punitive damages is to act as a deterrent to future conduct, which, in libel cases, means a prior restraint on freedom of expression. When that deterrent or restraint assumes proportions of the jury's verdict, $3,000,000, or even of the award made by the district court, $400,000, I submit that it is forbidden by the First and Fourteenth Amendments.[7]

The part of the *Times* opinion relating to prior restraints on freedom of expression was certainly not "new law." Nor was that part of the opinion limited to public officials. Clearly, I submit, whether Butts was a public official or not, the enormous award of damages must be set aside.

II.

The specific holding in *Times,* which had not theretofore been generally recognized, was that a State cannot under the First and Fourteenth Amendments award damages to a public official for defamatory falsehood relating to his official conduct unless he proves "actual malice"—that the statement was made with knowledge of its falsity or with reckless disregard of whether it was true or false. It was that principle to which I referred in my earlier dissent,[8] when I said "it was not even enunciated by the counsel who petitioned for certiorari in the *New York Times Co.* decision."[9] Now on petition for rehearing, counsel makes affidavit that: "The requirement of the *New York Times* case that general damages could not be awarded without the necessity of proof of actual malice on the part of the defendant was not specifically presented

7. See Bantam Books, Inc. v. Sullivan, 1963, 372 U. S. 58, 70, cited in *Times* (376 U. S. at 278).

8. Slip Opinion, p. 42.

9. An opinion which I had reached from an examination of the petition and briefs on certiorari.

in the Alabama courts nor in the petition for certiorari to the United States Supreme Court."

In order properly to object[10] to the district court's instructions allowing recovery of general damages without proof of malice, and recovery of punitive damages on a definition of malice at variance with that prescribed in *Times,* counsel must have anticipated that specific holding of the *Times* decision.

Judge Morgan, the District Judge in the present case, recognized, at least impliedly, that Curtis had not waived that constitutional right by its failure to insist upon it at the trial, when, in denying the motion for new trial under Rule 60(b), Fed. R. Civ. P., he considered and ruled on the defense on its merits. *Butts v. Curtis Publishing Co.,* N. D. Ga. 1964, 242 F. Supp. 390.

Based largely on facts dehors the present record, the majority held that Curtis' trial counsel had knowingly and intentionally waived the constitutional protections afforded by the *Times* case, by failing to raise them at the trial. In response to that holding, three of Curtis' attorneys have filed with this Court their sworn affidavits.[11] Now the majority goes still further beyond the present record and considers another case shown by the records of this Court but of which Judge Morgan could not have taken judicial notice when he considered and ruled on Curtis' section 60(b) motion. With deference, I submit that it is the function of this Court simply to review the ruling of the district court on the record before that court.

If, however, we are to resort to evidence outside the record and to bolster our judicial notice from records in

10. "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." Rule 51, Fed. R. Civ. P.

11. Ethically permissible "when essential to the ends of justice." A. B. A. Canons of Prof. Ethics No. 91.

other cases, those extraneous matters do not impugn the integrity and veracity of Curtis' trial counsel. It seems clear to me that, at the time of trial, counsel had no notice of the *specific* holding thereafter made in *Times*. It is impossible for me to believe that, if counsel had any such notice, they would have knowingly and intentionally waived the specific constitutional protection afforded by the *Times* case "in order to get the right to open and close the arguments," as suggested in the majority opinion.

It is too much to hold counsel to the duty of anticipating the specific holding of *Times,* because of general assertions of First Amendment defenses in other cases, or even because of Mr. Justice Black's view that the First Amendment ". . . intended there should be no libel or defamation law in the United States under the United States Government, just absolutely none so far as I am concerned. . . ."[12] The majority paints with such a broad brush as to require the assertion of a First Amendment defense in *every* libel or defamation case hereafter litigated.

With deference, I submit that it is the outworn sporting theory of justice[13] which leads the majority to convert this appeal into an unseemly trial of Curtis' lawyers. The function of this Court is not to decide a contest, but to administer justice. Curtis, not its lawyers, stands mulcted in damages to the extent of $460,000 as the result of a trial conducted on a fundamentally and constitutionally deficient theory of law.

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12. Quoted in footnote 3 to the majority opinion on rehearing.

13. "Federal procedure is moving away from what Pound calls 'the sporting theory of justice,' Wigmore the 'instinct of giving the game fair play,' and Arthur Vanderbilt the theory of procedure as 'a contest between two legal gladiators'. We are a Court 'to secure the just * * * determination of every action'. Rule 1, Federal Rules of Civil Procedure, 28 U. S. C. A." Commissioner of Int. Rev. v. Chase Manhattan Bank, 5 Cir. 1958, 259 F. 2d 231, 238.

The resulting damage extends far beyond the monetary loss to Curtis. This Court's refusal to consider and decide whether constitutional standards were observed in adjudging Curtis liable is a grave reflection upon the administration of justice itself. Permitting such a libel judgment to stand will cause ". . . the pall of fear and timidity [to be] imposed upon those who would give voice to public criticism in an atmosphere in which the First Amendment freedoms cannot survive."[14]

A just determination requires this Court to consider and decide this appeal on its merits.[15] The altered situation created by the intervening decision of the Supreme Court makes that a compelling duty.[16]

I, therefore, respectfully dissent.

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14. New York Times Co. v. Sullivan, 1964, 376 U. S. 254, 278.

15. Hormel v. Helvering, 1941, 312 U. S. 552, 556, 557.

16. The Peggy, 1801, 5 U. S. (1 Cranch) 103, 110; Connor v. New York Times Co., 5 Cir. 1962, 310 F. 2d 133, 135, and cases there cited.

OPINION OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF GEORGIA, ON PETITIONER'S MOTION FOR NEW TRIAL.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION.

CIVIL ACTION

No. 8311.

WALLACE BUTTS,
Plaintiff,

v.

CURTIS PUBLISHING COMPANY,
Defendant.

The jury in this libel action returned a verdict for general damages against the defendant in the sum of $60,000.00 and for punitive damages in the sum of $3,000,000.00.

The defendant moves, under Rule 59 of the Federal Rules of Civil Procedure, 28 U. S. C. A., to set aside the verdict for damages principally upon the ground of excessiveness, as set out in Ground 1 of the defendant's motion. Apart from defendant's contention that the verdict is excessive, the defendant sets out 23 other grounds in its motion for a new trial (Ground 5 of defendant's motion having been abandoned).

The cause of action by plaintiff arose by virtue of an article published by defendant in its March 23, 1963, issue of the *Saturday Evening Post,* said article having been principally written by one Frank Graham, Jr., but with

assistance from others employed by the defendant. The article was entitled "The Story of a College Football Fix", with the subtitle "How Wally Butts and Bear Bryant Rigged a Game Last Fall". The article concerned alleged information on Georgia plays given by Butts to Coach Bryant relating to the Alabama-Georgia football game played in Birmingham, Alabama, in September, 1962.

The article charged Butts with being corrupt and with betraying his players, and that the players were forced into the game like "rats in a maze" and "took a frightful physical beating". The article charged, in an italicized editorial, Butts, along with Coach Bryant, with being a participant in the greatest and most shocking sports scandal since that of the Chicago White Sox in the 1919 World Series. In the same editorial Butts was relegated to a status worse than that of "disreputable gamblers", and a corrupt person who, employed to "educate and guide young men", betrays or sells out his pupils.

Plaintiff Butts had been Head Football Coach at the University of Georgia from 1939 until 1961, at which time he became Athletic Director. As a member of his profession, he had been president of the Football Coaches Association, and by invitation had coached the College All-Stars, the Blue-Gray All Star Game, and the North-South All Star Game. Butts has been a lecturer and speaker at clinics and banquets throughout the United States. Testimony adduced was that plaintiff had been offered employment by several college and professional football teams in the country and was negotiating with a Texas professional team when the article was published, but thereafter negotiations were discontinued.

Evidence was introduced that on March 18, 1963, Butts, through his attorney, notified the Curtis Publishing Company that the article was false and advised that the article

not be published; and that thereafter, pursuant to Georgia law, Butts requested a retraction from Curtis, which was refused. It was admitted on the trial that one of Butts' daughters had telephoned long distance to a *Saturday Evening Post* official with a plea that the article be withheld from publication. The evidence of plaintiff showed that plaintiff was capable of earning a minimum of $12,000.00 per annum from his football activities, but that since the publication, all prior negotiations had been terminated.

The defendant filed its answer of justification and plead that the statements in the article were true. The defendant thus assumed the burden of proving the truth of the article. See *Cox v. Strickland,* 101 Ga. 482.

Curtis Publishing Company based its defense on certain notes taken by one George Burnett who made such notes to a telephone conversation alleged to have been overheard between Coach Bear Bryant, of the University of Alabama, and Butts, as Athletic Director of the University of Georgia, on a morning in September, a few days prior to the Alabama-Georgia game. By some mechanical defect, Burnett was connected by telephone to the conversation. These rough notes were kept by Burnett and revealed to Head Coach Johnny Griffith, of the University of Georgia, in late December, 1962, or early January, 1963. Curtis paid Burnett consideration for the story after the same was brought it its attention by Curtis' Birmingham, Alabama, lawyers, who were defending Curtis in a libel suit brought by Coach Bryant because of another article in the *Saturday Evening Post.*

The evidence presented showed that Frank Graham, Jr., the author of the article, and Davis Thomas, Senior Editor of the *Saturday Evening Post,* knew that Burnett had been convicted of "bad check writing". No representative of the *Post* looked at the notes before the article

was published. According to Coach Griffith of Georgia, defendant's witness, "a good number of Burnett's notes were incorrect and didn't even apply to anything Georgia had". No effort was made by the *Post* to view the actual game film, although the Sports Editor of the *Post,* one Roger Kahn, considered that necessary.

Inserted in the article were the following direct quotations, which were subsequently denied under oath by the parties quoted:

(1) Graham wrote that Burnett had told him that Larry Rakestraw, Georgia quarterback, placed his feet in a certain position while on offense, thereby tipping off the defensive team as to whether the Georgia play would be a run or a pass. Burnett later testified under oath that he had not told Graham any such thing.

(2) Mickey Babb, another Georgia football player, specifically denied the quotation in the article attributed to him pertaining to knowledge by the Alabama team of the Georgia formations and plays. Babb was quoted in the article as saying the Alabama players knew Georgia's key play (eighty-eight pop) and knew when Georgia would use it. Babb testified Georgia had no "eighty-eight pop" play. This was confirmed by Coach Johnny Griffith.

(3) Sam Richwine, the Georgia trainer, specifically and categorically denied the quotation in the article attributed to him, which was also to the effect that Alabama knew Georgia's plays.

(4) Coach Johnny Griffith categorically denied three separate and distinct quotations in the article that were attributed to him.

(5) There were many other instances in which the individual, credited by Graham as giving Graham certain information which was included in the article, categorically denied under oath that any such information had been furnished.

Frank Graham, Jr., author of the article, and Charles Davis Thomas, the Managing Editor of the *Saturday Evening Post,* testified by deposition that they both knew that after the article was published plaintiff Butts' career would be ruined. The author of the article, Frank Graham, Jr., testified by deposition at the trial. Curtis' Editor-in-Chief, Clay Blair, Jr., and its Senior Editor, Davis Thomas, were present in court but testified by deposition. Furman Bisher, of Atlanta, who was paid to assist in the preparation of the article, testified by deposition.

The article was clearly defamatory and extremely so. The *Saturday Evening Post* had a circulation in excess of 6 million copies per issue. It claims readers of 22 million. Butts was unquestionably one of the leading figures in the national football picture. The jury was warranted in concluding from the foregoing incidents and the persistent and continuing attitude of the officers and agents of the defendant that there was a wanton or reckless indifference of plaintiff's rights. The guilt of the defendant was so clearly established by the evidence in the case so as to have left the jury no choice but to find the defendant liable.

This Court does not feel that the award of $60,000.00 for actual damages was excessive. The evidence showed plaintiff to be a man in his fifties, and that his earnings from his profession had been a minimum of $12,000.00 per annum.

The Court must now consider the amount of punitive damages awarded. What is the nature of punitive damages

and for what purpose do we allow their imposition? The law of Georgia provides that in every tort there may be aggravating circumstances, either in the act or the intention, and in that event the jury may give additional damages to deter the wrong-doers from repeating the trespass. Sec. 105-2002, Georgia Code Annotated, 1933.

This Court, however, is greatly concerned with the size of the verdict as to punitive damages. An examination has been made of many cases and the awards made throughout the several jurisdictions of the United States, both in the Federal and the State Courts. As far as this Court can ascertain, the largest award ever sustained for punitive damages by the Appellate Courts was an award of $175,000.00 in the case of *Reynolds v. Pegler,* 123 F. Supp. 36, 223 F. 2d 429. Since the award in the case at hand, the New York Supreme Court, Appellate Division, October Term, in the case of *Faulk v. Aware, Inc., and Hartnett,* has reduced the award of punitive damages in the amount of $2,500,000.00 to $150,000.00. The award for punitive damages in the case under consideration is more than seventeen times larger than the highest award for punitive damages ever sustained. *Reynolds v. Pegler,* supra.

True, fixing the amount of damages is primarily in the province of the jury, and it has been said, with respect to libel cases, "the jury is generally considered to be the supreme arbiter on the question of damages". *Lynch v. New York Times Company,* 171 A. D. 399, 401. The Court, if possible, should try to avoid invading that field. However, a Court may not stand by idly when it is apparent that a verdict is excessive. In *Sunray Oil Corporation v. Allbritton,* 188 F. 2d 751 (5 Cir. 1951), Judge Hutcheson emphasized that a district judge has a duty to grant a new trial, not only when the jury's verdict is excessive as a

matter of law, but also where "it is larger in amount than the judge thinks it justly ought to be". Thus, he said:

> "Whether, in the opinion of the district judge a verdict is excessive as a matter of fact, that is, though not contrary to right reason and, therefore not excessive as a matter of law, it is larger in amount than the judge thinks it justly ought to be, or is excessive as a matter of law, that is, is so monstrous or inordinate in amount as to find no support in right reason, he has the same power, the same duty, in the one case as in the other to relieve against the excessiveness by granting a new trial or requiring a remittitur in lieu."

As was held by the late Judge Parker in the case of *Virginian Railway Company v. Armentrout,* 166 F. 2d 400, 408:

> "The power and duty of the trial judge to set aside the verdict under such circumstances is well established, the exercise of the power being regarded as not in derogation of the right of trial by jury but one of the historic safeguards of that right. * * *
>
> "To the federal trial judge, the law gives ample power to see that justice is done in causes pending before him; and the responsibility attendant upon such power is his in full measure. While according due respect to the findings of the jury, he should not hesitate to set aside their verdict and grant a new trial in any case where the ends of justice so require."

In accordance with the cases cited above, this Court feels it is its duty to keep a verdict for punitive damages within reasonable bounds considering the purpose to be achieved as well as the corporate defendant's wanton or

reckless indifference to the plaintiff's rights. In observance of such duty, this Court concludes that the award for punitive damages in this case was grossly excessive. It is the Court's considered opinion that the maximum sum for punitive damages that should have been awarded against Curtis Publishing Company should be $400,000.00.

Movant's Grounds 2, 3, and 4 assert that the right given by Section 105-2002, Georgia Code Annotated, 1933, to a jury to grant punitive damages violates the rights guaranteed by the Federal Constitution to freedom of speech and press and to substantive and procedural due process. These contentions are without merit. However, these constitutional questions are raised for the first time by this motion. No constitutional question concerning the statute was ever raised by movant's pleadings. The contention that a State statute is unconstitutional is an affirmative defense and must be so pleaded in defendant's answer. *Kewanee Oil & Gas Company v. Mosshamer,* 58 F. 2d 711, 712; *White Cleaners & Dyers v. Hughes,* 7 F. Supp. 1017 (D. C. La. 1934, 3 judges).

Movant's Ground 5 has been expressly withdrawn by defendant.

Grounds 6 through 13 of defendant's motion contend that error was committed in excluding certain evidence as to specific acts of misconduct by plaintiff, defendant contending that this evidence should have been permitted for the purpose of impeachment and in mitigation of damages. The first consideration is Section 38-202, Georgia Code Annotated, 1933, which provides as follows:

> "The general character of the parties, and especially their conduct in other transactions, are irrelevant matter, unless the nature of the action involves such character and renders necessary or proper the investigation of such conduct."

The defendant contends that under Rule 43(a) of the Federal Rules of Civil Procedure, this evidence is admissible in Federal Court. Rule 43(a) provides that in determining admissibility of evidence where there is a conflict between the State and the Federal rule, the plaintiff is entitled to the benefit of the more favorable rule. *Hambrice v. F. W. Woolworth Company,* 290 F. 2d 557.

However, on the question with which this Court is concerned and without passing upon the question as to whether the matter is substantive or procedural, it appears that there is no conflict between the Georgia rule and the Federal rule as to the admissibility of the specific acts of misconduct on the part of the plaintiff.

Under the decision of *Cox v. Strickland,* 101 Ga. 482, it is held that the filing of a plea of justification in defense to an action of libel puts the plaintiff's character in issue, and a defendant has a right to show that the plaintiff's general character is bad, but cannot, in so doing, go into the proof of specific acts or resort to general rumors by hearsay.

Neither under the majority of federal decisions which this Court has studied would such tests be admissible. See *Tribune Association v. Follwell,* 107 F. 646; *Sun Printing & Publishing Association v. Schenck,* 98 F. 925; *Morning Journal Association v. Duke,* 128 F. 657.

As was said in the *Schenck* case, supra:

> "It is not a defense to a libel or slander that the plaintiff has been guilty of offenses other than those imputed to him or of offenses of a similar character; and such facts are not competent in mitigation of damages. The only tendence of such proof is to show, not that the plaintiff's reputation is bad, but that it ought to be bad."

As further authority sustaining the inadmissibility of such evidence, see *Wigmore on Evidence,* 3d Edition, Section 209, where it is stated that the reputed character of the plaintiff in an action of defamation is admissible in mitigation of damages so long as proof of character is made by reputation only; but particular acts of misconduct are irrelevant and such evidence is universally regarded as improper. Pertinent to this issue is the statement of Richards, C. B., in the case of *Jones v. Stevens,* 11 Price 235, 265:

> "I cannot . . . allow defendants to impeach all the transactions of a man's life who may have occasion to seek redress in courts of justice and throw on him the difficulty of showing a uniform propriety of conduct during all his existence. It would be impossible for any man to come prepared to meet such a charge."

Movant contends that this Court erred in refusing to charge Section 38-1806 of the 1933 Georgia Code Annotated. There was no showing that any witness wilfully and knowingly testified falsely, and this Court charged generally on the subject of impeachment. See *Smaha v. George,* 195 Ga. 412.

Ground 15 of defendant's motion is without merit. Ground 16 of movant's motion is without merit. See *Smaha v. George,* supra; and *Branan v. LaGrange Truck Lines, Inc.,* 94 Ga. App. 829.

Grounds 17 and 18 of defendant's motion contend error in excluding evidence tending to impeach witness John Carmichael. Such evidence was offered by defendant to show that witness Carmichael had been convicted in 1933 while witness was a minor in Ohio. The Court, in its

discretion, refused to admit such evidence because of the lapse of time. See *Goddard v. United States,* 131 F. 2d 220; *Sinclair Refining Company v. Southern Coast Corporation,* 195 F. 2d 626.

The alleged false statements for the purpose of obtaining licenses were inadmissible. A witness cannot be impeached by proving contradictory statements previously made by him as to matters not relevant to his testimony and to the case. *Grant v. Hart,* 197 Ga. 662; *Haynes v. Phillips,* 67 Ga. App. 574. Both Grounds 17 and 18 of the defendant's motion are without merit.

Grounds 19, 20, and 21 do not merit the granting of a motion for a new trial on any of the grounds as set forth.

Ground 22 of defendant's motion for a new trial asserts error because of arguments of plaintiff's counsel in the closing remarks to the jury. No objection nor complaint was ever raised to any portion of plaintiff's counsel's argument to the jury, although separate arguments were made by counsel for both parties on separate days of the trial. Arguments were begun on Friday by both counsel and completed on Monday. Much of the argument of which complaint is now made was offered on Friday, and yet on the following Monday, no objection was raised on this portion of counsel's summation. Counsel for defendant consisted of numerous counsel, and yet exception was only made on the filing of this motion. It is an elementary principle of federal law that a new trial will not be granted where a party seeks to raise for the first time, on a motion for a new trial, that opposing counsel was guilty of misconduct in his argument to the jury, where such conduct was not excepted to during the trial. See *Travelers Insurance Company v. Bell,* 5 Cir. 1951, 188 F. 2d 725; *Thomson v. Boles,* 123 F. 2d 487; *Hobart v.*

O'Brien, 243 F. 2d 735; *Uhl v. Echols Transfer Company,* 5 Cir. 1956, 238 F. 2d 760. For the reasons stated above, Ground 22 of defendant's motion is without merit.

Ground 23(a) (b) (c) (d) and (e) of defendant's motion for a new trial complained of errors in the Court's instructions to the jury. The instructions complained of in these grounds of defendant's motion were not objected to at the trial of the case. Rule 51 of the Federal Rules of Civil Procedure provides in part as follows:

> "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

Opportunity was afforded counsel for defendant to make such objections before the jury was permitted to consider its verdict. Under the above-cited rule, the defendant may not now complain. See also *Pruett v. Marshall,* 5 Cir. 1960, 283 F. 2d 436; *Williams v. National Surety Corporation,* 5 Cir. 1958, 257 F. 2d 771; *Moore v. Louisville & Nashville Railroad Company, Inc.,* 5 Cir. 1955, 223 F. 2d 214.

Defendant's contention based on Ground 24 of defendant's motion for a new trial is without merit for the reasons stated in this Court's ruling on defendant's motion for a judgment notwithstanding the verdict this day filed with the Clerk of the Court.

All of the grounds set out in defendant's motion for a new trial, excepting Ground 1, are denied for the reasons stated above.

As to the first ground of the defendant's motion for a new trial, a federal trial court has authority to determine

whether a verdict is excessive and to grant either a new trial or to require a remittitur. *State Farm Mutual Automobile Insurance Company v. Scott,* 5 Cir. 1952, 198 F. 2d 152.

An order in compliance with this opinion will be filed this date.

This the 14th day of January, 1964.

LEWIS R. MORGAN,
United States District Judge.

ORDER.

(Filed January 14, 1964.)

Now, this the 13th day of January, 1964,

IT IS ORDERED that the motion of the defendant, Curtis Publishing Company, for a new trial is granted unless the plaintiff, Wallace Butts, within twenty (20) days after the service of this order, shall, in a writing filed with the Clerk of the United States District Court for the Northern District of Georgia, remit all the punitive damages awarded above the sum of $400,000.00; the award for general damages in the amount of $60,000.00 to remain undisturbed.

(Signed) LEWIS R. MORGAN,
Lewis R. Morgan,
United States District Judge.

OPINION OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF GEORGIA, ON PETITIONER'S ADDITIONAL MOTION FOR NEW TRIAL.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION.

CIVIL ACTION
No. 8311.

WALLACE BUTTS,
Plaintiff,

v.

CURTIS PUBLISHING COMPANY,
Defendant.

Defendant, on February 28, 1964, under Rule 60(b)(2), Federal Rules of Civil Procedure, 28 U. S. C. A., filed a motion for a new trial upon the ground of the discovery of new evidence, contending that such evidence conclusively demonstrates the falsity of the testimony of two of the plaintiff's witnesses, Dr. Frank A. Rose and Coach Paul Bryant, and strongly supports the defense of justification. The motion is also based upon alleged conduct of plaintiff in attempting to avoid the conditions on which defendant's motion for a new trial was denied and a judgment in plaintiff's favor was granted.

Thereafter, defendant filed an additional motion for a new trial pursuant to Rule 60(b), Federal Rules of Civil Procedure, because of a change in the law of libel and the constitutional restrictions placed upon an action for libel by virtue of the United States Supreme Court decision of March 9, 1964, in the case of *New York Times Company v. Sullivan.*

Even though a final judgment had been entered in the case at hand and an appeal from such judgment has been perfected by the filing of a notice of appeal, this District Court retains jurisdiction to consider and deny such motions under Rule 60(b). See *Ferrell v. Trailmobile, Inc.*, (5 C. A., 1955) 223 F. 2d 697.

The gist of Part I of the first motion is that there is substantial variance between the testimony of Dr. Rose and Coach Bryant in their testimony at the trial of this case and depositions which were later given by Dr. Rose and his secretary, Mrs. Marian H. Park, in an action pending in the Northern District of Alabama in the case of *Paul Bryant v. Curtis Publishing Company,* Case No. 63-166, which testimony by deposition was taken on January 8, 1964.

In attempting to sustain its plea of justification, the defendant introduced at the trial of this case a letter dated March 6, 1963, written by Dr. Rose, as President of the University of Alabama, to Dr. O. C. Aderhold, as President of the University of Georgia. The letter concerns certain telephone calls relating to conversations on new football rule changes which had transpired between Coach Bryant and plaintiff Butts. At the trial, Dr. Rose in his testimony, in attempting to explain the contents of the Aderhold letter, stated that the letter was hurriedly dictated on the morning of March 6, 1963, and signed by his secretary, Mrs. Park, as he (Dr. Rose) was attempting to catch an early morning plane for Washington, D. C., to attend a meeting of the American Council on Education.

In the depositions taken in the *Bryant* case, defendant shows that Dr. Rose did not go to Washington, D. C., on the date of March 6, 1963, nor was the letter hurriedly dictated as there was a previous draft of Aderhold letter, dated March 5, 1963, which draft was substantially the

same as the contents of the March 6, 1963, original letter mailed and received by President Aderhold.

The defendant further asserts that Dr. Rose, in his testimony at the trial testified that Coach Bryant told him he did not remember the call of September 16, 1962, to Coach Butts in Athens, Georgia, although he could have made it, and even though Rose had interrogated Bryant several times between February 24, 1963 and March 6, 1963. However, by a recently discovered letter, dated February 28, 1963, written by Bryant to Rose, Bryant, in this letter, informed Rose that he remembered the call to Butts in the middle of September very well, and that although Rose admitted receiving the letter dated February 28, 1963, prior to March 6, 1963, Rose still maintained throughout his testimony in said deposition that Bryant reported to him through all the investigation that he had no recollection of the Sunday, September 16, 1962, telephone call to plaintiff Butts.

Defendant contends that on the issue of the letter (Exhibit D-21) plaintiff was able to explain away the contents of the letter by means of Rose's characterization of Exhibit D-21 as a hasty, error-laden letter, and Bryant's total lack of recollection concerning the telephone call, when in fact the newly discovered evidence establishes that Bryant did recall the Sunday telephone call and that the letter was not a hasty, error-laden letter, but was a careful and thoughtful letter, and that someone received the draft of such letter dated March 5, 1963, prior to its final draft on March 6, 1963.

The phrase "newly discovered evidence" refers to evidence of facts in existence at the time of the trial of which the aggrieved party was excusably ignorant. In the case of *Chemical Delinting Company v. Jackson,* 193 F. 2d 123, 127, the Fifth Circuit Court of Appeals has held:

> "The motion must show that the evidence was discovered since the trial; must show facts from which the court may infer reasonable diligence on the part of the movant; must show that the evidence is not merely cumulative or impeaching; must show that it is material; and must show that such evidence will probably produce a different result."

See also *King v. Leach,* (5 C. A., 1942) 131 F. 2d 8.

The evidence clearly shows that the letter from Bryant to Rose was in existence in the latter part of February, 1963. The evidence further shows that the draft of the letter from Rose to Aderhold was in existence prior to March 6, 1963. Under the liberal discovery rule provided by the Federal Rules of Civil Procedure, the defendant could have obtained all of this evidence which it now has available prior to the trial of this case in August, 1963. No facts have been shown by the movant here from which this Court may infer reasonable diligence on its part.

Even assuming the evidence could not have been produced at the trial in August by due diligence—inferences not fairly conveyed by the record—the evidence now presented tends merely to affect the weight and credibility of the evidence of Dr. Rose and does not constitute a proper basis for a new trial. See *English v. Mattson,* (5 C. A., 1954) 214 F. 2d 406, 409; *Grant County Deposit Bank v. Greene,* 200 F. 2d 835.

After considering the "newly discovered evidence" presented in the motion at hand, and from this Court's review of all the evidence presented at the trial of the case, even if all the testimony entered at this hearing on the motion had been presented at the trial in August, this new evidence affecting the credibility of Dr. Rose would not have changed the verdict in this case. See *Chemical Delinting Company v. Jackson,* supra, and *English v. Mattson,* supra.

The second ground advanced by the defendant for a new trial under Rule 60(b) is to vacate the judgment entered against the defendant and to grant a new trial because after the plaintiff had filed his written consent to the remittitur (this consent still being on file) that, to the defendant's motion for a new trial, the plaintiff has filed a notice of cross-appeal. The question of the cross-appeal and the merits thereof are not for decision by this trial Court, but is a matter to be considered on appeal. See *Woodworth v. Chesbrough,* 244 U. S. 79, 61 L. Ed. 1005.

The thrust of defendant's additional motion for a new trial under Rule 60(b) is based upon the recent decision of the United States Supreme Court, rendered on March 9, 1964, in the case of *New York Times Company v. Sullivan.* The Supreme Court's ruling in the *Times* case, speaking through Mr. Justice Brennan, held:

> "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

The contention of the defendant is that the *Times* case is controlling for the case at hand, and that under this motion the previous judgment should be vacated and a new trial granted. In order that a prior decision of a court shall govern, such prior decision must be in point, and as a test in determining whether the adjudicated case is a precedent, such case should be measured by a similarity to the second case in its controlling facts. See *United States v. L. A. Tucker Truck Lines, Inc.,* 344 U. S. 33, 97 L. Ed. 54.

In the *Times* case, the Supreme Court held actual malice must be proved to recover general damages in actions

of libel brought by public officials against critics of their official misconduct. However, the concurring opinion of Justices Goldberg and Douglas stated:

> "Purely private defamation has little to do with the political ends of a self-governing society. The imposition of liability for private defamation does not abridge the freedom of public speech."

In the present motion at hand, the defendant contends that plaintiff's action comes under the *Times* ruling in that plaintiff was a public official, and that the verdict and judgment was awarded plaintiff as damages for injury to his reputation as a football coach on account of a publication made by the defendant concerning plaintiff's actions while acting as Director of Athletics at the University of Georgia. In the trial of the case, movant defended the action by entering a plea of justification, and no defense was made or evidence introduced concerning Butts' position as Athletic Director or as a public official. Georgia law provides under certain conditions communications concerning the acts of public men in their public capacity and reference therewith to be deemed privileged. Georgia Code Annotated, Section 107-709(6). Just where in the ranks of government employees the "public official" designation extends, the Supreme Court in the *Times* case did not determine.[1] The decision did determine that Sullivan, as an elected city commissioner of Montgomery, fitted into the category of public officials.

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1. In Footnote 23 of the majority opinion, it was stated: "We have no occasion here to determine how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included. Cf. *Barr v. Matteo*, 360 U. S. 564, 573-575. Nor need we here determine the boundaries of the 'official conduct' concept. It is enough for the present case that respondent's position as an elected city commissioner clearly made him a public official, ..."

Under Georgia law, members of the Board of Regents of the University System are public officials. Georgia Session Laws, 1931, Pages 7, 45. The evidence presented at the trial shows that plaintiff was Director of Athletics at the University for some two years prior to February, 1963, at which time he resigned. The article complained of was published in the defendant's issue of March 23, 1963. The Board of Regents at both the University of Georgia (located at Athens) and the Georgia School of Technology Board of Regents at both the University of Technology (located at Atlanta) control the athletic programs of the two institutions, but the details are handled at each institution by an athletic association composed of faculty members and alumni, and each is incorporated to facilitate such business transactions as improvement of athletic grounds and equipment at the two institutions. The schedule of athletic contests for each year is approved by the faculty and by the Regents. The separate athletic associations at both institutions are wholly under the control of the Regents and are their agents. For further details of the athletic setup, see *Page v. Regents of University System of Georgia,* 93 F. 2d 887, 891-892. As was stated in the *Page* case, the "coaches" are also members of the faculty.

Plaintiff Butts was Director of Athletics at the University. The Athletic Director, along with the various coaches in the Athletic Department, were employed by the separate incorporated athletic association. However, the defendant seeks by this motion to extend the category of "public officials" to one employed as agent by the University of Georgia Athletic Department. Even if plaintiff was a professor or instructor at the University, and not an agent of a separate governmental corporation carrying on "a business comparable in all essentials to those usually conducted by private owners"[2] he would not be a public

2. See *Allen v. Regents of the Unversity System of Georgia,* 304 U. S. 439, 451.

officer or official. Under Georgia law, the position of a teacher or instructor in a State or public educational institution is not that of a public officer or official, but he is merely an employee thereof. *Regents of the University System of Georgia v. Blanton,* 49 Ga. App. 602(4); *Board of Education of Doerun v. Bacon,* 22 Ga. App. 72. To hold plaintiff, an employee of the University Athletic Association, a public official would, in this Court's opinion, be extending the "public official" designation beyond that contemplated by the ruling in the case of *New York Times Company v. Sullivan,* supra.

If it were conceded that plaintiff Butts was a "public official", the case of *New York Times Company v. Sullivan* would not permit the vacating of this Court's previous judgment, as the ruling in the *Times* case does not prohibit a public official from recovering for a defamatory falsehood where he proves "actual malice"—that is, with knowledge that it was false *or with reckless disregard of whether it was false or not.* (Emphasis supplied.) In the trial of this case, there was ample evidence from which a jury could have concluded that there was reckless disregard by defendant of whether the article was false or not. See the Court's ruling on defendant's motion for a new trial dated January 14, 1964. *Butts v. Curtis Publishing Company,* 225 F. Supp. 916.

For the reasons stated above, the defendant's motions under Rule 60(b) to vacate the judgment entered against the defendant are denied.

This the 7th day of April, 1964.

LEWIS R. MORGAN,
Lewis R. Morgan,
United States District Judge.

Appendix C

APPENDIX C.

Defendant's Additional Motion for New Trial Pursuant to Federal Rule of Civil Procedure 60(b).

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION.

CIVIL ACTION

No. 8311.

WALLACE BUTTS,
Plaintiff,

v.

CURTIS PUBLISHING COMPANY,
Defendant.

Because of the drastic change in the law of libel and the constitutional restrictions placed upon an action for libel brought about by the Supreme Court's recent decision, on March 9, 1964, in the case of *New York Times Company v. Sullivan,* 32 U. S. Law Week 4184 (March 10, 1964), the defendant hereby moves this Court, pursuant to Rule 60(b)(6) to vacate the judgment entered against defendant in this action and to grant a new trial for the following reasons:

1. The verdict and judgment in this case awarded plaintiff damages for injury to his reputation as a football coach on account of statements made by defendant concerning plaintiff's actions while acting as Director of Athletics of the University of Georgia. The Director of Athletics of the University of Georgia is a public official: *Page v. Regents of University of Georgia,* 93 F. 2d 887 (5th Cir., 1937) (reversed in 304 U. S. 439 upon other grounds).

2. Said *New York Times Company v. Sullivan* case held that the constitutional guarantees provided by the First and Fourteenth Amendments prohibit a public official from recovering *any* "damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false, or with reckless disregard of whether it was false or not."

3. The following portions of the instruction given by the Court to the jury constitute error in that the Court stated that general damages could be recovered by the plaintiff without the plaintiff being required to prove the existence of "actual malice" on the part of the defendant:

> "I charge you that under Georgia law, a written publication which affects one injuriously in his trade or calling, such as the plaintiff Butts' coaching profession in this case under consideration, and contains imputations against his honesty and integrity, and which would, as its natural and probable consequence, occasion pecuniary loss, constitutes a cause of action and is libelous per se, and the right follows to such damages as must be presumed to proximately and necessarily result from such a publication." R. 1624.

"As the publication was libelous per se, I charge you that malice is to be inferred. However, the existence of malice may be rebutted by proof of the defendant which, in all cases, shall go in mitigation of damages.

"At this point, I think it is well that I should explain to you the meaning of malice under the law of defamation. Malice, in the law of defamation may be used in two senses. First, in a special or technical sense to denote absence of lawful excuse or to indicate absence of privileged occasion. Such malice is known as implied malice or malice in law. There is no imputation of ill will to injure with implied malice. Secondly, malice involving intent of mind and heart or ill will against a person is classified as express malice or malice in fact." R. 1630.

4. Applying the constitutional standards enunciated in the said *New York Times Company v. Sullivan* case, the proof presented in the instant case to show actual malice on the part of the defendant lacks the "convincing clarity", which such constitutional standards demand, and thus such evidence cannot sustain the judgment entered for the plaintiff. There was no evidence introduced in the instant case to prove that the statements made in the article defendant published in the March 23, 1963 issue of "The Saturday Evening Post" concerning plaintiff were made with knowledge on the part of the defendant that they were false, or with a reckless disregard of whether they were false or not. On the contrary, plaintiff proved in his own case that the Post editors responsible for the publication of the story—Blair and Thomas, R. 1024—were satisfied of the truthfulness and accuracy of the story. R. 1038, 1137-1138.

Therefore, the instant case was clearly tried upon unconstitutional assumptions, the correct principle unfortunately not being announced until after the trial by the Supreme Court's landmark decision in the *New York Times Company v. Sullivan* case. As Mr. Justice Goldberg recognized in that case, "we are writing upon a clean slate."

A hearing upon this Motion is respectfully requested.

WELBORN B. CODY,
Attorney for Defendant.

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Appendix D

THE STORY OF A COLLEGE FOOTBALL FIX

A SHOCKING REPORT OF HOW WALLY BUTTS AND "BEAR" BRYANT RIGGED A GAME LAST FALL

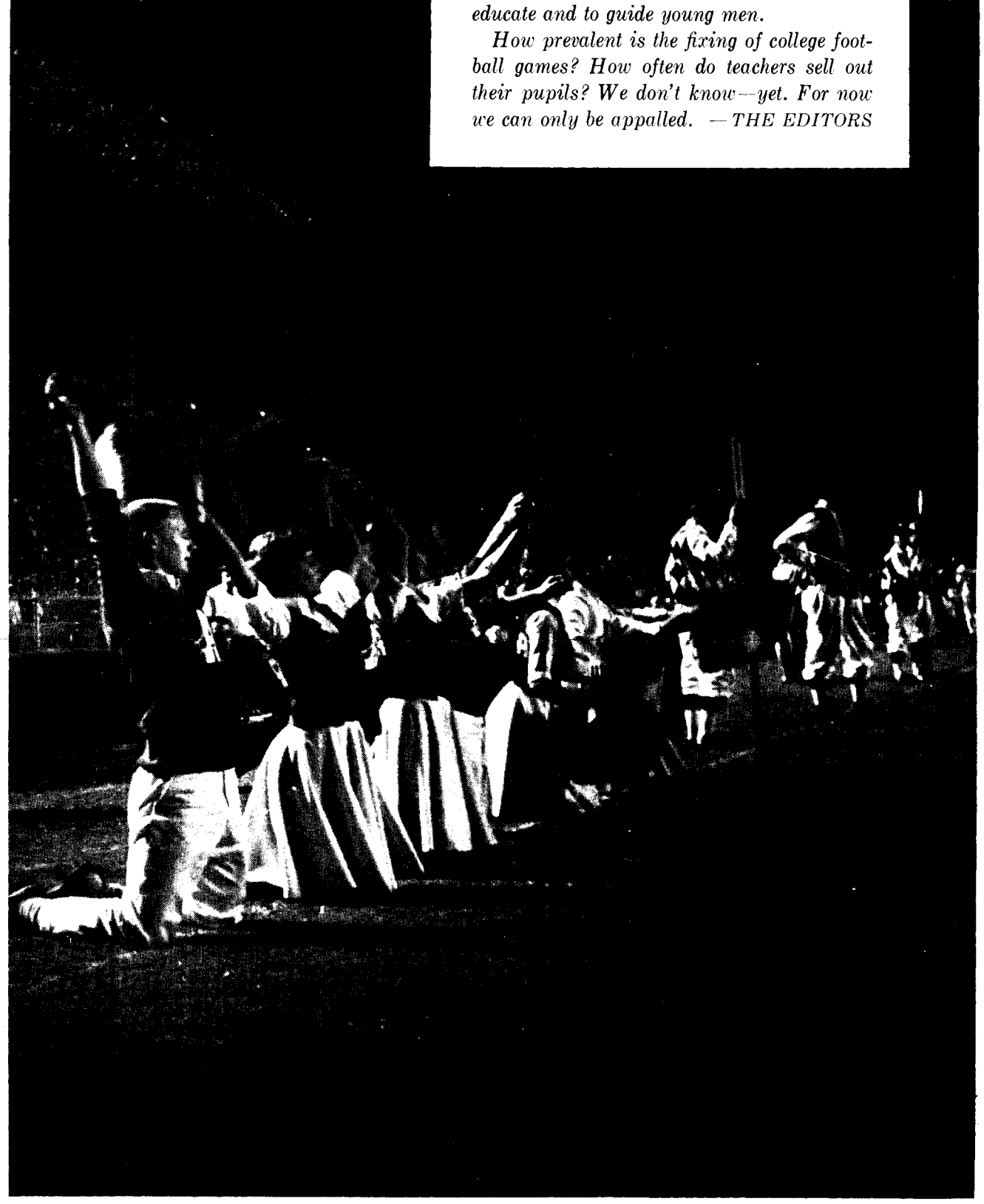
By FRANK GRAHAM JR.

Not since the Chicago White Sox threw the 1919 World Series has there been a sports story as shocking as this one. This is the story of one fixed game of college football.

Before the University of Georgia played the University of Alabama last September 22, Wally Butts, athletic director of Georgia, gave Paul (Bear) Bryant, head coach of Alabama, Georgia's plays, defensive patterns, all the significant secrets Georgia's football team possessed.

The corrupt here were not professional ballplayers gone wrong, as in the 1919 Black Sox scandal. The corrupt were not disreputable gamblers, as in the scandals continually afflicting college basketball. The corrupt were two men—Butts and Bryant—employed to educate and to guide young men.

How prevalent is the fixing of college football games? How often do teachers sell out their pupils? We don't know—yet. For now we can only be appalled. —THE EDITORS



On their knees, Alabama cheerleaders plead for touchdown. Team scored five.

On Friday morning, September 14, 1962, an insurance salesman in Atlanta, Georgia, named George Burnett picked up his telephone and dialed the number of a local public-relations firm. The number was Jackson 5-3536. The line was busy, but Burnett kept trying. On the fourth or fifth attempt he had just dialed the final number when he heard what he later described as "a series of harsh electronic sounds," then the voice of a telephone operator said:

"Coach Bryant is out on the field, but he'll come to the phone. Do you want to hold, Coach Butts, or shall we call you back?"

And then a man's voice: "I'll hold, operator."

Like most males over the age of four in Atlanta, George Burnett is a football fan. He realized that he had been hooked by accident into a long-distance circuit and that he was about to overhear a conversation between two of the colossi of Southern football. Paul (Bear) Bryant is the head coach and athletic director of the University of Alabama, and Wallace "Wally" Butts was for 22 years the head coach of the University of Georgia and, at the time of this conversation, the university's athletic director. Burnett ("I was curious, naturally") kept the phone to his ear. Through this almost incredible coincidence he was to make the most important interception in modern football history.

After a brief wait Burnett heard the operator say that Coach Bryant was on the phone and ready to speak to Coach Butts.

"Hello, Bear," Butts said.

"Hello, Wally. Do you have anything for me?"

As Burnett listened, Butts began to give Bryant detailed information about the plays and formations Georgia would use in its opening game eight days later. Georgia's opponent was to be Alabama.

Butts outlined Georgia's offensive plays for Bryant and told him how Georgia planned to defend against Alabama's attack. Butts mentioned both players and plays by name. Occasionally Bryant asked Butts about specific offensive or defensive maneuvers, and Butts either answered in detail or said, "I don't know about that. I'll have to find out."

"One question Bryant asked," Burnett recalled later, "was 'How about quick kicks?' And Butts said, 'Don't worry about quick kicks. They don't have anyone who can do it.'

"Butts also said that Rakestraw [Georgia quarterback Larry Rakestraw] tipped off what he was going to do by the way he held his feet. If one foot was behind the other it meant he would drop back to pass. If they were together it meant he was setting himself to spin and hand off. And another thing he told Bryant was that Woodward [Brigham Woodward, a defensive back] committed himself fast on pass defense."

As the conversation ended, Bryant asked Butts if he would be at home on Sunday. Butts answered that he would.

"Fine," Bryant said. "I'll call you there Sunday."

Listening to this amazing conversation, Burnett began to make notes on a scratch pad he kept on his desk. Some of the names were strange to him—tackle Ray Rissmiller's name he jotted down as "Ricemiller," and end Mickey Babb's as "Baer"—and some of the jargon stranger still, but he recorded all that he heard. When the two men had hung up Burnett still sat at his desk, stunned, and a little bit frightened.

Suddenly he heard an operator's voice: "Have you completed your call, sir?"

Burnett started. "Yes, operator. By the way, can you give me the number I was connected with?"

The operator supplied him with a number in Tuscaloosa, Alabama, which he later identified as that of the University of Alabama. The extension was that of the athletic department. Burnett then dialed Jackson 5-3536—the number he originally wanted. This time the call went through normally, and he reached a close friend and former business associate named Milton Flack.

"Is Wally Butts in your office now, Milt?" Burnett asked.

"Well, he's in the back office—making a phone call, I think. Here he comes now."

"Don't mention that I asked about him," Burnett said hurriedly. "I'll talk to you later."

Through some curious electronic confusion, George Burnett, calling his friend Milt Flack, had hooked into the call Wally Butts was making from a rear office in Flack's suite. He was the third man, the odd man. But he was not out.

Putting the pieces together

In the next few hours Burnett tried to piece together what he knew of Georgia football. Butts, a native of Milledgeville, Georgia, had joined the university coaching staff as an assistant in 1938. A year later he was named head coach. For 20 years he was one of the most popular and successful coaches in the South. Then prominent University of Georgia alumni abruptly soured on him, and on January 6, 1961, he was replaced by a young assistant coach named Johnny Griffith. Butts, filed away in the position of Georgia's athletic director (which he had held along with his coaching job for some years), was outspokenly bitter about his removal from the field.

Burnett knew, too, that Butts recently had been involved in a disastrous speculation in Florida orange groves. Butts had lost over $70,000 because, as someone put it, "you couldn't grow *cactus* on that land." One of his partners in the deal was also an associate of Milt Flack at a public-relations firm called Communications International, the office Burnett had been trying to call when he hooked into the Butts-Bryant conversation.

That afternoon Burnett told Flack what he had overheard. Both of them, though only slightly acquainted with the high-spirited, gregarious Butts, liked him, and they decided to forget the whole thing. Burnett went home in the evening and stuffed his notes away in a bureau drawer. He felt a great sense of relief. The matter, as far as he was concerned, was closed.

Eight days later, on September 22, the Georgia team traveled to Birmingham to play Alabama before a crowd of 54,000 people at Legion Field. Alabama hardly needed any "inside" information to handle the outmanned Bulldogs. Bryant, one of the country's most efficient and most ruthless coaches—he likes his players to be mean, and once wrote that football games are won by "outmeaning" the other team—had built a powerhouse that was in the middle of a 26-game winning streak. Alabama was the defending national champion, combining a fast-charging and savage-tackling defense with an effective attack built around a sensational sophomore quarterback named Joe Namath. The Georgia team was composed chiefly of unsensational sophomores.

Various betting lines showed Alabama favored by from 14 to 17 points. If a man were to bet on Alabama he would want to be pretty sure that his team could win by *more* than 17 points, a very uncertain wager when two major colleges are opening the season together and supposedly have no reliable line on the other's strengths and weaknesses.

Bryant, before the game, certainly did not talk to the press like a man who was playing with a stacked deck.

"The only chance we've got against Georgia is by scratching and battling for our life," he said, managing to keep a straight face. "Put that down so you can look at it next week and see how right it is."

The game itself would have been enjoyed most by a man who gets kicks from attending executions. Coach Bryant (he neglected to wear a black hood) snapped every trap. The first time Rakestraw passed, Alabama intercepted. Then Alabama quickly scored on a 52-yard pass play of its own. The Georgia players, their moves analyzed and forecast like those of rats in a maze, took a frightful physical beating.

"The Georgia backfield never got out of its backfield," one spectator said afterward. And reporter Jesse Outlar wrote in Atlanta's Sunday *Journal* the following day: "Every time Rakestraw got the ball he was surrounded by Alabama's All-American center Lee Roy Jordan and his eager playmates."

Georgia made only 37 yards rushing, completed only 7 of 19 passes for 79 yards, and made its deepest penetration (to Alabama's 41-yard line) on the next to the last play of the game. Georgia could do nothing right, and Alabama nothing wrong. The final score was 35–0, the most lopsided score between the two teams since 1923.

It was a bitter defeat for Georgia's promising young team. The 38-year-old Johnny Griffith, who was beginning his second season as head coach, was stunned. Asked about the game by reporter Jim Minter, he said: "I figured Alabama was about three touchdowns better than we were. So that leaves about fifteen points we can explain only by saying we didn't play any football."

Quarterback Rakestraw came even closer to the truth. "They were just so quick and mobile," he told Minter. "They seemed to know every play we were going to run."

Later other members of the Georgia squad expressed their misgivings to Furman Bisher, sports editor of the Atlanta *Journal*. "The Alabama players taunted us," end Mickey Babb told him. "'You can't run *Eighty-eight Pop* [a key Georgia play] on us,' they'd yell. They knew just what we were going to run, and just what we called it."

And Sam Richwine, the squad's trainer, told Bisher: "They played just like they knew what we were going to do. And it seemed to me a lot like things were when they played us in 1961 too." (Alabama walloped Georgia in 1961 by a score of 32–6.)

Only one man in the Georgia camp did not despair that day. Asked by reporter

George Burnett of Atlanta: He overheard critical long-distance call.

Wally Butts, former athletic director of Georgia: He gave away Georgia plays, defense patterns.

Head coach Paul (Bear) Bryant of Alabama. He took plays for his defending national champions.

Solemnly Wally Butts leads a Georgia football team in locker-room prayer.

Downcast coach Griffith slouches near bench as Georgia team is slaughtered.

John Logue about Georgia's disappointing performance, ex-coach Wally Butts nodded wisely and set him straight. "*Potential* is the word for what I saw," he said. "Unlimited *potential.*"

The whole matter weighed heavily on George Burnett. He began to wonder if he had done the right thing when he had put the notes aside and kept his mouth shut. Now 41 years old, he was still struggling to support his large family. Among his five children were a couple of boys who played football. "How would I feel," Burnett asked himself, "if my boys were going out on the field to have their heads banged in by a stronger team, and then I discovered they'd been sold out?" He began to wake up at night and lie there in the dark, thinking about it.

In one sense Burnett knew it would be easiest to keep the notes in the drawer. While every citizen is encouraged to report a crime to authorities, the penalties against the man who talks are often more severe than those against the culprit. Burnett wasn't worried about physical retaliation. But there might be social and economic ones. Football is almost a religion in the South; the big-name coaches there are minor deities.

Butts no longer had his old-time stature, but many people were still intensely loyal to him (and he was a director of the small Atlanta insurance agency where Burnett worked). Bear Bryant was a national figure who had made impressive records at Texas A&M and Kentucky, and had more recently transformed Alabama from pushovers to national champions.

Burnett, protective toward his family, fearful of challenging deities, was troubled by a drive to do what was right. But what was right? To talk? To create furore, perhaps even national scandal? Or should he remain silent, ignoring wrong? That was a safe course, but one that might sit heavily on his conscience for all the rest of his days.

Living in his private misery, he thought about his past. Burnett himself had played high-school football in San Antonio, Texas, where he was born. During World War II he became a group navigator aboard a Martin B-26. On January 14, 1945, when his plane was shot down over Saint-Vith, Belgium, he was the only survivor. He lost part of his left hand, and spent the rest of the war in a German prison camp. Articulate and personable, he was now the division manager of the insurance agency.

On January 4 of this year he sat in his office with Bob Edwards, a longtime friend who was also an employee of the agency. Burnett knew that Edwards had played football with Johnny Griffith at South Georgia, a junior college.

"You know, Bob," Burnett said, after they had talked business for a while, "there's something that's been eating me up for a long while. I was going to tell you about it at the time, and then I decided to keep quiet. But I think you should know this, being a friend of Johnny Griffith."

After Edwards heard the story of the phone call, he asked if he could report it to Griffith. Burnett, still reluctant to get seriously involved, told Edwards to go ahead but to try to keep his name out of it. Powerful men in Georgia might be offended if Wally Butts was hurt, and Burnett did not want to jeopardize his own career just when things were beginning to break nicely for him.

But like so many others, Burnett found that there is no such thing as a little involvement. Griffith pressed to meet him, and nervously Burnett agreed. In the middle of January he met with Edwards and Griffith in the Georgia coach's room at Atlanta's Biltmore Hotel. Simultaneously a general meeting of the Southeastern Conference coaches was taking place at the Biltmore.

The Georgia-Alabama game had been forgotten by most of the coaches and athletic officials present. A popular topic of conversation was a late-season game between Alabama and Georgia Tech, in which Bryant's long winning streak had been broken.

Alabama, a five-point favorite, had trailed 7–6 with only a little more than a minute to play. Then Alabama made a first down on the Georgia Tech 14-yard line. Since Bryant had a competent field-goal kicker, the classic strategy would have been to pound away at the middle of Tech's line, keeping the ball between the goalposts and, on third or fourth down, order a field-goal try. (Alabama had defeated Georgia Tech on a last-minute field goal in 1961.) Instead, Bryant's quarterback passed on first down. The pass was intercepted, and Georgia Tech held the ball during the game's waning seconds, thus scoring last season's greatest upset.

During the January conference at the Biltmore, Bryant was frequently kidded about that first-down pass.

Away from the bars and the crowds, in Griffith's room the talk was only of Georgia-Alabama. Griffith listened grimly to Burnett's story, then read his notes. Suddenly he looked up.

"I didn't believe you until just this minute," he told Burnett. "But here's something in your notes that you couldn't possibly have dreamed up . . . this thing about our pass patterns. I took this over from Wally Butts when I became coach, and I gave it a different name. Nobody uses the old name for this pattern but one man. Wally Butts."

Suspicions confirmed

Griffith finished reading the notes, then asked Burnett if he could keep them. Burnett nodded.

"We knew somebody'd given our plays to Alabama," Griffith told him, "and maybe to a couple of other teams we played too. But we had no idea it was Wally Butts. You know, during the first half of the Alabama game my players kept coming to the sidelines and saying, 'Coach, we been sold out. Their linebackers are hollering out our plays while we're still calling the signals.'"

Griffith has since spoken of his feelings when he had finished reading Burnett's notes, and Burnett and Edwards had left. "I don't think I moved for an hour—thinking what I should do. Then I realized I didn't have any choice."

Griffith went to university officials, told them what he knew and said that he would resign if Butts was permitted to

remain in his job. On January 28 a report reached the newspapers that Butts had resigned. At first it was denied by Butts and the university. A few days later it was confirmed with the additional news—that Butts would remain as athletic director until June 1 so that he could qualify for certain pension benefits. Rumors flooded Atlanta. One of the wildest was that Butts was mysteriously and suddenly ill and had entered the state hospital at Athens. This was quickly scotched when Georgia University officials maintained that Butts merely went for the physical checkup required for his pension records. Shortly afterward he was seen in Atlanta at a Georgia Tech basketball game.

But if Butts was seen publicly, events involving him remained closely guarded secrets. Burnett was asked to come to the Atlanta office of M. Cook Barwick, an attorney representing the University of Georgia. There he met Dr. O. C. Aderhold, the university president. Burnett's story was carefully checked. He then agreed to take a lie-detector test, which was administered by polygraph expert Sidney McMain, in the Atlanta Federal building. Burnett passed the test to everybody's satisfaction.

Phone-company check

Next an official of the Southern Bell Telephone Company checked and found that a call had been made from the office of Communications International to the University of Alabama extension noted by Burnett on his scratch pad. This information corroborated Burnett's statement that the call had been made at about 10:25 in the morning and had lasted 15 or 16 minutes.

"I jotted down the time when the call was completed," Burnett said. "It was 10:40. This is an old navigator's habit, I guess. For instance, I know that I was shot down over Saint-Vith at exactly 10:21, because when the bombardier called 'Bombs away!' I looked at my watch and wrote down the time. A few seconds later we got hit."

University officials still nursed reservations about Burnett's story because of the fantastic coincidence that had enabled him to overhear Butts's call. Then, during one of the many conferences he attended in attorney Barwick's office in the Rhodes-Haverty Building, a second coincidence, equally odd, cleared the air. Barwick placed a call to Doctor Aderhold at the university. Suddenly, Barwick and Aderhold found themselves somehow braided into a four-way conversation with two unknown female voices. The two men burst into nervous laughter. Burnett's story gained a little more credence.

February 21 was a painful day for George Burnett. He was summoned once more to Barwick's office, because Bernie Moore, the commissioner of the Southeastern Conference, "wanted to ask some questions." On Burnett's arrival he found not only Moore but Doctor Aderhold, two members of the university's board of regents, and another man identified as Bill Hartman, a friend of Wally Butts.

From the start, Burnett sensed a mood of hostility in the air. The ball was carried by one of the members of the Georgia board of regents, who confronted Burnett with a report that he had been arrested two years before for writing bad checks and that he was still on probation when he overheard the conversation between Butts and Bryant.

"Is there anything else in your past you're trying to cover up?" the regents official demanded.

Burnett was frightened and angry. "I didn't realize that *I* was on trial," he said. He went on to say that he had nothing to hide, that he had given university officials permission to look into his background, and that he had taken a lie-detector test, signed an affidavit that his testimony was true and permitted his statements to be recorded on tape. His notes had been taken from him and placed by Barwick in the safety-deposit vault of an Atlanta bank.

"I *was* arrested on a bad-check charge," Burnett admitted. "I was way behind on my bills and two of the checks I wrote—one was for twenty-five dollars and the other for twenty dollars—bounced. I was fined one hundred dollars and put on probation for a year. I think that anybody who is fair will find I got into trouble because I've always had trouble handling my financial affairs and not because I acted with criminal intent."

Burnett was shaken by this meeting. He felt that he had been candid with the university but that he had also angered many friends of Wally Butts. He signed a paper at the officials' request which gave the university permission to have his war records opened and examined. He cared about his reputation. He was proud to have been a navigator.

"Doctor Aderhold was always very kind to me at those meetings," Burnett said later, "but I didn't like the attitude of some of the others. I began to feel that I'd be hurt when and if these people decided to make this mess public. That's when I went to my lawyer, and we agreed that I should tell my story to *The Saturday Evening Post*."

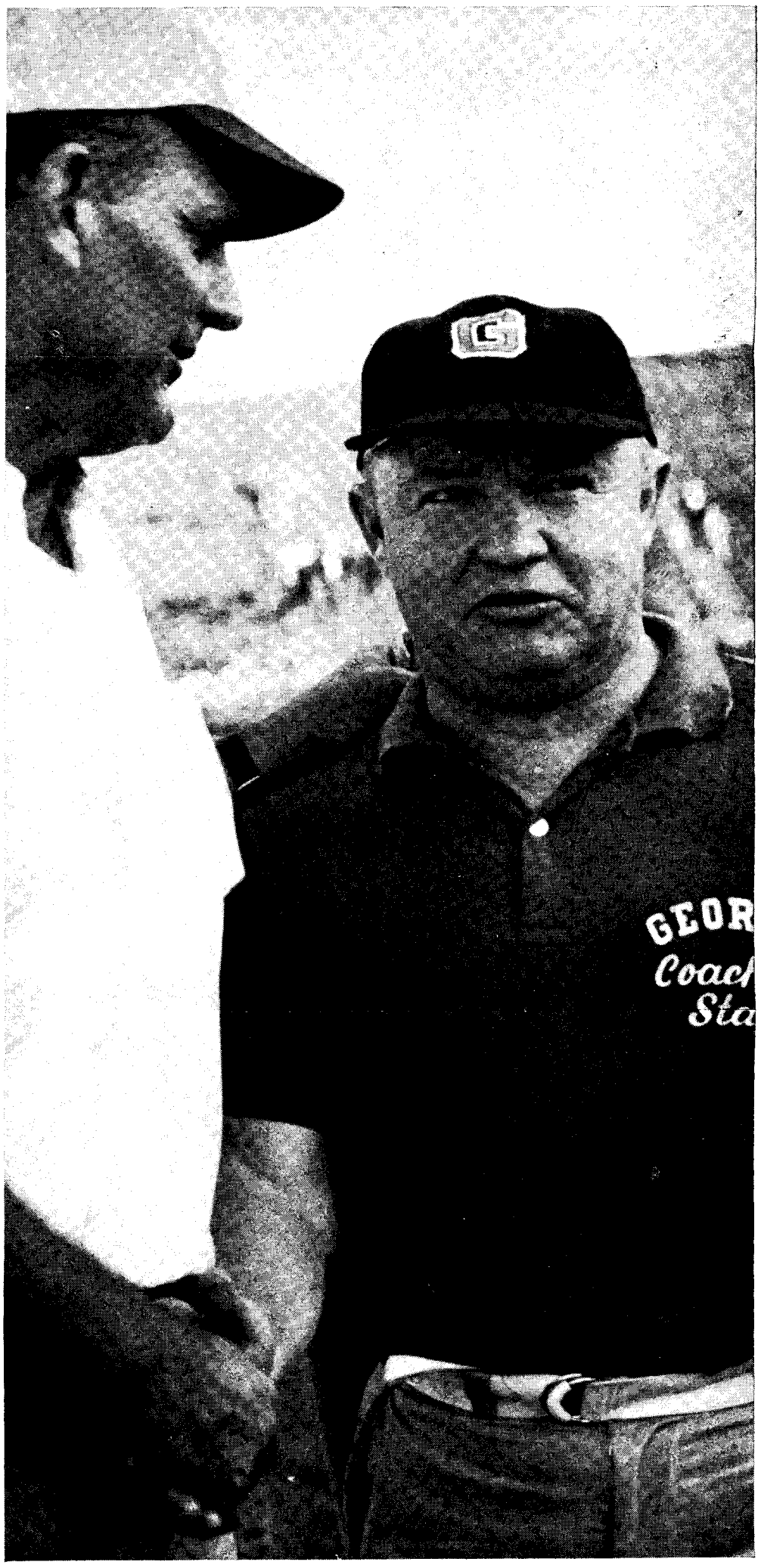
Now the net closed on Wally Butts. On February 23 the University of Georgia's athletic board met hastily in Atlanta and confronted Butts with Burnett's testimony. Challenged, Butts refused to take a lie-detector test. The next day's newspapers reported that he had submitted his resignation, effective immediately, "for purely personal and business purposes."

"I still think I'm able to coach a little," Butts told a reporter that day, "and I feel I can help a pro team."

The chances are that Wally Butts will never help any football team again. Bear Bryant may well follow him into oblivion—a special hell for that grim extrovert—for in a very real sense he betrayed the boys he was pledged to lead. The investigation by university and Southeastern Conference officials is continuing; motion pictures of other games are being scrutinized; where it will end no one so far can say. But careers will be ruined, that is sure. A great sport will be permanently damaged. For many people the bloom must pass forever from college football.

"I never had a chance, did I?" Coach Johnny Griffith said bitterly to a friend the other day. "I never had a *chance*."

When a fixer works against you, that's the way he likes it. THE END



Butts and Bryant meet as friends, exchange warm greetings before the Georgia-Alabama game at Legion Field, Birmingham, Alabama, in 1960.