters of public interest and general concern and within limits is not liable for stating his real opinion on such subjects, however severe the criticism may be. It is immaterial whether or not the criticism is sound, or whether the court or jury would agree with it, so long as it represents the honest opinion of the speaker upon a matter of recognized public interest.

"The statute expressly declares that fair comment by newspapers and periodicals is privileged. But since this right was enjoyed by everyone at common law, the statute gives the newspaper no added privileges. Nor is it to be construed as taking away the common law defense of individuals. . . . (p. 41)

"It should be remembered that there is a distinction between comment or criticism, which is the opinion of the speaker or writer upon certain facts, and the facts upon which that opinion is based. A misstatement of fact cannot

ordinarily be justified by a plea of fair comment. . . . (p. 43) [fol. 2139] "It has already been said that fair comment is a criticism, discussion, or expression of opinion upon existing facts and does not protect against a misstatement of the facts themselves. The question of what should be called fact and what comment is difficult. . . ." (p. 53)

"Texas has swung from its early holding in the Copeland Case (Express Printing Co. v. Copeland, 64 Tex. 354 (1885) that an untrue charge of crime, honestly and reasonably made, about a public officer, is privileged, to its present position that such a charge cannot be justified by a newspaper. In following its present doctrine Texas is supported by the weight of authority, and there are strong reasons for its holding." (p. 99)

An article under the heading of "Libel and Slander—Fair Comment—Statements of Opinion" by Tom J. Mays appears in 16 Tex. Law Review 87 (1937-38). He commences with, "A judicial warning to the press with respect to comment and criticism upon matters of public interest is discernible in the recent decision of Houston Printing Co. v. Hunter." 105 S. W. 2d 312 (Fort Worth Civ. App., 1937), affirmed 106 S. W. 2d 1043 (Tex. Sup., 1937). The article continues, "That fair comment and criticism upon such matters is qualifiedly privileged is quite generally recognized both at common law and in Texas by statute. On the other hand, where false allegations of fact are made regarding matters of public concern, the courts are not in accord. Perhaps a majority of the courts hold that false allegations of fact are not entitled to immunity even though made in good faith and without malice. . . . Texas is clearly in line with the majority, holding that falsification of the facts is never privileged.

"Although the distinction between statements of fact and statements of opinion or comment has been freely recognized, it is generally conceded that distinguishing the two becomes a difficult problem in many cases." (p. 88)

[fol. 2140] "Most of the cases, it seems, wherein the words are held actionable as statements of fact, have found imputation of malfeasance, misconduct, or corruption in office, or imputations of evil or corrupt motives in the administration of duties. These being treated as statements of fact, then certainly a false imputation of crime committed by a public officer or candidate would be actionable as a statement of fact in Texas. (pp. 89-90) . . .

"It is manifest that some method is needed by which to distinguish between statements of fact and comment; and it is equally certain that no absolute test can be laid down. But it is submitted that more desirable and satisfactory results can be reached." (p. 90)

The author suggests the following test by which to distinguish statements of fact from comment, "Where the statement alleged to be libelous can be reasonably construed by the reader as an expression of opinion only, on the basis of facts either already known to the reader or else reasonably assumed by the person writing the statement to be known to the reader, then it should be regarded as fair comment. Where, however, the statement alleged to be libelous, as reasonably construed, conveys to the reader not only an expression of the writer's opinion, but also certain supposed information, and this information conveyed does not accord with the true facts, it is not comment, but should be treated as a statement of fact.

"Under this test, whether a publication will be treated as a statement of fact and libelous, if untrue, will depend upon the surrounding circumstances of each particular case. Under such a guidance, even an imputation of crime might be held to be merely an expression of opinion and not actionable." (p. 91)

In, "The Press and the Law in Texas" by Norris G. Davis, University of Texas Press, Austin, 1956, it is stated [fol. 2141] that, " . . . the right of fair comment is a weak defense in most libel suits. It is subject to so many limitations that it is seldom completely applicable. There are three groups of limitations. First, the comment must be

limited to matters of public concern. Second, the article must be a statement of opinion—or comment—rather than a statement of fact, a very difficult distinction to make. Finally, the comment must be reasonable and fair and made in good faith, and this limitation is also difficult to define." (p. 65)

"Even if the subject matter and the person concerned are clearly matters of public concern, there remains two severe limitations. One of these, the requirement that the story or article must be comment, not a statement of fact, has caused by far the most trouble. The separation of comment from factual statements in most stories and articles is extremely difficult, and Court decisions have shown confusion on the point." (p. 67) "One important rule developed for separation of fact and comment is the theory that imputation of dishonest motives to a public official or imputation of an act constituting a crime under the law is a statement of fact and cannot be considered fair comment." (p. 68) San Antonio Light Pub. Co. v. Lewy, 113 S. W. 574 (CCA of Texas, 1908, Ref.); Forke v. Homann, 39 S. W. 210 (CCA of Texas, 1896, ref.). The author in reference to the article by Mays in 16 Tex. Law Review 87 (1937-38), states: "One writer who has studied the fair-comment cases in Texas and has found the same confusion illustrated here has offered the following definitions of 'opinion statements' and 'fact statements.'" (p. 73) He then quotes the test suggested by Mays and continues: "Certainly the courts should become aware of the need to distinguish statements of fact from opinion on a less arbitrary basis than is now customary. If the Supreme Court would adopt such a definition as the one quoted above, it would do much toward creating such an awareness. Actual differentiation of fact and opinion would still be difficult, but court decisions would be more just. (p. 74) [fol. 2142] "Actually, it is clear that almost any story, editorial, or other type of news article must be a mixture of statements of fact and comment, even though the writer

attempts to confine himself to comment. Any type of comment, in implication at least, must be based on fact; and newsmen know that the most effective comment is that based on startling and important statements of fact. Newsmen should therefore be prepared to prove the truth of any statement of fact and to rely on fair comment as defense only for the conclusions drawn from these true facts. They should strongly urge the courts also to make the distinction between fact and opinion rather than, as they so often do, plead all defenses to all parts of a story alleged to be libelous." (p. 74)

In our opinion the test suggested by Mr. Mays and favorably commented on by Mr. Davis is a good one. We think that its application to the facts in this case support our holding that the statements involved were statements of fact and that the appellant was not prepared to prove the truth of either statement. The information conveyed was not in accord with the true facts. Reference is made to the complete text of the articles above referred to and the authorities cited therein. See also 36 Tex. Jur. 2d, Libel and Slander, §§ 87, 89, 92 and 171 together with cases cited under each.

We find no merit in appellant's contention that the reports, made without malice, are protected from the claim of libel by the First and Fourteenth Amendments to the United States Constitution. These Amendments prohibit Congress from making laws abridging freedom of speech and of the press and the State from making or enforcing laws of similar nature.

"The interest of the public in obtaining information about public affairs and of the defendant in discussing such matters is often brought directly in conflict with the plaintiff's claim to his own good name, and the law must draw a line between them. . . . (8 Tex. Law Rev. 41, p. 98) [fol. 2143] "It is not true that false and derogatory statements about a man's character are today always actionable. If they were, the whole defense of privilege would be swept

away. Nor is it true that everything may be justified under a defense of free speech or press. These rights as embodied in constitutions and statutes, were designed primarily to prevent interference by the government with a man's talking or writing, and not to do away with responsibility for what was said. If 'Freedom of the Press' always furnished a complete defense there could be no such tort as libel. . . . " (8 Tex. Law Rev. 56)

"It is submitted that any decision based entirely upon the right to an inviolate character or freedom of speech is unsound. Either doctrine given full sway would annihilate the other. . . . " (8 Tex. Law Rev. 61)

"Articles 5430, 5431, 5432, and 5433, Vernon's Texas Civil Statutes, 1948, clearly declare the policy of this State regarding the question of libel. The law protects the right of a citizen to defend his reputation and good name from libelous publications, and this right is zealously guarded. Bell Pub. Co. v. Garrett Engineering Co., 141 Tex. 51, 170 S. W. 2d 197; Belo & Co. v. Looney, 112 Tex. 160, 246 S. W. 777; Express Pub. Co. v. Keeran, Tex. Com. App., 284 S. W. 913." Fitzjarrald v. Panhandle Pub. Co., 228 S. W. 2d 503 (Tex. Sup., 1950).

We find no application of the authorities cited by the appellant to the facts of this case.

Libelous Per Se

Did the Court commit error in holding as a matter of law that the "charge" and "command" statements were libelous per se, rather than to submit same to the jury for its determination? We think not. The language contained in the statements is not ambiguous. There can be no doubt as to the meaning of either.

Each of the statements imputed to Walker the crime of [fol. 2144] insurrection against the United States. It is undisputed that the crowd on the Ole Miss Campus was engaged in rioting and by force interfering with the efforts

of U. S. marshals to enforce an executive order of the President of the United States issued under sanction of law and of applicable statutes. Insurrection is punishable by fine or imprisonment or both.

The statements further imputed to Walker responsibility for the death of two men and of the wanton destruction of property, all accomplished by students and others under his leadership and direction. The onslaught of the riotous crowd "led" by Walker who had "assumed command" was such that Van Savell considered he was, "lucky to have been arrested and glad to be behind closed, heavily guarded doors."

It imputed that Walker, who "advised on several tactics," none of which were ever specified, directed or advised on the making and use of the molotov cocktails (gasoline bombs) and other offensive weapons used by the rioters.

"The court should construe the meaning of unambiguous language, pass on its defamatory character, and instruct the jury accordingly. But where the language is ambiguous or of doubtful meaning there is a question for the jury." 36 Tex. Jur. 2d 496, § 166; p. 482, § 156 of the same text and cases cited under each. Fitzjarrald v. Panhandle Pub. Co., supra.

"To charge a person with or impute to him the commission of any crime for which punishment by imprisonment in jail or the penitentiary may be imposed is slanderous or libelous per se." 36 Tex. Jur. 2d 288, § 7; H. O. Merren & Co. v. A. H. Belo Corp., 228 F. Supp. 515.

"Any written or printed language tending to degrade a person in the estimation of honorable people, or imputing to him disgraceful or dishonorable acts, is libelous per se." 36 Tex. Jur. 2d 297, § 13.

"The language claimed to be defamatory must be taken as a whole. Thus, a newspaper article must be considered in its entirety in determining the sense in which its language is used, and whether the article, or a particular

[fol. 2145] statement therein, is libelous." 36 Tex. Jur. 2d 313, § 27.

" 'Libelous per se' means that written or printed words are so obviously hurtful to person aggrieved by them that they require no proof of their injurious character to make them actionable." Rawlins v. McKee, 327 S. W. 2d 633 (Texarkana Civ. App., 1959, ref., n.r.e.).

"Defamatory language may be actionable per se, that is, in itself, or may be actionable per quod, that is, only on allegation and proof of special damages. The distinction is based on a rule of evidence, the difference between them lying in the proof of the resulting injury. Language that necessarily, in fact or by a presumption of evidence, causes injury to a person to whom it refers is actionable per se. In other words, the defamatory words must be of such a nature that the court can presume as a matter of law that they will tend to disgrace and degrade the person or hold him up to public hatred, contempt, or ridicule, or cause him to be shunned and avoided. Where the language is actionable per se damages are conclusively presumed and need not be proved." 36 Tex. Jur. 2d 280, § 2.

"To be libelous a publication must be defamatory in its nature, and must tend to injure or impeach the reputation of the person claimed to have been libeled. The language used, taken in connection with the facts and circumstances alleged by way of innuendo, must be reasonably calculated to produce one or more of the results mentioned in the statutory definition; that is, it must have the effect of injuring or tending to injure the person to whom it refers to the extent of exposing him to public hatred, contempt, ridicule, or financial injury, or to impeach his honesty, integrity, or virtue.

"It is not necessary, however, that the language have all the injurious or pernicious tendencies enumerated in the statute; it is actionable if it has any of them. . . .

[fol. 2146] "A publication that tends to subject the plaintiff to public contempt, or that impeaches his integrity or

reputation, is libelous though it does not charge him with a crime.

"The term 'public hatred,' as found in the statutory definition, signifies public or general dislike or antipathy." 36 Tex. Jur. 2d 285, § 6.

Damages

In connection with special issue No. 9 the jury was instructed that it 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 as a direct and proximate result of the statements inquired about. The jury awarded $500,000.00.

From our investigation and study of the record we are unable to find any legal justification to disturb the award of damages. If any improper influences were present they do not appear from the record. Under the pleadings the appellee sought damages, including exemplary damages, in the sum of $2,000,000.

"Mental suffering on the part of the person defamed is one of the direct results of a libel or slander. Accordingly, injury to the feelings, humiliation, and anguish of mind are proper elements of compensatory damages, provided they are the direct and proximate result of the defamation. This suffering is classed as general damages, that are presumed to have been sustained, and that, in actions for libel, are recoverable under a general averment, without specific proof that they were incurred, and, by virtue of statute, regardless of whether there was any other injury or damage, even though the publication was not libelous per se." 36 Tex. Jur. 2d 402, § 98.

"The plaintiff is entitled to compensation for injury to his character or reputation caused by the defamation. . . . [fol. 2147] It follows that the jury, in fixing the amount of recovery, may consider the loss of, or injury to, character or reputation, even though there is no proof thereof nor

any proof of good character. . . ." 36 Tex. Jur. 2d 400, § 97.

"In other words, a general allegation of damages will admit evidence of those damages naturally and necessarily resulting from the defamation charged. It is unnecessary to itemize the elements of general damages; rather, the amount may be alleged in the aggregate. Thus, the plaintiff need not aver the nature, character or extent of the mental suffering caused, or even that he thereby suffered any agony, but it is sufficient to aver the damages he sustained by reason thereof. . . ." 36 Tex. Jur. 2d 445, § 126.

"Generally speaking, the damages resulting from a libel or slander are purely personal and cannot be measured by any fixed standard or rule. The amount to be awarded rests largely in the discretion of the jury, or the court in a case tried without a jury, and an appellate court will not disturb the verdict or award unless it appears from the record to be excessive or the result of passion, prejudice, or other improper influence. . . .

"In fixing the amount the jury may take into consideration the motives of the defendant, and the mode and extent of publication. . . ." 36 Tex. Jur. 2d 405, § 102.

## Exemplary Damages

By counter-points the appellee contends the court erred in setting aside the findings of the jury in response to special issues Nos. 4, 8, 10 and 11, which related to malice and exemplary damages.

Issues Nos. 4 and 8 inquired if appellant was actuated by malice, and malice was defined, "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 [fol. 2148] conscious indifference to the right or welfare of the person to be affected by it."

The appellee had the burden of proving that the appellant's act or acts were such as to fall within the above

definition before he was entitled to a finding of malice and exemplary damages.

The statement of facts consists of eleven volumes and 2126 pages. The entire record has received our close and sustained attention.

In view of all the surrounding circumstances, the rapid and confused occurrence of events on the occasion in question, and in the light of all the evidence, we hold that appellee failed to prove malice as defined, and the trial court was correct in setting aside said findings.

We think there is yet another reason to support the Court's action in disregarding the jury's answers to the issue relating to malice and exemplary damages, namely, the lack of necessary pleadings and proof required under the holdings in Western Union Tel. Co. v. Brown, 58 Tex. 170 (Tex. Sup., 1882); Wortham-Carter Pub. Co. v. Littlepage, 223 S. W. 1043, p. 1046 (Fort Worth Civ. App., 1920, no writ hist.), and Fort Worth Elevators Co. v. Russell, 70 S. W. 2d 397 (Tex. Sup., 1934).

The record leaves some doubt as to whether A. P. is an incorporated or an unincorporated association. It does appear, however, that its composition, the manner in which it functions, and its organizational set-up is more akin to a corporation than not and that the holdings in the above cited cases would be applicable.

We think the record in this case will support our view. Certainly, A. P. is not an individual. Having no mind and being an entity only by a fiction of law, it must be held incapable of entertaining actual or express malice unless the requirements of the holding in Fort Worth Elevators Co. v. Russell, Western Union Tel. Co. v. Brown and Wortham-Carter Publishing Co. v. Littlepage, supra, are complied with. A. P. is referred to as a corporation in the appellee's brief.

[fol. 2149]

Jury Misconduct

We find no error in the action of the Court in overruling the appellant's amended motion for new trial because of alleged misconduct of the jury.

During a general discussion of the case a juror remarked that the A. P. (or news media generally) was always hurting someone by the printing of false or malicious reports or words to this effect. There was considerable discrepancy in the testimony of the five jurors called to testify on the motion for new trial as to whether the reference was to the A. P. or to news media generally. It was a casual statement. "Nobody made any comment at all" about it. It is undisputed that it was quickly dropped. Who made the statement, which jurors or how many probably heard it or specifically at what stage in the proceedings the statement was made was not shown. It was dropped and not again mentioned. The jury discussed and answered the issues in order. They were 11 to 1 on the issues preceding those relating to malice and exemplary damages. While discussing these issues a remark was made that the full amount should be awarded because the A. P. had plenty of money and it was mentioned "about the Georgia football coach (Wally Butts) collecting." The jurors were in dispute as to whether the statement concerning Butts was ever made. It is without dispute that the statements, if any, were made after the jury had already found damages in the sum of $500,000 and were considering the issues on malice and exemplary damages.

The juror who was the last to agree on the $500,000 was the juror who stopped the discussion as to how much money the Press had. He pointed out that it did not make any difference and was out of order. The matter was promptly dropped. The only answers which could have been influenced or affected by such statements, if any, were those to the issues on malice and exemplary damages and these find-
[fol. 2150] ings of the jury were disregarded by the Court on other grounds in the rendition of judgment.

In order to justify a new trial under Rule 327, T. R. C. P., the movant has the burden of establishing to the satisfaction of the Court that it reasonably appears from the evidence both on the hearing of the motion and the trial of the case and from the record as a whole that injury probably resulted by reason of the alleged jury misconduct. The appellant failed to meet its burden under this rule.

The trial court in its findings of fact and conclusions of law found that none of the statements singly or collectively induced any juror to change an answer or vote differently than he would otherwise have done. That there was no showing of probable injury to the appellant because of such statements.

"When a trial court hears the testimony of jurors on an issue of misconduct, alleged to have occurred during the jury's deliberation upon its verdict, he is accorded the same latitude in passing upon the credibility of the witnesses and of the weight to be given to their testimony as the jury had upon the trial of the original cause. If there be any inconsistencies or contradictions in the testimony of a witness upon the hearing of a motion for new trial, it rests within the sound discretion of the trial court to harmonize and reconcile such conflicts so far as possible. A juror's testimony upon such hearing may be so contradictory and inconsistent that the trial court in exercising its privilege to pass upon the credibility of the witness may be justified in disregarding his entire testimony. Carl Construction Co. v. Bain, 235 Ky. 833, 32 S. W. (2d) 414." Monkey Grip Rubber Co. v. Walton, 122 Tex. 185, 53 S. W. 2d 770 (1932).

In our opinion the alleged improper statements, when viewed in the light of the evidence on the motion for new [fol. 2151] trial and on the trial of the case and on the record as a whole, did not probably result in injury to defendant. Rules 327 and 434, T. R. C. P.

Having considered each of the appellant's points of error and the cross-points raised by the appellee and having concluded that each should be they are each and all accord-

ingly overruled, and the judgment of the trial court is affirmed.

Per Curiam

[fol. 2152] Clerk's Certificate to foregoing paper (omitted in printing).

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[fol. 2153]

IN THE COURT OF CIVIL APPEALS FOR THE

SECOND SUPREME JUDICIAL DISTRICT OF TEXAS

From the District Court of Tarrant County

(No. 31,741-C)

16624

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THE ASSOCIATED PRESS

vs.

EDWIN A. WALKER

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JUDGMENT—July 30, 1965

This cause came on to be heard on the transcript of the record and the same having been reviewed, it is the opinion of the Court that there was no error in the judgment. It is therefore ordered, adjudged and decreed that the judgment of the trial court in this cause be and it is hereby affirmed.

It is further ordered that appellee, Edwin A. Walker, do have and recover of and from appellant, The Associated Press, and its surety on its supersedeas bond, Houston Fire and Casualty Insurance Company, the amount adjudged below, with interest thereon at the rate of six per cent per annum from August 3, 1965, together with all costs in this behalf expended, both in this Court and in the trial court, for which let execution issue, and that this decision be certified below for observance.

IN THE COURT OF CIVIL APPEALS FOR THE
SECOND SUPREME JUDICIAL DISTRICT OF TEXAS
17887—16624

---

THE ASSOCIATED PRESS
vs.
EDWIN A. WALKER

---

ORDER DENYING APPELLANT'S MOTION FOR REHEARING—
September 17, 1965

This day came on to be heard the motion by appellant for a rehearing in this cause and said motion having been duly considered by the Court is hereby overruled.

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[fol. 2154]

IN THE COURT OF CIVIL APPEALS FOR THE
SECOND SUPREME JUDICIAL DISTRICT OF TEXAS
17888—16624

---

THE ASSOCIATED PRESS
vs.
EDWIN A. WALKER

---

ORDER DENYING APPELLEE'S MOTION FOR REHEARING—
September 17, 1965

This day came on to be heard the motion by appellees for a rehearing in this cause and said motion having been duly considered by the Court is hereby overruled.

[fol. 2155] Clerk's Certificate to foregoing papers (omitted in printing).

[fol. 2156]

IN THE SUPREME COURT OF TEXAS

From Tarrant County, Second District

No. A-11,069

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THE ASSOCIATED PRESS

vs.

EDWIN A. WALKER

---

ORDER DENYING APPLICATIONS FOR WRITS OF ERROR—
February 9, 1966

Application of The Associated Press, as well as the conditional application of Edwin A. Walker, for writs of error to the Court of Civil Appeals for the Second Supreme Judicial District having been duly considered, and the Court having determined that same present no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said applications be, and hereby are, refused.

It is further ordered that applicant, The Associated Press, and its surety, Houston Fire & Casualty Insurance Company, and applicant, Edwin A. Walker, each pay all costs incurred on their respective applications for writs of error.

IN THE SUPREME COURT OF TEXAS

From Tarrant County, Second District

No. A-11,069

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THE ASSOCIATED PRESS

vs.

EDWIN A. WALKER

---

ORDER DENYING MOTION FOR REHEARING OF APPLICATION FOR WRIT OF ERROR—March 23, 1966

Motion of The Associated Press for rehearing of its application for writ of error having been duly considered, it is ordered that such motion be, and hereby is, overruled.

[fol. 2157] Filed in Court of Civil Appeals for Second Supreme Judicial District of Texas, March 30, 1966—Lida Swanson, Clerk.

[fol. 2158] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 2159]

SUPREME COURT OF THE UNITED STATES

No. 150—October Term, 1966

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THE ASSOCIATED PRESS, Petitioner,

v.

EDWIN A. WALKER.

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ORDER ALLOWING CERTIORARI—October 10, 1966

The petition herein for a writ of certiorari to the Court of Civil Appeals of the State of Texas, Second Supreme Judicial District and/or the Supreme Court of the State of Texas is granted and one and one half hours are allotted for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

# UNIVERSITY OF MISSISSIPPI

UNIVERSITY, MISSISSIPPI

# PLOT PLAN

SCALE OF FEET

100 0 100 200 300 400 500

OLMSTED ASSOCIATES - LANDSCAPE ARCHITECTS

BROOKLINE, MASS. AUG. 11, 1948

9791-No1

REVISED MAY 16, 1960
REVISED AUG 25, 1961
REVISED NOV 20, 1963