SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 37

CURTIS PUBLISHING COMPANY, PETITIONER,

vs.

WALLACE BUTTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX

VOLUME 1

RECORD PRESS, PRINTERS, NEW YORK, N. Y., NOVEMBER 8, 1966

[fol. 1]

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 21,491

CURTIS PUBLISHING COMPANY, Appellant-Appellee,

versus

WALLACE BUTTS, Appellee-Appellant.

(AND REVERSE TITLE)

Appeal from the United States District Court for the Northern District of Georgia.

Before Tuttle, Chief Judge, Wisdom, Circuit Judge, and McRae, District Judge.

JUDGMENT—Filed May 8, 1964

By the Court:

On Consideration of the motion of appellant to dismiss appellee's cross appeal, and of appellee's withdrawal of his cross appeal, It Is Ordered that appellee be, and he is hereby granted permission to withdraw his cross appeal reserving his amendment filed February 24, 1964 to his notice of cross appeal.

[fol. 2]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

APPELLANT'S DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed April 30, 1964

1. Plaintiff's Complaint (filed March 25, 1963).
2. Defendant's Answer (filed April 10, 1963).
3. Defendant's Amended Answer (filed July 29, 1963).
4. Defendant's Motion to Compel Plaintiff to Answer Certain Questions Which Plaintiff Declined to Answer on Deposition Taken May 3, 1963; with attached list of questions submitted to plaintiff which he refused to answer (filed May 16, 1963).
5. Order of Judge Lewis R. Morgan Compelling Plaintiff to Answer Questions Listed in Defendant's Motion to Compel dated May 16, 1963 (filed June 5, 1963).
6. Order of Judge Lewis R. Morgan dated August 1, 1963, in regard to the Admissibility of Evidence of Alleged Specific Acts of Misconduct of the Plaintiff.
7. Pre-trial Order (dated August 5, 1963).
8. Transcript of evidence of the following named witnesses for the defendant:

Hugh Fleming:
Line 1, page 100, through line 5, page 113.

[fol. 3] *George Burnett:*
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Line 6, page 128, through line 6, page 169.
Line 12, page 172, through line 12, page 207.

J. D. Bolton:
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Jack C. Gorday:
Line 21, page 246, through line 23, page 252.

Coach Johnny Griffith:
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Line 21, page 369, through line 3, page 374.

Coach Frank Inman:
Line 15, page 374, through line 10, page 397.

Coach Leroy Pearce:
Line 3, page 399, through line 25, page 418.
Line 5, page 420, through line 13, page 445.
Line 11, page 446, through line 16, page 475.

9. Plaintiff's Motion for Directed Verdict:
Line 1, page 476, through page 483.

10. Transcript of evidence of the following named witnesses for the plaintiff:

Frank Graham, Jr.:
Line 3, page 492, through line 3, page 535.

Coach Paul William Bryant:
Line 23, page 537, through line 7, page 577.
Line 12, page 578, through line 13, page 592.
Line 1, page 593, through line 17, page 602.

[fol. 4] *Jimmy Sharp:*
Line 13, page 603, through line 11, page 612.

Charles Pell:
Line 16, page 613, through line 21, page 628.

John Gregory:
Line 19, page 629, through line 17, page 630.
Line 7, page 632, through line 19, page 667.

James Wallace Butts:
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Line 14, page 712, through line 2, page 719.
Line 23, page 724, through line 13, page 736.

Line 16, page 738, through line 13, page 746.
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LeRoy Jordon:
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Charles Louis Trippi:
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Raymond W. Clark:
Line 20, page 781, through line 10, page 786.

Robert Wallace Williamson:
Line 4, page 787, through line 24, page 793.

Mickey Babb:
Line 8, page 795, through line 4, page 809.

Samuel Richwine:
Line 16, page 809, through line 21, page 813.

[fol. 5] *Brigham Everett Woodward:*
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James Wallace Butts: (Continued)
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Proffer of evidence made by defendant's counsel in regard to specific acts of misconduct of plaintiff:
Line 1, page 892, through line 22, page 907.

John Carmichael:
Line 1, page 878, through line 21, page 890.
Line 5, page 908, through line 14, page 939.
Line 1, page 1000, through line 4, page 1005.

Frank Graham, Jr.:
Line 15, page 939, through line 1, page 961.
Line 1, page 962, through line 6, page 998.
Line 18, page 1007, through line 13, page 1015.

Clay D. Blair, Jr.:
Line 9, page 1020, through line 5, page 1042.

Roger Kahn:
Line 20, page 1042, through line 14, page 1063.
Line 13, page 1064, through line 19, page 1069.

[fol. 6] *William C. Hartman, Jr.:*
Line 14, page 1070, through line 5, page 1090.
Line 3, page 1091, through line 14, page 1104.
Line 19, page 1120, through line 18, page 1133.

Charles Davis Thomas:
Line 5, page 1135, through line 11, page 1147.

Robert Henry Edwards:
Line 21, page 1151, through line 20, page 1152.

Furman Bisher:
Line 12, page 1156, through line 7, page 1161.

John C. Carmichael: (continued)
Line 20, page 1162, through line 15, page 1192.
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Line 13, page 1195, through line 11, page 1199.

11. Transcript of evidence of following named rebuttal witnesses of defendant:

Harold Heckman:
Line 10, page 1216, through line 10, page 1219.
Line 7, page 1223, through line 20, page 1223.

William T. Bradshaw:
Line 14, page 1224, through line 9, page 1236.

R. H. Driftmier:
Line 18, page 1236, through line 1, page 1240.

[fol. 7] *Dr. O. C. Aderhold:*
Line 8, page 1241, through line 9, page 1267.
Line 1, page 1269, through line 15, page 1289.
Line 1, page 1292, through line 5, page 1299.
Line 7, page 1300, through line 4, page 1301.

Dr. Hugh Mills:
Line 2, page 1305, through line 20, page 1307.
Line 23, page 1307, through line 11, page 1309.
Line 17, page 1313, through line 11, page 1315.

J. D. Bolton:
Line 1, page 1316, through line 5, page 1319.
Line 3, page 1320, through line 5, page 1331.

Frank Scoby:
Line 1, page 1340, through line 9, page 1354.
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Dr. H. M. Davis:
Line 14, page 1359, through line 17, page 1362.

Frank Scoby: (Continued)
Line 8, page 1365, through line 1, page 1384.
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Dr. O. C. Aderhold: (Continued)
Line 19, page 1398, through line 13, page 1406.

12. Transcript of evidence of following named rebuttal witnesses of plaintiff:

[fol. 8] *Dr. Frank Anthony Rose:*
Line 1, page 1409, through line 8, page 1447.
Line 6, page 1448, through line 6, page 1458.
Line 1, page 1459, through line 5, page 1459.

James Wallace Butts (Continued)
Line 13, page 1459, through line 21, page 1461.

13. Plaintiff's Requested Instructions to the Jury Identified as Number 5, 13 and 14.

14. Defendant's Requested Instructions to the Jury Identified as Number 3, 6, 8 and 14.

15. Plaintiff's Counsels' Argument to the Jury:
    Line 1, page 1534, through line 20, page 1557.
    Line 8, page 1560, through line 2, page 1591.

16. Charge of the Court to the Jury (line 16, page 1616 through line 13, page 1646, of the original record).

17. Transcript of Defendant's Exceptions to the Court's Charge to the Jury (line 11, page 1656, through line 23, page 1660, of the original record).

18. Judgment entered August 20, 1963.

19. Defendant's Motion for New Trial (filed August 29, 1963).

20. Defendant's Motion for Judgment Notwithstanding the Verdict (filed August 29, 1963).

[fol. 9] 21. Order of Judge Lewis R. Morgan, dated January 14, 1964, Denying Defendant's Motion for Judgment Notwithstanding the Verdict.

22. Order of Judge Lewis R. Morgan, dated January 14, 1964, Granting Defendant's Motion for New Trial, Unless Plaintiff Remit All But $460,000.00 of Judgment, Rendered in His Favor on August 20, 1963.

23. Order of Judge Lewis R. Morgan, dated January 15, 1964, Amending His Previous Order of January 14, 1964, on Defendant's Motion for New Trial.

24. Consent of Plaintiff to Remit (dated January 20, 1964).

25. Judgment of January 22, 1964, setting aside previous Judgment Rendered August 20, 1963, and Entering Judgment for Plaintiff in the Amount of $460,000.00 and Overruling Defendant's Motion for New Trial.

26. Defendant's Notice of Appeal (filed January 24, 1964).

27. Plaintiff's Notice of Cross-Appeal (filed January 30, 1964).

28. Rule 10 entitled "Pre-trial and Trials" of the United States District Court for the Northern District of Georgia, as promulgated March 1, 1962, by the three Judges of said Court (including the form of Pre-trial Order prescribed by said rule).

29. Deposition of Wallace Butts taken May 3, 1963:
    Line 11, page 58, through line 17, page 58.

[fol. 10]

30. Deposition of Wallace Butts taken July 16, 1963:
    Line 6, page 92, through line 7, page 93.

31. Transcript of pretrial conference dated July 8, 1963:
    Line 1, page 170, through line 2, page 182.
    Line 20, page 184, through line 20, page 187.

32. Transcript of pre-trial conference dated July 29, 1963:

    Line 24, page 121, through line 3, page 137.
    Line 2, page 147, through line 12, page 147.
    Line 18, page 165, through line 1, page 167.
    Line 24, page 179, through line 10, page 180.

33. Transcript of proceedings on December 10, 1963, in regard to defendant's Motions for New Trial and Judgment Notwithstanding the Verdict:

    Line 2, page 124, through line 17, page 125.
    Line 4, page 126, through line 13, page 126.
    Line 11, page 155, through line 2, page 157.

34. Documents introduced by defendant and admitted:

    Clerk's Number:

    4—The Saturday Evening Post—issue of 3/23/63 (only the article entitled "The Story of a College Football Fix.")

11—Butts' financial statement of July 17, 1961.

12—Burnett notes (seven pages).

13—Toll ticket (Butts to Bryant call) (both sides).

14—Toll ticket (Bryant to Butts call) (both sides).

[fol. 11]

19—Letter to Therrell—dated 3/26/63.

20—Letter—Butts to Aderhold—dated 2/23/63.

21—Letter—Rose to Aderhold—dated 3/6/63.

34—NCAA Const. and By-Laws (portion) (only one page).

35. Documents introduced by plaintiff and admitted:

Clerk's Number:

6—Memorandum addressed by Mr. Blair to staff members of The Saturday Evening Post.

16—Communication from Bernie Moore to Southeastern Conference Institution on unnecessary roughness in college football.

22—Financial Statement of Curtis Publishing Company (page 1—being a Consolidated Balance Sheet).

Submitted by: Welborn B. Cody, Attorney for Defendant.

Of Counsel: Kilpatrick, Cody, Rogers, McClatchey & Regenstein, 1045 Hurt Building, Atlanta, Georgia 30303, Jackson 2-7420.

[fol. 12] Certificate of Service (omitted in printing).

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

DESIGNATION BY APPELLEE OF ADDITIONAL MATTERS TO BE INCLUDED IN THE RECORD—Filed April 30, 1964

Appellee, as authorized by Rule 23(a) of the above named court, designates the following additional matters to be printed in the record in this action, in addition to those already designated by Appellant:

1. Motion of plaintiff to exclude all evidence obtained as a result of the alleged intercepted telephone conversation. (Identified in the Index of the Clerk of the United States District Court, Northern District of Georgia in this case as Volume I, Page No. 50).

[fol. 13] 2. Order of Judge Lewis R. Morgan dated 20th day of May 1963 denying plaintiff's motion to exclude evidence obtained as a result of telephone conversation. (Identified in the Index of the Clerk of the United States District Court, Northern District of Georgia in this case as Volume 1, Page No. 102).

3. Notice of amendment of plaintiff's cross appeal filed in Office of the Clerk, United States District Court, Northern District of Georgia, February 24, 1964.

4. Defendant's counsels' argument to the jury:
Line 5, page 1504, through line 5, page 1533 of Volume 3 of the Court Reporter's Transcript of proceedings in the trial court.

Line 23, page 1591, through line 25, page 1615 of Volume 3 of the Court Reporter's Transcript of proceedings in the trial court.

5. Jury's verdict as returned in open court:
Line 15, page 1662, through line 9, page 1663 from Volume 3 of the Court Reporter's Transcript of proceedings in the trial court.

6. Documents introduced by plaintiff and admitted in evidence:

CLERK'S NUMBER:

8 Check requisition to Milton Flack—$500.00 being voucher issued by Curtis Publishing Company.

[fol. 14]

9 Check requisition to Frank Graham, Jr.—$2,000.00, being voucher issued by Curtis Publishing Company.

10 Check requisition to Furman Bisher—$1,000.00, being voucher issued by Curtis Publishing Company.

11 Check requisition to Pierre Howard—$500.00 being voucher issued by Curtis Publishing Company.

12 Check requisition to Pierre Howard for Burnett, 2-26-63, $2,000.00, voucher issued by Curtis Publishing Company.

13 Check requisition to Pierre Howard for Burnett, $3,000.00, being voucher issued by Curtis Publishing Company.

14 Check requisition to Frank Graham, Jr., for expenses incurred, $512.09, being voucher issued by Curtis Publishing Company.

15 Check requisition to Frank Graham, Jr., $38.59, being voucher issued by Curtis Publishing Company.

17 Communication to Intercollegiate Football Coaches, Commissioners and Officials, entitled "Unwarranted Viciousness and Brutality in our College Game."

21 Copy of a letter from Frank Graham, Jr. to Pierre Howard, 2-22-63.

[fol. 15]

24 The article entitled "Father is a Football Coach" beginning at page 37 in the November 20, 1954 issue of The Saturday Evening Post.

25 The article entitled "Georgia Plays for Keeps" beginning at page 28 of the November 4, 1949 issue of The Saturday Evening Post.

26 Copy of letter to J. D. Bolton from Wallace Butts dated 10-22-62.

27 Copy of letter to J. D. Bolton from Wallace Butts dated 4-27-62.

28 Copy of letter to Coach Johnny Griffith from Wallace Butts dated 10-22-62.

29 Copy of letter to Coach Johnny Griffith from Wallace Butts dated 2-26-63.

7. Transcript of pre-trial conference dated July 8, 1963:
Line 5, page 48, through line 14, page 50.
Line 20, page 62, through line 21, page 62.
Line 15, page 145 through line 1, page 146.

8. Transcript of pre-trial conference dated July 29, 1963:
Line 17, page 107 through line 19, page 108.
Line 11, page 121 through line 23, page 121.

9. Transcript of evidence of the following named witnesses: (From the "Court Reporter's Transcript of Proceedings").

[fol. 16]

GEORGE BURNETT:
Line 6, page 128 through line 9, page 169.

HUGH FLEMMING:
Line 22, page 486 through line 18, page 488.

JAMES WALLACE BUTTS:
Line 23, page 724 through line 23, page 752.

LEROY JORDON:
Line 19, page 755 through line 17, page 769.

SAMUEL RICHWINE:
Line 16, page 809 through line 6, page 814.

JAMES WALLACE BUTTS: (Continued)
Line 1, page 844 through line 25, page 849.

WILLIAM C. HARTMAN, JR.:
Line 14, page 1070 through line 6, page 1090.

HAROLD HECKMAN:
Line 12, page 1216 through line 8, page 1221.

DR. O. C. ADERHOLD:
Line 1, page 1269 through line 24, page 1289.

DR. HUGH MILLS:
Line 12, page 1309 through line 16, page 1313.

J. D. BOLTON:
Line 6, page 1319 through line 2, page 1320.

[fol. 17]
FRANK SCOBY:
Line 10, page 1363 through line 7, page 1365.
Line 14, page 1384 through line 3, page 1385.

Respectfully submitted,

William H. Schroder, Allen E. Lockerman, T. M. Smith, Attorneys for Wallace Butts, Appellee.

Of Counsel: Troutman, Sams, Schroder & Lockerman, 1605 William Oliver Bldg., Atlanta, Georgia 30303.

Certificate of Service (omitted in printing).

[fol. 19]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

Civil Action No. 8311

WALLACE BUTTS, Plaintiff,

versus

CURTIS PUBLISHING COMPANY, Defendant.

COMPLAINT—Filed March 25, 1963

Now comes Wallace Butts, as plaintiff, and names the Curtis Publishing Company as defendant, and for complaint says:

1.

Jurisdiction of this Court is founded on diversity of citizenship and amount. Plaintiff is a resident and citizen of the State of Georgia, residing in the City of Athens, Clark County, Georgia. The defendant is a corporation organized and existing under the laws of the State of Pennsylvania, with its principal place of business in the City of Philadelphia. Defendant maintains an office and place of business at 805 Peachtree Street, N. E., Atlanta, Georgia, at which place service of this complaint may be perfected. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00.

[fol. 20]

2.

Plaintiff claims damages from the defendant in the amount of Ten Million ($10,000,000.00) Dollars, as a result of a certain libelous publication by defendant as hereinafter alleged.

3.

Plaintiff has been engaged in the football coaching profession for approximately 35 years. Plaintiff began his coaching career in Madison, Georgia as head coach of Madison Agricultural and Mechanical School. After spending four years at Madison, plaintiff became football coach at Georgia Military College in Milledgeville, Georgia where, after remaining three years, he went to Louisville, Kentucky where he coached Louisville Male High for a period of three years. In 1938 plaintiff became assistant coach at the University of Georgia under Coach Joel Hunt and in the following year was elevated as head coach of the Georgia Bulldogs, which position he held until 1961 at which time he became Athletic Director of the University of Georgia.

4.

Plaintiff, during his career, has enjoyed a national reputation as a successful and respected member of the coaching profession and has been accorded many honors among which was his election in 1959 as president of the Football Coaches Association, a national organization of football coaches throughout America. Upon invitation he has coached the College All Stars, the Blue-Grey All Star Game and the North-South All Star Game. Plaintiff has during his career been widely sought as a speaker and lec- [fol. 21] turer at clinics, banquets and other such public gatherings throughout the United States. In addition, plaintiff has been approached and offered employment as head football coach by several colleges and professional football teams in the country due entirely to his reputation as a successful member and leader in his profession.

5.

The defendant is engaged in the publishing of several magazines and periodicals, the best known of which is the Saturday Evening Post. The Saturday Evening Post has

in years past been the chief and most valuable asset of the defendant due to its vast and impressive circulation and consequent advertising revenue. However, in the last several years the advertising revenues of the Saturday Evening Post have declined radically and drastically to the point that the magazine lost its status as a valuable income producing asset and showed staggering deficits. In an effort to rescue its foundering publication, the defendant elected new directors who in turn elected a new president who in turn made sweeping changes in the editorial staff and management of the Saturday Evening Post.

6.

In an apparent last ditch effort to bolster its sagging circulation, which in turn would increase advertising revenues, the Saturday Evening Post has resorted recently to the publishing and printing of lurid, defamatory and exposé type matter concerning nationally known personalities. All of this is in keeping with its announced new editorial policy as delivered recently through its Vice [fol. 22] President and Director of Editorial Development, Clay Blair, Jr., of " . . . sophisticated muckraking. . . . We are going to provoke people, make them mad."

7.

Specifically, the defendant did wilfully, maliciously and falsely publish a libelous article concerning the plaintiff in its most recent issue bearing date March 23, 1963 entitled, "The Story of a College Football Fix" with sub-title "How Wally Butts and Bear Bryant Rigged a Game Last Fall."

8.

Plaintiff was informed prior to the actual circulation of said article on or about March 18, 1963, that the defendant had under consideration such an article and plaintiff did,

through his attorney, under date of March 11, 1963, send a telegram to the defendant, followed by a letter of the same date, advising the defendant that the proposed content of said article was false and that in the interest of fair and accurate reporting, said article be not published. A copy of said telegram and letter, marked respectively Exhibits "A" and "B" are incorporated herein by reference.

9.

In addition, and after said article was published and circulated, plaintiff, on March 18, 1963, pursuant to Georgia Code Section 105-720, requested that the defendant retract and correct the defamatory statements concerning the plaintiff in its said article, which to date defendant has refused to so do or even to reply to said request. A copy [fol. 23] of said telegram marked Exhibit "C" is incorporated herein by reference.

10.

Plaintiff alleges that the publication of said libelous article has caused plaintiff extreme mortification and embarrassment in that same is a direct insult and attack on his honor, character, and integrity as a football coach. As stated in said article, "but careers will be ruined, that is true," plaintiff's career as a member of the football coaching profession has been ruined and destroyed by this scurrilous and contemptible defamation.

11.

The statements and insinuations contained in said article have damaged plaintiff as aforesaid in the following particulars:

(a) Plaintiff is charged in large block letters in the very title and sub-title of the article with being a "rigger and fixer."

(b) In an italicized editorial, plaintiff is charged 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, plaintiff is relegated to a status worse than that of "disreputable gamblers", a corrupt person who, employed to "educate and to guide young men" betrays or sells out his pupils.

(c) Plaintiff is charged with rigging and fixing the Alabama-Georgia football game with Coach Bryan as a gambling device in order to restore his financial resources.

[fol. 24]

(d) Plaintiff is charged with such a degree of corruptness and foulness that his betrayed players, as a result of plaintiff's alleged deception, fixing and rigging, were forced into the game like "rats in a maze", and "took a frightful physical beating."

(e) Defendant, in a final act of malice, contempt and editorial irresponsibility, closes its article with its definition of plaintiff as a fixer as being one who never leaves open a "chance" by stating "when a fixer works against you, that is the way he likes it."

12.

Plaintiff brings this action and seeks a recovery of Five Million ($5,000,000.00) Dollars in general damages to compensate him for the injury to his peace, happiness and feelings, and in addition thereto sues for Five Million ($5,000,000.00) Dollars in the nature of punitive damages to deter the defendant from repeating this trespass on plaintiff's honor, reputation and integrity.

Plaintiff Demands a Jury Trial.

Wherefore, plaintiff prays that process issue in terms of law, that the defendant be required to come into this Honorable Court and make its answer and that the plain-

tiff have judgment against the defendant for actual and [fol. 25] punitive damages in the sum of Ten Million ($10,000,000.00) Dollars and costs.

William H. Schroder, Allen E. Lockerman, T. M. Smith, Jr.

Of Counsel: Troutman, Sams, Schroder & Lockerman, 1605 William-Oliver Building, Atlanta 3, Georgia.

IN UNITED STATES DISTRICT COURT

ANSWER—Filed April 10, 1963

Now Comes, Curtis Publishing Company, the defendant in the foregoing case, and files this its Answer and shows to the Court:

First Defense

1. Defendant admits the averments of paragraph 1 of the Complaint.

2. Defendant admits that plaintiff claims damages from the defendant as a result of the publication complained of, [fol. 26] but denies each and every other averment contained in paragraph 2 of the Complaint.

3. Defendant admits the averments of paragraph 3 of the Complaint.

4. Defendant admits the averments of paragraph 4 of the Complaint.

5. Defendant admits the averments contained in the first sentence of paragraph 5 of the Complaint. The remaining averments of paragraph 5 of the Complaint require no answer, being subject to a Motion to Strike heretofore filed.

6. The averments of paragraph 6 of the Complaint require no answer, the same being subject to a Motion to Strike heretofore filed.

7. Defendant admits publication of the article referred to in paragraph 7 of the Complaint, but denies each and every other averment contained in said paragraph.

8. Defendant admits that the telegram and letter referred to in paragraph 8 of the Complaint were sent on behalf of the plaintiff and received by the defendant. Defendant is without knowledge or information sufficient to form a belief as to what information plaintiff had in his possession at the time of the sending of said telegram and letter. Defendant denies each and every other averment contained in paragraph 8 of the Complaint.

9. Defendant admits that plaintiff sent, and the defendant received, the telegram referred to in paragraph 9 of the Complaint and identified as Exhibit "C". Defendant [fol. 27] also admits that it has refused, and still refuses, to comply with the request contained in said telegram. Defendant denies each and every other averment contained in paragraph 9 of the Complaint.

10. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 10 as to the effect of the publication of the article complained of on plaintiff. Defendant denies each and every other averment contained in paragraph 10 of the Complaint.

11. Defendant denies each and every averment contained in paragraph 11 of the Complaint.

12. Defendant avers that paragraph 12 of the Complaint requires no answer.

Second Defense

1. Defendant avers that the statements in the article complained of which are of and concerning the plaintiff, are true.

Third Defense

1. The Complaint fails to state a claim upon which relief can be granted.

Wherefore, having fully answered, defendant prays for judgment in its behalf.

Welborn B. Cody, Attorney for Defendant.

[fol. 28] Of Counsel: Smith, Kilpatrick, Cody, Rogers & McClatchey, 1045 Hurt Building, Atlanta 3, Georgia, Jackson 2-7420.

In United States District Court

Motion of Plaintiff to Exclude All Evidence Obtained as a Result of the Alleged Intercepted Telephone Conversation—Filed May 3, 1963

This case involves statements made by defendant in an article published under date of March 23, 1963, entitled "The Story of a College Fix," plaintiff asserting said statements to be libelous and defendant asserting them to be true. For the purpose of this motion only, a copy of said article is hereto attached, marked Exhibit "A".

A reading of the article set up as Exhibit "A" states that it is based on an alleged telephone conversation between plaintiff and Paul (Bear) Bryant, intercepted by one George Burnett. If any of said conversation took place as alleged, neither the interception by Burnett nor the use of the information obtained by Burnett or by defendant or anyone was authorized by either party to said conversation, and under the provisions of 47 U.S.C. § 605, no person having received the contents, substance, purport, effect or [fol. 29] meaning thereof, knowing how such information was obtained may divulge or publish the existence, contents, substance, purport, effect or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto.

If any such conversation took place as alleged by defendant, the use thereof in any manner is prohibited by such statute and, accordingly, plaintiff moves the Court for a ruling that no part of said alleged telephone conversation or any information gained as the result thereof may be used in evidence against plaintiff and that defendant may not on discovery make inquiries concerning the existence of or the contents of said alleged telephone conversation or any facts resulting from the knowledge thereof by defendant.

Plaintiff shows that a ruling at this time will substantially shorten the nature and extent of discovery and the scope of the trial.

W. H. Schroder, Allen E. Lockerman, T. M. Smith, Jr., Attorneys for Plaintiff.

Of Counsel: Troutman, Sams, Schroder & Lockerman, 1605 William Oliver Building, Atlanta 3, Georgia.

[fol. 30]

IN UNITED STATES DISTRICT COURT

ORDER DENYING PLAINTIFF'S MOTION—Filed May 20, 1963

On May 3, 1963, the plaintiff in the above-styled case filed a motion to exclude all evidence obtained as a result of the alleged intercepted telephone conversation which may be offered in evidence against the plaintiff upon the trial of this case. The plaintiff contends that if any of the said conversation took place as alleged, neither the interception by Burnett nor the use of the information obtained by Burnett or by the defendant or by anyone was authorized by either party to the said conversation, and under the provisions of 47 U.S.C., Section 605, no person having received the contents, substance, purport, effect, or meaning thereof, knowing how such information was obtained, may divulge or publish the existence, contents, substance, pur-

port, effect, or meaning of the same, or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto. The plaintiff believes that, if any such conversation took place as alleged by the defendant, the use of this conversation in any manner is prohibited by the statute.

The defendant has filed its brief in opposition to the plaintiff's motion to exclude evidence relating to this alleged telephone conversation, and contends therein that a ruling at this time would be premature, since neither the Court nor the parties can accurately foresee the precise circumstances in which evidence relating to this conversation might arise, nor the numerous potential sources from which such evidence might be obtained.

[fol. 31] The Court wishes to make it clear that its opinions contained in this order constitute a *preliminary* ruling for the purposes of facilitating discovery and to serve as an indication of the present thinking of the Court. This is in no way a *final* ruling on the admissibility of evidence relating to evidence relating to the subject telephone conversation, as that determination will be made upon the trial of this case in August.

The principal thrust of the plaintiff's motion is based upon 47 U.S.C., Section 605, which has been set forth above. A violation of this provision is made criminal by 47 U.S.C., Section 501. It seems to this Court that Congress, through the enactment of this statute, sought to prohibit mechanical tampering with telephone communications by deliberate acts of wire tapping. As Judge Holtzoff said, in *United States* v. *Sullivan,* 116 F. Supp. 480, 481:

> "It is obvious from the phraseology of the statute that it was aimed at actions of two types: First, it sought to prohibit a telephone switchboard operator from divulging any conversation that may be overheard, or telegram or radio operator from disclosing the contents of a telegram or radiogram; and Second, *it sought to preclude any unauthorized person from*

> *surreptitiously attaching some mechanical apparatus to a telephone wire* and thereby listening to or otherwise intercepting communications passing over the wire without the knowledge of the parties to the conversation or message as the case may be." (Emphasis supplied)

In *United States* v. *Guller,* 101 F. Supp. 176, 178, in holding telephone conversations of the defendant which were [fol. 32] overheard by the eavesdropping of federal agents in an adjoining hotel room admissible over an objection based on Section 605, the District Court emphasized the absence of any physical interference with the communications facilities:

> "The interception forbidden by Section 605 of the Communications Act of 1934, 47 U.S.C.A., Section 605, must be by some mechanical interpositions in the transmitting apparatus itself, that is, the interjection of an independent receiving device between the lips of the sender and the ear of the receiver."

In *Irvine* v. *People of the State of California,* 347 U.S. 128, 74 S. Ct. 381, 98 L. Ed. 561, the Supreme Court refused to extend the prohibition of Section 605 to electronic interceptions which were not achieved by wiretapping.

In this case, a concealed microphone was installed in the hall of a house, and a hole was bored in the roof of the house, from which wires were strung to transmit to a neighboring garage whatever sounds the microphone might pick up. Officers were posted in the garage to listen. Later, the microphone was placed in a closet where the device remained until its purpose of enabling the officers to overhear incriminating statements was accomplished. Justice Jackson remarked as follows:

> "We should note that this is not a conventional instance of 'wire tapping'. Here the apparatus of the officers was not in any way connected with the tele-

phone facilities, there was no interference with the communications system, there was no interception of any message. All that was heard through the microphone [fol. 33] was what an eavesdropper, hidden in the hall, the bedroom, or the closet, might have heard. *We do not suppose it is illegal to testify to what another person is heard to say merely because he is saying it into a telephone.* We cannot sustain the contention that the conduct or reception of the evidence violated the Federal Communications Act. 48 Stat. 1103, 47 U.S.C., Sec. 605. Cf. *Nardone* v. *United States,* 308 U.S. 338; *Goldman* v. *United States,* 316 U. S. 129; *Schwartz* v. *Texas,* 344 U. S. 199." (Emphasis supplied)

In *De Lore* v. *Smith,* 67 Ore. 304, 132 Pac. 521, Judge McNary, of the Supreme Court of Oregon, stated:

"During the progress of the trial, defendant, for the purpose of showing knowledge upon the part of plaintiff of the return of the cattle to Gilcrest, gave testimony to the effect that he overheard a conversation between plaintiff and her daughter wherein the former was told the cows had been re-delivered to Gilcrest. Plaintiff's counsel objected to the testimony for the reason that the witness was an eavesdropper and thereby committed 'an act of gross impropriety and a moral wrong, and a witness testifying to such a conversation could not show any of the elements or conditions which must first be shown in order to admit evidence of such a conversation'. Defendant overheard the conversation, to which objection was made, at a point on the telephone intermediate between the home of plaintiff and her daughter, who is the wife of Gilcrest. In qualifying himself as a witness, defendant stated that *by chance he took down the receiver of the telephone* [fol. 34] when the parties were engaged in conversation and that he heard the declaration and knew the voices of the parties conversing. Since a time prac-

> tically concurrent with the use of the telephone as a medium of communication, the Courts have held that a conversation had over the telephone was admissible when the witness could testify he recognized the voice of the party speaking. *While the practice of eavesdropping or 'cutting in' on a telephone is most despicable, yet we cannot say as a rule of evidentiary law that the practice of this impropriety disqualifies a person who has qualified himself by testifying he recognized the voice of the speaker. Under the circumstances, the question whether the conversation did take place, its nature, and whether defendant correctly identified the voices engaged in the conversation was a fact for the jury.*" (Emphasis supplied)

In view of these authorities, it is the preliminary ruling of this Court that evidence relating to the Butts-Bryant telephone conversation is admissible in this civil action. Accordingly, the plaintiff's motion is denied.

The plaintiff has filed with this Court a motion for reconsideration of the Court's order of May 9, 1963, which refused to compel the defendant to answer Interrogatory No. 28 relating to the number of libel suits now pending against the defendant. Inasmuch as the Court has made a thorough study of this point, and has determined that it would be unwise and impractical to bring into this case evidence pertaining to other suits having nothing to do with the issues involved in the case at bar, the plaintiff's motion for reconsideration of the order dated May 9, 1963, is hereby denied.

[fol. 35]

It Is So Ordered.

This the 20th day of May, 1963.

Lewis R. Morgan, United States District Judge.

In United States District Court

Order Concerning Motion to Compel Answers to Certain Questions—Filed June 5, 1963

The defendant having filed with this Court a motion to compel answers to certain questions heretofore propounded to the plaintiff by deposition, and the Court having given consideration to the questions propounded by the attorneys for the defendant, and the plaintiff having refused to answer said questions upon advice of counsel, and it appearing to the Court that the answers to these questions propounded might be relevant and material to the issues involved, it is the order of the Court that the plaintiff be required to give answer to the questions propounded by the attorneys for the defendant at a time and place to be mutually agreed upon by the parties.

Upon motion seasonably made by the attorneys for the plaintiff, let the motion to compel and the answers thereto be placed in a sealed envelope and filed in the Clerk's Office of this Court, and the contents of the motion and the answers thereto not be revealed by the Clerk of the Court [fol. 36] or by the defendant except by permission of the Court, such as at the trial under circumstances as this Court specifies, all in accordance with the authority granted under Rule 30(b) of the Federal Rules of Civil Procedure.

It Is So Ordered.

This the 5th day of June, 1963.

Lewis R. Morgan, United States District Judge.

IN UNITED STATES DISTRICT COURT

AMENDMENT TO DEFENDANT'S ANSWER—Filed July 29, 1963

Now Comes the defendant in the foregoing case and files this, its Amendment to the Answer heretofore filed, and for cause thereof shows to the Court:

1.

At the time the original Answer was filed, defendant made no answer to a part of paragraph 5 of the Complaint, and no answer to paragraph 6 of the Complaint, because simultaneously with the filing of said Answer the defendant filed a Motion to Strike part of paragraph 5 and all of paragraph 6 of the Complaint, which Motion to Strike has since been overruled.

[fol. 37] 2.

Defendant therefore answers that part of paragraph 5 of the Complaint which has not been heretofore answered, by alleging as follows:

> 5. Defendant admits that it is engaged in the publishing of several magazines and periodicals, the best known of which is The Saturday Evening Post; that The Saturday Evening Post has been and continues to be a valuable asset of the defendant; that beginning in 1960 and continuing until the middle of 1962 the advertising revenues of The Saturday Evening Post, as well as other magazines, declined; that in April 1962, the Board of Directors of defendant was increased from eleven to thirteen in number and two new directors were elected to fill the new directorships; that a new President of defendant was elected by the Board of Directors in July, 1962; and that substantial changes in the editorial staff and management of defendant's magazines, including The Saturday Evening Post,

have been made. Defendant denies each and every other averment contained in paragraph 5 of the Complaint.

3.

Answering paragraph 6 of the Complaint which has not been heretofore answered, defendant alleges as follows:

6. Defendant admits that beginning in the latter part of 1962, The Saturday Evening Post adopted an editorial policy of "sophisticated muckraking" in the [fol. 38] sense of printing the truth about the grave dangers facing the country, including the threat from outside the country and the deterioration of moral values within the country. Defendant denies each and every other averment contained in paragraph 6 of the Complaint.

Wherefore, having answered, defendant prays that this, its Amendment, be allowed and made a part of the record in said case.

Welborn B. Cody, Thomas E. Joiner, E. J. Boudurant, Jefferson Davis, Jr., Attorneys for Defendant.

Of Counsel: Smith, Kilpatrick, Cody, Rogers & McClatchey, 1045 Hurt Building, Atlanta, Georgia, 30303. Jackson 2-7420

Certificate of Service (omitted in printing).

[fol. 39]

IN UNITED STATES DISTRICT COURT

ORDER REGARDING ADMISSIBILITY OF EVIDENCE—
Filed August 1, 1963

The defendant in this case contends that it intends to offer evidence at the trial as to specific acts of misconduct on the part of the plaintiff which fall into two categories. The first category includes acts of dishonesty on the part of the plaintiff in his dealings with the University of Georgia and also certain violations by him of standards of ethics to which the plaintiff is subject by reason of his employment with the University of Georgia, the University being a member of the Southeastern Conference and the National Collegiate Athletic Association. The second category concerning the activities of the plaintiff is that tending to show an illicit and adulterous relationship with a particular woman.

The defendant contends that under Rule 43(a) of the Federal Rules of Civil Procedure this evidence is admissible in Federal Courts. 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. *Woolworth,* 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.

[fol. 40] 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 the defendant has the right to show that the plaintiff's general character is bad, but cannot, in so doing, go into 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; *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 tendency 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 admissibility of such evidence, see *Wigmore on Evidence,* Third 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.

However, the defendant, should the plaintiff place his good character in issue, would have the right on cross-examination to go into special facts to ascertain the nature and extent of the knowledge of the witness. *Cox* v. *Strick-*[fol. 41] *land,* 101 Ga. 482; *Smith* v. *State,* 91 Ga. App. 360. But in so doing, it is not permissible to prove specific acts, except on cross-examination for the purpose of testing the knowledge of the defendant's witnesses, and except for the purpose of impeaching knowingly false statements made by the defendant himself to the jury or by his witnesses on cross-examination. *Sikes* v. *State,* 76 Ga. App. 993; *Mimbs* v. *State,* 189 Ga. 189, 192; *Green on Evidence,* Sec. 138.

Counsel will be governed in the trial of this case by this expression of opinion.

It Is So Ordered.

This the 31st day of July, 1963.

Lewis R. Morgan, United States District Judge.

IN UNITED STATES DISTRICT COURT

PRE-TRIAL ORDER—Filed August 5, 1963

This Pre-Trial Order supersedes the pleadings and shall govern the trial of the case, but this Order, in the interest of justice, will be amended upon motion timely made.

1. In this action jurisdiction of the court is invoked upon [fol. 42] the ground of diversity of citizenship. The jurisdiction of the court is not disputed.

(a) There are no motions now pending in the case.

(b) No further discovery is desired by the parties in advance of trial, except that the defendant desires to take the deposition of Fred Nichols before or during the trial.

2. The names of the parties in the above caption are correct and complete and there is no question of misjoinder or nonjoinder.

3. The jury shall be qualified as to relationship to the parties to the case and to the following as counsel for plaintiff, to-wit:

Henry B. Troutman
Robert S. Sams
William H. Schroder
Allen E. Lockerman
T. M. Smith
Henry B. Troutman, Jr.
T. M. Smith, Jr.
Tench C. Coxe
Harold C. McKenzie, Jr.
Robert L. Pennington

(a) The procedure to be followed concerning questions to be propounded to the jury has been discussed and agreed upon at a previous pre-trial hearing.

4. A summary by plaintiff's counsel of plaintiff's cause of action is as follows:

[fol. 43] Wallace Butts, head coach of the University of Georgia football team from 1939 to 1961 when he became Athletic Director, is suing Curtis Publishing Company claiming that his reputation as a football coach has been damaged by a false and libelous article published in the March 23rd issue of the Saturday Evening Post charging him with having fixed and rigged the 1962 football game between the University of Georgia and the University of Alabama, as a gambling device, by furnishing Georgia's plays, defensive patterns and all the significant secrets possessed by Georgia's football team to Paul Bryant, head football coach of the University of Alabama prior to the game. The plaintiff alleges that he has been damaged by said libelous article in the respects set forth in his complaint to the extent of $5,000,000.00 general damages and $5,000,000.00 punitive damages.

5. A summary of defendant's contentions, including all special defenses, is as follows:

Defendant admits the publication of the article but contends that the statements therein complained of which are of and concerning the plaintiff are true. Defendant denies the conclusions of the plaintiff as to what charges are made by the article. Defendant contends that the article is not libelous per se and denies that the article libeled the plaintiff, and denies that the plaintiff was in the coaching profession at the time of the publication complained of. Defendant denies that plaintiff is entitled to recover any damages by reason of the publication of the article of which plaintiff complains.

6. No further amendments to the pleading are contemplated by the parties.

[fol. 44] 7. The documents likely to be offered in evidence by the parties or of which they have knowledge have been identified at the pre-trial hearing held on July 29, 1963 or on depositions and assigned tentative numbers. It was agreed that some of the documents will be admitted in evidence without objections. The authenticity of most of the documents was agreed upon. It is not intended for this Order to limit either party in the introduction of other documents.

8. Counsel for the parties have furnished each other a list of the probable witnesses to be used at the trial.

9. Various memoranda of authorities by counsel for each party on unusual questions of law involved in the case have heretofore been supplied to the Court.

10. The Court has ruled over objection by counsel for plaintiff that the second defense, as stated in the Answer of the defendant, is a plea of justification. Therefore, the defendant at the trial of this case will have the burden of proving the truth of the statements in the article which are of and concerning the plaintiff and the defendant will introduce its evidence first and will have the opening and concluding arguments.

11. It is estimated that the trial of the case will require approximately two weeks.

This the 5th day of August, 1963.

Lewis R. Morgan, United States District Judge.

[fol. 45]

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

WALLACE BUTTS, Plaintiff,

versus Civil Action No. 8311

CURTIS PUBLISHING COMPANY, Defendant.

JUDGMENT—August 20, 1963

This action came on for trial before the Court and a jury, Hon. Lewis R. Morgan, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict.

It is Ordered and Adjudged that the plaintiff, Wallace Butts, recover of the defendant, Curtis Publishing Company, the sum of Sixty Thousand ($60,000.00) Dollars general damages, and Three Million ($3,000,000.00) Dollars punitive damages, with future interest thereon at the rate of seven (7) per cent as provided by law, and his costs of action.

Dated at Atlanta, Ga., this the 20th day of August, 1963.

B. G. Nash, Clerk, Ruth M. Stilwell, Deputy Clerk.

[fol. 46]

IN UNITED STATES DISTRICT COURT

DEFENDANT'S MOTION FOR NEW TRIAL—
Filed August 29, 1963

Now Comes the defendant in the foregoing case and moves the Court to set aside the verdict of the jury returned herein on August 20, 1963, and the judgment entered thereon on the same date, and to grant a new trial on the following grounds, to-wit:

1.

Because of the gross excessiveness of the verdict, awarding $3,000,000 in punitive damages is so exorbitant and flagrantly outrageous that it demonstrates beyond doubt that it is the product of bias and prejudice on the part of the jury and is in such an amount as to shock the conscience of the Court.

2.

That portion of the jury's verdict awarding the plaintiff $3,000,000 punitive damages, violates and abridges and cannot be sustained without violating and abridging the right of freedom of speech and of the press guaranteed by [fol. 47] the First and Fourteenth Amendments of the United States Constitution because:

(a) The amount of such damages rested in the sole discretion of the jury without regard to any standard or limitation which would safeguard or take cognizance of those Constitutional guarantees;

(b) The stated purpose of such damages under the charge was to deter the defendant from repeating the trespass, and to worn others not to commit a like

[File endorsement omitted]

offense, with the result that the award of punitive damages by the jury especially in the amount of $3,000,000, must constitute an attempt by the jury to effect a prior restraint upon future publication by this defendant or by other publishers or both;

(c) Georgia Code Sec. 105-2002, as construed by the Georgia courts, which defines the purpose of punitive damages in a libel action upon Georgia law and which in part served as the basis for the charge on that subject in this action, on its face permits the jury to attempt suppression of future publication by this defendant by an award of punitive damages;

(e) The amount of punitive damages, in the circumstances of this case, was so excessive as to violate and abridge through excessiveness alone, the guarantees of free speech and press.

[fol. 48]

3.

That portion of the jury's verdict awarding the plaintiff $3,000,000 punitive damages violates and abridges and cannot be sustained without violating and abridging defendant's rights to substantive and procedural due process of law under the Fifth and Fourteenth Amendments of the United States Constitution, because:

(a) The amount of such damages rested in the sole discretion of the jury without regard to any standard or limitation;

(b) The amount of such damages in the circumstances of this case was so excessive as to constitute a deprivation of property without due process of law.

4.

Sec. 105-2002 of the Georgia Code as construed by the courts of Georgia violates and abridges defendant's rights under the Fourteenth Amendment of the United States

Constitution because the amount of damages which could be imposed under that Section rests in the sole discretion of the jury without regard to any standard or limitation, which damages are imposed *ex post facto*.

5.

Because evidence indicates that a material witness for the plaintiff testified falsely on a material point, as more fully set forth in affidavits filed with The Honorable Lewis R. Morgan contemporaneously herewith, which affidavits are incorporated herein by reference.

[fol. 49]

6.

Because the Court erred in refusing to permit counsel for the defendant to examine witness J. D. Bolton and to introduce documentary evidence regarding numerous telephone calls made by the plaintiff between October, 1961 and February 1, 1963, which telephone calls were charged to the University of Georgia in the amount of $2,818.10. Said telephone calls were set forth in a 42-page document identified as defendant's Exhibit 17. Defendant contends that said telephone calls were made to individuals of questionable character, including a woman not his wife, to whom some 300 of said calls were made. That all of said telephone calls were charged to the University of Georgia, though none were in connection with the business of the University. The defendant proposed to show by the witness J. D. Bolton that defendant's Exhibit 17 was prepared by the plaintiff with the help of his secretary and with the help of the witness J. D. Bolton, and that after the list was completed, it was approved by the plaintiff as correct and the plaintiff so stated to J. D. Bolton. Defendant further proposed to show by the witness J. D. Bolton that it was not until after the institution of his litigation that the University officials learned of these telephone charges having been charged to the University of Georgia and that upon subsequent demand of the plaintiff for the

payment thereof, the plaintiff agreed that the list was correct and that he would reimburse the University. That thereafter on April 8, 1963, the plaintiff by letter to J. D. Bolton, Comptroller, agreed to make this payment, which letter was identified as defendant's Exhibit 18, and which letter was in the following language:

> "I accept the final figure of $2,818.10 as the correct amount I owe the Athletic Department of the Uni- [fol. 50] versity of Georgia for personal telephone calls charged to that account."

That the Court likewise excluded the foregoing letter from the evidence in said case after the same had been tendered by counsel for the defendant.

Defendant alleges and contends that the exclusion of such evidence and the refusal to permit defendant's counsel to examine J. D. Bolton with respect thereto was harmful and prejudicial to the defendant and constitutes grounds for a new trial.

7.

Because the Court erred in refusing to permit counsel for the defendant to introduce the depositions of George P. Anderson and William Baxter to prove the following facts:

(a) That they were employees of the Phoenix Hotel in Lexington, Kentucky in October, 1960.

(b) That plaintiff charged to the University of Georgia $155.70 of alcoholic and other beverages purchased at said Phoenix Hotel in Lexington, Kentucky from October 21 through October 23, 1960.

(c) That on October 21, 1960, a registration at the Phoenix Hotel in Lexington, Kentucky in the name of "Lindsey, E. C. and wife" was made and was noted to be charged to the University of Georgia.

[fol. 51] In connection with these depositions, defendant's counsel offered to prove that none of the items referred to in (b) above were in connection with the business of the University of Georgia and that the registration referred to in (c) above was, in fact, arranged by the plaintiff for the woman referred to in Paragraph 6 hereof and the bill for her room and other hotel charges was, in fact, charged to the University of Georgia though these were not in connection with any business of the University.

That the refusal of the Court to permit the defendant to introduce said evidence was harmful and prejudicial and constitutes grounds for a new trial.

8.

Because the Court erred in refusing to permit counsel for the defendant to introduce the deposition of the woman referred to in paragraph 6 hereof, and because the Court refused to permit counsel for the defendant to introduce into evidence the deposition of James C. Tracy, an employee of Delta Air Lines, Inc., which depositions were to prove the following facts:

(a) That on January 26, 1962, the woman referred to in paragraph 6 hereof traveled from Miami, Florida, to Orlando, Florida, in the company of the plaintiff, her air line ticket having been purchased by the plaintiff through the use of Air Travel Credit Card No. DLQ 2834 WDL 2 and charged to the University of Georgia Athletic Association.

(b) That on May 9, 1962, a passenger described as "E. C. Smith" traveled via Delta Air Lines from At-
[fol. 52] lanta, Georgia, to Miami, Florida, on an air line ticket purchased by plaintiff and charged on Air Travel Credit Card DLQ 2834 WDL 2 to the University of Georgia Athletic Association.

(c) That on July 10, 1962, said woman, in the company of plaintiff, traveled from Atlanta, Georgia, to

Miami, Florida, via Delta Air Lines tickets which were purchased by plaintiff through the use of Air Travel Credit Card DLQ 2834 WDL 2 and charged to the University of Georgia Athletic Association.

(d) That on September 19, 1962, a passenger designated as "E. Smith" traveled from Atlanta, Georgia, to Birmingham, Alabama, via Delta Air Lines, Inc., under a ticket purchased by plaintiff and charged on Air Travel Credit Card DLQ 2834 WDL 2 and charged to the University of Georgia Athletic Association.

(e) That on November 7, 1962, a passenger designated as "E. Smith" traveled from Atlanta, Georgia, to Jacksonville, Florida, via Delta Air Lines, Inc., under a ticket purchased by plaintiff and charged on Air Travel Credit Card DLQ 2834 WDL 2 and charged to the University of Georgia Athletic Association.

(f) That on December 27, 1962, plaintiff and a passenger designated as "E. Smith" traveled from Birmingham, Alabama, to Atlanta, Georgia, via Eastern Air Lines, Inc., under tickets purchased by plaintiff and charged to Air Travel Credit Card DLQ 2834 WDL [fol. 53] 2 and charged to the University of Georgia Athletic Association.

(g) That on all of the transportation tickets referred to in subparagraphs (a) through (f) herein the plaintiff signed for the same and authorized them to be charged to the University of Georgia Athletic Association.

(h) That said "E. C. Smith" and "E. Smith", as referred to in subparagraphs (b), (d), (e) and (f) hereof, was in fact the same woman referred to in paragraph 6 of this Motion, and that none of said trips had any connection with business of the University of Georgia Athletic Association.

Defendant alleges and contends that the exclusion of such evidence was harmful and prejudicial to it and constitutes grounds for a new trial.

9.

Because the Court erred in refusing to permit counsel for the defendant to introduce the deposition of the woman referred to in paragraph 6 hereof, which deposition was taken by defendant's counsel on July 17, 1963, and refusing counsel for the defendant permission to call said woman as a witness for the purpose of questioning her as to the following:

(a) That said woman traveled with the plaintiff on numerous occasions, some of which were to football games participated in by the University of Georgia team, that plaintiff visited her in her hotel room, that [fol. 54] on at least two occasions plaintiff was seen drunk in her presence, that plaintiff paid her expenses on said trips and exhibited her to members of the University of Georgia football team, including the trip to Los Angeles, California, for the game between the University of Georgia and the University of Southern California, in 1960; to Lexington, Kentucky, for the game between the University of Georgia and the University of Kentucky, played on October 22, 1960; and the game between the University of Georgia and the University of Alabama in 1962, at which game plaintiff visited in her room at the Guest House Motel in Birmingham, Alabama; that she attended the football game in Jacksonville, Florida, between the University of Georgia and the University of Florida in November, 1962, her expenses having been paid by the plaintiff.

(b) That the plaintiff on a number of occasions during the time he was Athletic Director of the University of Georgia visited the Domino Lounge and the Copa-Cabana night clubs in Atlanta, Georgia, in the company of said woman, at which places liquor was served and

floor shows, consisting of so-called strip-teast artists, performed.

(c) That said woman visited plaintiff on numerous occasions in hotel and motel rooms in and around the City of Atlanta, Georgia, including the Atlanta Biltmore, Air Host Inn, Dinkler Plaza, Henry Grady and Piedmont Hotels.

(d) That plaintiff purchased and gave to said woman one 1961 Pontiac convertible, the license tag for which was registered in the name of said woman but the [fol. 55] conditional sales contract recorded in the public records in the office of the Clerk of the Superior Court of Clarke County, Georgia, disclosed the name of the plaintiff as the purchaser thereof.

(e) That on one occasion said woman accompanied plaintiff on a trip to Nassau in The Bahama Islands, on which trip no member of plaintiff's family was present.

Defendant alleges and contends that the exclusion of such evidence was harmful and prejudicial to it and constitutes grounds for a new trial.

10.

Because the Court erred in refusing to permit counsel for the defendant to question witness J. D. Bolton in regard to the embarrassment of some of the University of Georgia officials arising from the recording of a retention title contract for a 1961 Pontiac purchased by the plaintiff and in the name of the plaintiff from Boomershine Motors, Inc., of Atlanta, when said Pontiac was actually purchased for, and the license tag registered in the name of, the woman referred to in paragraph 6 hereof for the year 1962. Defendant's counsel offered to prove by the said J. D. Bolton that he confronted the plaintiff with the fact of this embarrassment and the plaintiff told said Bolton that he had

helped finance said automobile for said woman's brother, when, in fact, it was for her.

Defendant alleges and contends that the exclusion of such evidence as hereinbefore referred to was harmful and prejudicial to it and constitutes grounds for a new trial.

[fol. 56]

11.

Because the Court erred in refusing to permit counsel for the defendant to question witness J. D. Bolton in regard to the embarrassment of some of the officials of the University of Georgia arising from the fact that the plaintiff visited many times with the woman referred to in paragraph 6 hereof in her apartment in Atlanta, Georgia, while he was Coach and Athletic Director of the University of Georgia, making this known to others and causing common gossip to be spread around the community.

Defendant alleges and contends that the exclusion of such evidence as hereinbefore referred to was harmful and prejudicial to it and constitutes grounds for a new trial.

12.

Because the Court erred in refusing to permit counsel for the defendant to examine plaintiff as to the following:

(a) All of the facts and incidents set forth in the paragraphs numbered 6 through 11 of this Motion.

(b) As to the facts that plaintiff testified upon deposition that he did not know any person that goes by the name of "E. C. Lindsey".

(c) That, when confronted by J. D. Bolton, Comptroller of the University of Georgia, with a certain hotel bill described in paragraph 7(c) hereof, the plaintiff directed J. D. Bolton to send that bill to "E. C. Lindsey" at the address known as 50 Biscayne Drive, [fol. 57] N. E., Atlanta, Georgia, Apartment #5, which

was, in truth and in fact, the residence address of the woman referred to in paragraph 6 hereof.

(d) His knowledge as to his general reputation in the community and from that knowledge whether or not that reputation was good or bad.

Defendant alleges and contends that the exclusion of such evidence was harmful and prejudicial to it and constitutes grounds for a new trial.

13.

Defendant contends that the evidence referred to in paragraph 6 through 12 of this Motion was relevant, material and admissible for the following reasons, to-wit:

(a) To refute the testimony of the plaintiff that he had never done "anything that would injure the University of Georgia" and to affect the credibility of the plaintiff as a witness.

(b) To refute the allegations in plaintiff's Complaint which pray for punitive damages "to deter the defendant from repeating this trespass on plaintiff's honor, reputation and integrity," it being the contention of the defendant that such evidence tended to show a lack of honor, reputation and integrity on the part of the plaintiff.

(c) To mitigate damages, it being the contention of the defendant that a person guilty of such conduct [fol. 58] would not be a man of such delicate sensitivity who could suffer an injury to his peace, happiness and feelings by the alleged libelous article published by the defendant.

(d) To prove that the plaintiff was a corrupt man as such term was defined by the Court in its charge to mean "depraved, debased or perverted," plaintiff having alleged in his complaint and the plaintiff's counsel having argued to the jury that defendant accused him

in the alleged libelous article of being a corrupt person and said portion of the Complaint of defendant having been read to the jury by the Court in its charge.

(e) When the plaintiff in a libel action voluntarily takes the stand as a witness in his own behalf, he may be examined as to any specific acts of misconduct.

14.

Because the Court erred during the trial of the case by declining to permit counsel for defendant to cross-examine the plaintiff on the subject of his refusal on May 3, 1963 (when his deposition was being taken) to answer the following questions:

(a) "Will you tell the reporter what happened, the events that happened, leading up to that termination and how it was handled?" (meaning the termination of plaintiff's relationship as Athletic Director at the University of Georgia in 1963).

(b) "Do you remember whether or not from that [fol. 59] office on September 13, 1962, you put in a telephone call to Coach 'Bear' Bryant?" (meaning the office of Communications International, Inc. in Atlanta, Georgia).

(c) "Coach Butts I show you what has been identified as defendant's Exhibit 3 which consists of seven pages, and ask you if at this conference the original, of which this purports to be a photostat was exhibited to you?" (the conference referred to was that held in Attorney Cook Barwick's office on February 22, 1963, at which time certain officials of the University of Georgia were present, among them Dr. O. C. Aderhold, President, Mr. J. D. Bolton, Comptroller, William C. Hartment, Dr. Harmon Caldwell, Chancellor, and others. The Exhibit 3 referred to was the notes made by George Burnett concerning the alleged telephone conversation between the plaintiff and Coach Paul Bryant) .

(d) "Did you, or not, make the statement at that time in the presence of these gentlemen who attended that conference that in substance, these notes shown on this Exhibit 3 were correct?"

(e) "Were you at that time apprised of the substance of George Burnett's story as he had told it to one of the University officials about this alleged telephone conversation?"

(f) "Did you, or not, state to those present at that conference that Burnett's story was substantially correct except that he had misunderstood or misinterpreted the effect of it?"

[fol. 60] (g) "Did you at that time at that conference admit to those present that you had a telephone conversation with Coach 'Bear' Bryan on September 13, 1962, which lasted 16 minutes and 3 seconds?"

(h) "Did you state to those present that George Burnett probably did hear the conversation that went on between you—the alleged conversation between you and Coach 'Bear' Bryant?"

(i) "Were you, or not, handed the original notes prepared by George Burnett on September 13, 1962, concerning the alleged telephone conversation with Coach 'Bear' Bryant?"

(j) "Do you recall in the alleged telephone conversation Coach 'Bear' Bryant stating to you that he would call you on the following Sunday, and, if so, did he actually call you on the following Sunday?"

(k) "At the time of your resignation in 1960, had you heard of any complaints from any of the alumni concerning your personal conduct?"

On May 3, 1963, the deposition of the plaintiff, having been called as an opposite party for cross-examination,

was taken by the defendant for purpose of discovery and for use as evidence at the trial.

Counsel for the defendant stated to the plaintiff (while he was on the witness stand and under cross-examination) that he wanted to read the foregoing questions that were propounded to the plaintiff at the time of such deposition [fol. 61] and then ask the plaintiff whether he at that time refused to answer all of said questions.

Defendant contends that it was entitled as a matter of right to demonstrate to the jury the plaintiff's reluctance to relate the facts no matter what his reason might be for such refusal, even though such refusal might have been based on the advice of his counsel. In any event, the defendant contends that it was entitled to show the demeanor of the witness and to show any reluctance on his part to testify, his manner of testifying, the nature of facts under inquiry, and the probability or improbability of his testimony, all of which bears materially on the credibility of the witness, particularly in a case in which the witness is the plaintiff seeking to recover damages in the sum of $10,000,000.

Defendant, therefore, contends that such action on the part of the Court in excluding such evidence was prejudicial error for which a new trial should be granted.

15.

Because the Court erred in failing to instruct the jury as to the provisions of Georgia Code Sec. 38-1806 in accordance with a timely written request, as follows:

> "What credit to impeached witness, question for jury.— When a witness shall be successfully contradicted as to a material matter, his credit as to other matters shall be for the jury, but if a witness shall swear wilfully and knowingly falsely, his testimony shall be disregarded entirely, unless corroborated by circumstances or other unimpeached evidence. The [fol. 62] credit to be given his testimony where im-

peached for general bad character or for contradictory statements out of court shall be for the jury to determine."

The above Georgia Code section constituted the Defendant's Request to Charge No. 3, which the Court prior to argument of counsel stated that such request would be given substantially as requested.

Defendant contends that said request of said charge was not given as requested, but instead the Court instructed the jury as follows:

"If you believe that any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves. If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness' testimony in other particulars. And you may reject all of the testimony of that witness or give it such credibility as you may think it deserves."

This charge was clear error for the Court eliminated entirely any reference to the mandatory provisions of Georgia Code Sec. 38-1806 which require that the jury shall disregard the entire testimony of a witness whom it finds to have testified wilfully and knowingly falsely, unless it shall also find that such testimony was also corroborated by circumstances or other unimpeached evidence.

[fol. 63] 16.

Because the Court erred in refusing to charge the jury as follows:

"Whenever a party presents himself as a witness and his evidence is contradictory, vague or equivocal, his testimony must be construed most strongly against him."

Counsel for defendant made such request to charge in writing, the same being designated Defendant's Request to Charge No. 6. Defendant contends that such a charge was proper and was adjusted to the evidence in said case for the reason that the plaintiff's testimony in many respects was contradictory, vague and equivocal, and under the circumstances the jury should have been instructed that his testimony should have been construed most strongly against him.

17.

Because the Court erred in refusing to allow counsel for the defendant to question John C. Carmichael, a witness for the plaintiff, concerning a previous conviction on September 19, 1933 for petty larceny in the State of Ohio, said crime involving the stealing of women's purses from theaters. Counsel for defendant had in his possession and presented to the Court a duly authenticated copy of said conviction and record of the said Carmichael.

The Court, in refusing to permit defendant's counsel to examine witness Carmichael in respect to this criminal record, stated that the ground for such refusal was the fact that the offense was committed thirty years ago.
[fol. 64] The failure of the Court to allow counsel for the defendant to question the said Carmichael concerning his previous conviction was prejudicial to the defendant in that it prevented defendant from impeaching said witness of plaintiff by the proof of a crime involving moral turpitude.

18.

Because the Court erred in refusing to allow counsel for the defendant to question John C. Carmichael, a witness for the plaintiff, about, and to introduce into the evidence, the following:

1. An application for a permit for the sale of beer and wine to the City of Atlanta, Georgia, dated July 22, 1940, signed by the said Carmichael, wherein he

stated that he had never been convicted or plead guilty to a crime in any court. In fact, the said Carmichael had been convicted in a court in Ohio in 1933, as is set forth in more detail in the preceding paragraph of this Motion.

2. An application for a permit to sell beer, addressed to The Honorable Mayor and General Counsel of the City of Atlanta, Georgia, dated March 12, 1957, signed by the said Carmichael, wherein he stated as follows:

"Have you ever been convicted or plead guilty to a crime in any court? x

Yes No

If so state the offense and date—1932—But I Was Not Guilty And Was Released."

[fol. 65] In fact, the said Carmichael had been found guilty of the crime in the State of Ohio set forth in more detail in the preceding paragraph of this Motion, and was convicted in the Criminal Court of Fulton County on March 22, 1950 of possessing illegal distilled spirits and alcohol, which latter conviction was admitted by the said Carmichael on the witness stand in this case.

The Court excluded such evidence or the questioning of the witness with respect thereto, but, in excluding the same, the Court did not assign any reason for such ruling. Defendant alleges and contends that such evidence was relevant, material and admissible for the following reasons:

(a) It tended to impeach the witness.

(b) It affected the credibility of the witness.

Defendant, therefore, alleges and contends that the exclusion of such evidence by the Court was harmful and prejudicial to it and constitutes a ground for a new trial.

19.

Because the Court erred in allowing counsel for the plaintiff to examine, over the objection of counsel for the defendant, J. D. Bolton, Hugh Mills and Harold Heckman, all witnesses for the defendant, with respect to whether they knew of the reputation of the plaintiff's witnesses Hartman, Clark, Baird and Trippi, and as to whether or not such witnesses' reputations were good or bad in the community, and whether or not they would believe them on oath. Defendant contends that such questioning of de- [fol. 66] fendant's witnesses was improper when the character and veracity of such of plaintiff's w itnesses had not been brought into issue.

In allowing such questioning by counsel for the plaintiff, the Court relied upon Georgia Code § 38-1804, which Code section defendant contends is not in point or applicable to such ruling.

Defendant further alleges and contends that allowing counsel to question defendant's witnesses in such regard was harmful and prejudicial to the defendant and constitutes a ground for a new trial.

20.

Because the Court erred in excluding the following testimony of George Burnett:

1. As to what Burnett asked the operator and as to the operator's answer to Burnett in regard to the extension number in Tuscaloosa, Alabama, to which Burnett had been connected, upon the ground that such testimony of Burnett was hearsay. Defendant contends and alleges that anything which Burnett himself said previously would not be hearsay, and further that the conversation between Burnett and the operator was reported in the alleged libelous article, the truth of which the defendant had the bur-

den of proving. Such testimony of Burnett was not offered to prove the truth of what the operator said, but rather to prove that his conversation with the operator did take place substantially as reported by the defendant in the alleged libelous article.

[fol. 67] 2. As to what Burnett said to Milton Flack and what Flack said to Burnett when Burnett called Flack after Burnett overheard the conversation between plaintiff and Paul Bryant. Such conversation between Burnett and Flack was reported in the alleged libelous article by the defendant. The Court excluded such testimony by Burnett on hearsay grounds. The defendant alleges and contends that anything said by Burnett previously would not be hearsay and that the entire conversation between Burnett and Flack was admissible not to prove the truth of what Flack said, but rather to prove that such conversation as reported by defendant in such alleged libelous article actually took place.

3. As to Burnett's testimony as to the conversation between Burnett and Bob Edwards on January 4, 1963. Said conversation was reported by defendant in the alleged libelous article. The Court excluded such testimony on hearsay grounds. The defendant alleges and contends that such testimony was not offered to prove the truth of what Edwards said, but rather to prove that such conversation between Burnett and Edwards as reported by defendant in the alleged libelous article, actually took place.

4. As to Burnett's testimony of what took place at a meeting attended by Burnett and certain officials of the University of Georgia in the office of Cook Barwick, attorney for the University of Georgia. The Court excluded such testimony on hearsay grounds. The defendant alleges and contends that the conversations which took place at such meeting in Cook Bar-

[fol. 68] wick's office were reported by it in the alleged libelous article, and that the testimony of Burnett was introduced to prove that such conversations did take place at such meeting, and not to prove the truth of the matter asserted by the participants in the meeting. In addition, defendant alleges and contends that the defendant was entitled to show the extent to which the officials of the University of Georgia questioned and checked upon George Burnett and his story, all of which illustrated the diligence of the defendant in its investigation of the story prior to its publication.

Defendant alleges and contends that the exclusion of such evidence was harmful and prejudicial to defendant and each exclusion is a ground for a new trial.

21.

Because the Court erred in admitting into evidence, over timely objection by defendant's counsel, plaintiff's Exhibits 16 and 17 which are, respectively, a memorandum on unnecessary roughness in college football and a letter from the President of the Football Coaches Association and the Chairman of the Football Rules Committee relating to unwarranted viciousness and brutality in college football.

The defendant contends that these Exhibits were inadmissible on the grounds that these documents were hearsay and were not relevant to any issue involved in this case and on the further ground that no proper foundation was laid for the admissibility of this evidence.

[fol. 69]

22.

Because of the following errors in plaintiff's counsel's closing arguments to the jury, which, even though not specifically objected to by counsel for the defendant, constitute significant and fundamental errors which the Court

may notice without objection and which it may take into consideration in exercising its discretion upon the motion of defendant for a new trial:

(a) Closing argument of Lockerman—

> " . . . I think I likewise have a right to mention to you briefly that I probably have known Wally Butts longer than any man in this case. I was at Mercer University with Wally Butts when he played end on the football team there. He was in some respects a small man in stature, but he had more determination and more power to win than any man that I have ever seen in my life. I would not stand before you in this case today arguing in his behalf if I thought that Wally Butts would not tell you the truth when he raises his hand on this stand and swears to Almighty God that what he is going to tell you is the truth."

Defendant contends that the above argument is objectionable and improper since plaintiff's counsel introduced before the jury his own unsworn testimony as to the credibility of the plaintiff, when the actual evidence in the case was to the effect that plaintiff's reputation was bad and that witnesses would not believe him under oath. In such argument plaintiff's counsel clearly violated the established principle that an attorney in closing argument should not state to the jury his own belief regarding one of the [fol. 70] principal issues in the case, particularly when there was no testimony in the record whatsoever to that effect. This argument was particularly harmful in view of the fact that the Court had previously ruled that character witnesses on behalf of the plaintiff could be cross-examined as to their knowledge of specific instances of misconduct and the plaintiff deliberately failed to call such character witnesses. Thus, the argument of plaintiff's counsel denied defendant the right to an effective cross-examination.

(b) Closing argument of Lockerman—

"... and when that suit was filed the Curtis Publishing Company came into this court and filed its answer to it, and admitted every word in it. Now, since having done that, the Curtis Publishing Company is trying to contradict what it said in its own pleadings in judicio, here in the Court Room."

Defendant contends that the above argument is objectionable and is an improper misstatement of the facts, the same being so crucial that if accepted by the jury a verdict would be demanded for the plaintiff inasmuch as the jury is being told that the defendant admitted that the article is libelous and that the plaintiff was entitled to damages.

(c) Closing argument of Lockerman—

"In this very law suit alone that has been in every paper, every radio station, every television station for months and months and months, and recently hour on the hour, all over the world, they have gotten untold millions of dollars in publicity where the name 'Satur- [fol. 71] day Evening Post' is on the ears and the lips and tongue of all the people in the world.

"These reporters here, all over this Court Room, are sending this out. That is what they want. You could return a verdict for Wally Butts in this case of ten million dollars, and it would be the greatest merchandising bargain the Saturday Evening Post ever got. There is no way of telling—they could not have bought the publicity they have gotten in this case probably for fifty or seventy-five or a hundred million dollars, because it is worldwide, and you try to buy space in magazines, daily papers, radio stations, television stations all over the world where your name is mentioned every hour on the hour, such as this has been, you can't do it for any amount of money, and they have used Wally Butts for that purpose.

"If you should return a verdict in this case, say, for five million dollars, they would think that they had won the greatest victory that could possibly be returned in the case."

Closing argument of Schroder—

"Now, listen to this, gentlemen. 'The final yardstick, we have about six lawsuits pending,' and he later identified those lawsuits as libel suits, 'meaning that we are hitting them where it hurts.' Proud of his libel suits, proud of the publicity, the free advertising he gets from his libel suits.

"Mr. Clay Blair, who wouldn't get on the stand and testify so you could see him, had this to say when his [fol. 72] deposition was taken, at page 44, which we read. 'I was not being facetious when I used the phrase "sophisticated muckraking". I meant it then and I mean it now.' Their type of sophisticated muckraking is this article here where they can get a mere germ of an idea that they know will sell and will cause people to get hit where it hurts them, and result in a libel suit with a $100,000,000 worth of free advertising to them, and that is what they want. I will show you why that is what they want.

"Mr. Clay Blair, again, 'I changed the image of the Post. He said that the March 23 issue—that is the one with Butts' story in it— is a step in the right direction. This issue takes up twenty-five percent toward the goal of the magazine that I envision.'

"Gentlemen, if that is just twenty-five percent, that type of story toward the goal he envisions, what can we look for or hope to look for when that is multiplied four times.

"He says, Mr. Clay Blair, 'The Post advertising revenues fell from one hundred six million dollars in 1960 to eighty-six million in 1961, and to about sixty-six million in 1962. I did not like that trend dropping twenty million dollars from a one hundred six in 1960

to eighty-six in 1961 and again to sixty-two million in 1962.'

"That is when they changed the image. They have got to get those advertising revenues up, and I say that is the worse kind of libel that you can have. A [fol. 73] newspaper can print a libel because someone has given it some information that turned out to be inaccurate but when you go out and buy a libel—and they paid over $9,000 for this story, which will show here in the voucher, paid $9,000 for it—and did the reporting job that they did, they knew what they were getting, and they have it. One million dollars of free advertising."

* * *

"I say, gentlemen, this is the time we have got to get them. A hundred million dollars in advertising, would ten percent of that be fair to Wally Butts for what they have done to him? Would a fifty percent assessment on each of the twenty-three million issues which they wrote about him there, would that be a strain or a burden on them?"

The defendant contends that this line or argument, so heavily emphasized by both of plaintiff's counsel, was clearly improper and prejudicial since it injected into the case assertions wholly unsubstantiated by any evidence whatsoever. For example, it was boldly asserted that the defendant received the benefit of $50,000,000 to $100,000,000 of free advertising solely because of this case; that it suggests a wholly improper measure of damages for consideration by the jury (that they might determine damages on the basis of some percentage of the wholly unsubstantiated assertions to the effect that the defendant had somehow directly profited from the notoriety attributable to the subject proceedings. The manner in which his argument was presented (for example, relatively indirectly by Lockerman on Friday followed by a direct and unqualified assertion by Schroder on Monday), seems almost calculated

[fol. 74] to deceive the jury into thinking that the assertions made were in fact true. The statements by Schroder were calculated to confuse the jury into correlating the alleged free advertising with the admitted substantial decline of advertising revenues, facts of which were introduced into evidence in the case over the objection of the defendant, and instilled in the jury the impression unsupported by any evidence that the defendant had profited in an astronomical amount by the notoriety incident to the trial.

(d) Closing argument of Schroder—

> "Somebody has got to stop them. There is no law against it, and the only way that type of, as I call it, yellow journalism can be stopped is to let the Saturday Evening Post know that it is not going to get away with it today, tomorrow, or any more hereafter, and the only way their lesson can be brought home to them, gentlemen, is to hit them where it hurts them, and the only thing they know is money."
>
> * * *
>
> "I am looking to you for my protection. Heavens knows, if you let them out of this case for five million dollars or less, and boy, it's been worth it to them, I may be next, because they are not going to stop with that. You may be next; my wife; my children; or yourself. We have got to stop them now, and you are the only twelve in the world that can stop them."

Defendant contends that the above argument is wholly improper not only as attempting to unduly arouse the prej- [fol. 75] udice and passion of the jury, but also as injecting and suggesting a wholly improper consideration with respect to the measure of damages. The Georgia law does not authorize punitive damages to deter the defendant from repeating the alleged trespass against anyone other than the plaintiff.

(e) Closing argument of Lockerman—

"I am sorry that I may have appeared to have gotten right emotional about this matter. I am emotional about it. I am mad about it. There are just thousands and thousands of people who are mad about it too, and I believe that in your deliberations and in your final verdict that you are going to return the kind of verdict that will help restore Wally Butts as he should be restored in the eyes of the world."

Closing argument of Schroder—

"... They don't care about Butts. They wouldn't care about you or about me. They are just one stp in the direction they are aiming."

* * *

"... They write about human beings; they killed him, his wife, his three lovely daughters. What do they care? They have got money; getting money for it."

* * *

[fol. 76] "... I think it would teach them that we don't have that kind of journalism down here, and we don't want it down here, and we don't want it to spread from 666 Fifth Avenue any further than that building right now."

Defendant contends that the above arguments are clearly objectionable as improperly appealing to the prejudices and passions of the jurors to the obvious injury and harm of the defendant.

(f) Closing argument of Schroder—

"... I have lived in agony with this man since I got the first notice that this was what was going to happen this Post article was coming out. I have seen him deteriorating ever since it came out, and I have lived in agony along with him, and it may be that the personal first-

hand knowledge that I have had since almost living with him and his family every day, I may have said some things or done some things or conducted myself in some manner that was displeasing to you. All I can say, I have done my best, and if I have done any of those things, don't hold it against Wally Butts."

Defendant contends that the above argument not only constitutes testimony by plaintiff's counsel, but also involves an improper and prejudicial attempt by argument to inject into the minds of the jurors allegations not specifically covered by the evidence.

(g) Closing argument of Lockerman—

"Mr. Cody is a fine lawyer. I respect him very much. I know that in this case that he is being persuaded by the Curtis Publishing Company, his client in the mat- [fol. 77] ter, in which he necessarily must avoid discussing the real issues."

* * *

"He [Mr. Cody] has seen fit to talk to you about anything except the truth of those charges."

Closing argument of Schroder—

"I want to begin by taking up where the Saturday Evening Post lawyer ended Friday." . . . Throughout that argument not two minutes were devoted to the merits of the case; not two minutes were devoted to the plea of justification, that is to say, that what is in that article published by the Saturday Evening Post is true."

Defendant contends that the above argument was improper, offensive and irrelevant and immaterial to any of the issues in the case and interjected personalities, thereby appealing to the prejudices and passions of the jurors.

Defendant, therefore, contends that all of the above arguments on the part of plaintiff's counsel were prejudicial

and harmful to the defendant and constitute errors for which a new trial should be granted.

23.

Because of the following errors in the Court's charge, which errors, even though not specifically objected to by counsel for the defendant, constitute significant errors which the Court may notice without objection and which [fol. 78] it may take into consideration in exercising its discretion upon this motion of defendant for a new trial:

(a) In giving the following charge in regard to punitive damages:

"The purpose of punitive damages is to deter the defendant from a repetition of the offense and is a warning to others not to commit a like offense. It is intended to protect the community and has an expression of ethical indignation, although the plaintiff receives the award."

The defendant contends that such charge is not a correct statement of the Georgia law of punitive damages in that punitive damages can only be given to deter the wrongdoer from repeating the trespass upon the plaintiff and not as a deterrent to third persons, nor can punitive damages be awarded for the protection of the community in general, but only for the protection of the plaintiff. Such charge was not anticipated by the defendant in that the plaintiff had requested a charge correctly stating the Georgia law of punitive damages and the Court stated that such charge was to be given substantially as requested by plaintiff, nor were such damages prayed for in plaintiff's complaint.

(b) In giving the following charge to the jury:

"Before you would be authorized to find punitive damages under the Georgia law, you must first determine that the plaintiff, Wallace Butts, is entitled to recover general damages. However, if you decide to

award punitive damages, the sum you award need have [fol. 79] no relationship to any amount that you may award for general damages. It may be greater or it may be less. That is a matter which rests in your sole discretion."

Defendant contends that the law requires that there must be a relationship between the general damages and the punitive damages which the jury is authorized to award the plaintiff.

(c) In giving the following charge to the jury:

"A defendant may show that it acted without malice and that there was neither actual malice nor any circumstances from which malice may be inferred. In a word, a defendant is permitted to show that, in publishing this article, it in good faith relied upon certain matters which had come to its attention. And if the jury accepts this as credible, this would go in mitigation of punitive damages."

Defendant contends that such charge is erroneous in that the impression was thereby conveyed to the jury that absence of actual malice would merely mitigate punitive damages, whereas the Georgia law is clearly that, in the absence of actual malice, no punitive damages can be awarded.

(d) The often repeated language in the charge to the effect that the defendant had the burden of proving the "statements in the article" to be true (there are seven repetitions of this in the charge) and the inconsistency of such language with the part of the charge dealing with substantial truth and the sting of the libel.

[fol. 80] Defendant contends that such confused the jury as to whether or not the defendant had the burden of prov-

ing the accuracy of all of the statements in the article, particularly since the Court failed to charge the defendant's request #8, which request was to the effect that defendant need not prove the truth of any statements made about anyone other than the plaintiff.

(e) By charging the jury as follows:

"I charge you that the law presumes that the plaintiff has a good reputation, and when a defamatory statement is made against him, the law presumes he has sustained injury to that reputation and to his feelings."

Defendant contends that the above charge was erroneous for the following reasons:

(i) That when evidence of bad character or reputation of the plaintiff is introduced, there is no longer a presumption that the plaintiff has a good reputation.

(ii) That the Court has not in the above quoted portion of the charge, nor in any other portion of the charge, clearly instructed the jury that the presumption of good reputation can be rebutted.

(iii) That the Court has not in the above quoted portion of the charge, nor in any other portion of the charge, clearly instructed the jury that the question of whether or not the plaintiff has a good reputation was for the jury in this case.

[fol. 81] Defendant, therefore, contends that such errors in the Court's charge were prejudicial and harmful to the defendant and constitute errors for which a new trial should be granted.

24.

Because the Court erred in charging the jury, over objection by the defendant, the following:

(a) That the alleged libelous article was libelous per se, as follows:

"Under the law of Georgia, if the publication was libelous per se, and I charge you that this article was libelous per se, and the law will presume that anyone so libeled must have suffered damage. In such case, no measure of damages can be prescribed, except through the enlightened consciences of impartial jurors."

Defendant contends that the article is not libelous per se.

(b) That the article was libelous per se as being a charge made with reference to the profession of the plaintiff and that the plaintiff was engaged in a profession at the time of the publication of the alleged libelous article, as follows:

"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 [fol. 82] which would, as its natural and probable consequence, occasion pecuniary loss, constitutes a cause of action and is libelous per se, and the rule follows to such damages as must be presumed to proximately and necessarily result from such a publication.

* * *

"I charge you that the words 'libelous per se' in this case mean words of such character that a presumption of the law arises therefrom that a party has been degraded in his business or professional reputation."

The defendant contends that the plaintiff was not in a profession at the time of the publication of the article.

25.

Because the verdict is contrary to law and to the evidence in this case in that the plaintiff's complaint is clearly an action for alleged damages to his professional reputation and has been so construed by the Court, and by plaintiff's counsel, but the evidence at the trial showed without contradiction that the plaintiff was not engaged in a profession at the time of the publication of said alleged libelous article. Since plaintiff has not shown that he was engaged in a profession at the time of publication, the article was not libelous per se and due to the plaintiff's failure to allege or to prove special damages, a verdict in his favor for any amount whatsoever is not authorized and, therefore, the verdict was contrary to law and to the evidence introduced in the case and a new trial should be granted.

[fol. 83] Defendant reserves the right to amend this Motion with permission of the Court and to add additional grounds thereof after the Official Record is filed by the court reporter.

In addition to the foregoing Motion, the defendant moves the Court to enlarge the time for filing additional affidavits and documents under Rule 59(c), which affidavits and documents may further substantiate the grounds for any part of the foregoing Motion.

Wherefore, defendant prays that a new trial be granted in said case on any one or all of the grounds hereinbefore stated.

Request is hereby made for an oral argument on this Motion.

Welborn B. Cody, Thomas E. Joiner, E. J. Bondurant, Jefferson Davis, Jr., Attorneys for Defendant.

Of Counsel: Kilpatrick, Cody, Rogers, McClatchey & Regenstein, 1045 Hurt Building, Atlanta 3, Georgia.

[fol. 84]

IN UNITED STATES DISTRICT COURT

DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT—Filed August 29, 1963

[Title omitted]

Defendant moves the Court to set aside the verdict entered in the above-entitled action on August 20, 1963, and the judgment entered thereon on the same date, and to enter judgment in accordance with defendant's motion for directed verdict.

Defendant's motion for directed verdict should have been granted because the plaintiff's action is clearly one for alleged damages to his professional reputation and his complaint has been so construed by the Court and by plaintiff's counsel, but the evidence at the trial showed, without contradiction, that the plaintiff was not engaged in a profession at the time the alleged libelous article was published. Since plaintiff has not shown that he was engaged in a profession at the time of publication, the article was not libelous per se and due to the plaintiff's failure to allege or to prove special damages, a verdict in his favor for any amount is not authorized and, therefore, the defendant's motion for a directed verdict should have been [fol. 85] granted, and this motion for judgment notwithstanding the verdict should be granted.

Welborn B. Cody, Thomas E. Joiner, E. J. Bonderant, Jefferson Davis, Jr., Attorneys for Defendant.

Of Counsel: Kilpatrick, Cody, Rogers, McClatchey & Regenstein, 1045 Hurt Building, Atlanta 3, Georgia.

IN UNITED STATES DISTRICT COURT

ORDER DENYING DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT—Filed January 14, 1964

The defendant herein has filed a motion for judgment notwithstanding the verdict, contending in said motion that the plaintiff is not entitled to any recovery since the evidence established without contradiction that he was not, at the time of the publication of the charge complained of, in the profession of a football coach, and because he neither claimed nor offered evidence of any special damage incurred by him as a result of the publication.

It was the ruling of this Court at the time of trial, and the jury was so instructed, that "a written publication [fol. 86] 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."

There is a strong thread running throughout the trial of this case and the many hearings which preceded the trial that this article was being held by this Court to be libelous per se for the reason that it degraded him in his business or professional reputation. The plaintiff and defendant discuss at length in their respctive briefs whether the article would have been libelous per se even if plaintiff had not been engaged in his profession at the moment of libel. There is overwhelming authority to the effect that this would in fact be the case; *Weatherholt* v. *Howard,* 143 Ga. 41; *Estes* v. *Sterchi Bros. Stores, Inc.,* 50 Ga. App. 619, 179 S. E. 222; numerous other decisions and treatises. However, the Court is prepared to stand squarely on the issue of the article's having hurt him in his profession as the basis for the ruling of libelous per se.

The plaintiff's name was synonymous with University of Georgia football for some 25 years. He had served as

President of the American Football Coaches Association; he was one of the few coaches to be selected to serve on the important Rules Committee; he was admittedly widely known and respected as a successful coach and as an eminent authority in the sport of football. Can it be sincerely argued by the defendant that this man, who is in his mid-fifties, is not injured *legally* in the eyes of the football world, simply because he had not officially occupied a position of employment in this field for a period of six to eight weeks? Future employment quite probably would have [fol. 87] occurred, and in what capacity other than that to which he had given his whole life?

Law is perverted from its proper function when it multiplies impediments to justice without the warrant of clear necessity. By the rigid technicalities sought to be imposed by the defendant, the plaintiff, caught in a mesh of procedural and technical complexities, is told there is only one way out of them, and that is to have filed his lawsuit a few days earlier, while still listed on the employment rolls of The University of Georgia, *prior to the publication of the subject article.*

Because of that omission, it being of course impossible to do, he is to be left ensnared in the web—the processes of the law, so it is said, being impotent to set him free.

This Court does not believe that paths to justice are so few and narrow. I think we should hesitate quite a long time before committing our procedure to so sterile a conclusion.

Accordingly, the motion for judgment notwithstanding the verdict is denied.

It Is So Ordered.

This the 14th day of January, 1964.

Lewis R. Morgan, United States District Judge.

[fol. 88]

IN UNITED STATES DISTRICT COURT

OPINION AND ORDER GRANTING MOTION FOR NEW TRIAL—
Filed January 14, 1964

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 [fol. 89] 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 had 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 atorney, 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. [fol. 90] 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 de-

fect, 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 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 Kann, considered that necessary.

[fol. 91] 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, [fol. 92] 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 plain-

tiff 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 [fol. 93] 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 wrongdoers 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 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

[fol. 94] 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."

[fol. 95] 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 puni-

tive 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 and 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 [fol. 96] 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 de-

termining admissibility of evidence whether 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 put 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 [fol. 97] *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 tendency 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."

[fol. 98] 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. [fol. 99] 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.

Grounds 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

> [fol. 100] 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 the 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 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. 1962, 198 F. 2d 152.

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

[fol. 101] This the 14th day of January, 1964.

Lewis R. Morgan, United States District Judge.

IN UNITED STATES DISTRICT COURT

ORDER—Filed January 14, 1964

Now, this the 14th 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.

Lewis R. Morgan, United States District Judge.

[fol. 102]

IN UNITED STATES DISTRICT COURT

AMENDMENT TO ORDER ON MOTION FOR NEW TRIAL—
Filed January 15, 1964

The order on the motion for a new trial in the above-named case having been filed on January 14, 1964, this Court hereby amends said order by adding to the third paragraph on Page 14 of said original order the following words: "including Ground 14 of said motion, which ground has no merit", so that said paragraph, when amended, shall read as follows:

> "All of the grounds set out in defendant's motion for a new trial, excepting Ground 1, are denied for the reasons stated above, including Ground 14 of said motion, which ground has no merit."

This the 15th day of January, 1964.

Lewis R. Morgan, United States District Judge.

[fol. 103]

IN UNITED STATES DISTRICT COURT

CONSENT OF WALLACE BUTTS TO REMIT—
Filed January 20, 1964

An order having been entered by this Honorable Court dated January 14, 1964, granting the motion of the defendant, Curtis Publishing Company, for a new trial unless the plaintiff, Wallace Butts, within twenty (20) days from the date thereof, shall, in a writing filed with the Clerk of this Court, 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;

Now comes the plaintiff, Wallace Butts, and after grave deliberation, having neither the financial nor the physical resources available to conduct a second trial of this case, and standing to gain nothing thereby in the present posture of the case, regretfully, but with great respect for this Honorable Court, accedes to the Court's said order and remits all punitive damages awarded above the sum of $400,000.00, leaving a net total recovery in favor of plaintiff in the amount of $460,000.00.

This 20th day of January, 1964.

Wallace Butts, Plaintiff.

[fol. 104] William H. Schroder, Allen E. Lockerman, T. M. Smith, Jr.

Of Counsel:

Troutman, Sams, Schroder & Lockerman, 1605 William-Oliver Building, Atlanta 3, Georgia, Attorneys for Plaintiff, Wallace Butts.

Service acknowledged January 20, 1964. EAB.

Jeff Davis, Sr., Attorney for Defendant.

Of Counsel:

Kilpatrick, Cody, Rogers, McClotchey & Regenstein.

[fol. 105]

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

WALLACE BUTTS, Plaintiff,

versus Civil Action No. 8311

CURTIS PUBLISHING COMPANY, Defendant.

JUDGMENT—January 22, 1964

The plaintiff, having filed with the Clerk of this Court a writing remitting all of the punitive damages awarded above the sum of $400,000, which writing was in accordance with the Order of this Court dated January 14, 1964, the defendant's Motion for New Trial is hereby overruled.

The judgment for the plaintiff for $3,060,000 entered on August 20, 1963, is hereby set aside and

It Is Hereby Ordered and Adjudged that the plaintiff, Wallace Butts, recover of the defendant, Curtis Publishing Company, the sum of $460,000, with interest as provided by law.

Dated this 22nd day of January, 1964.

Lewis R. Morgan, United States District Judge.

[fol. 106]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

Civil Action No. 8311

[Title omitted]

NOTICE OF APPEAL—Filed January 24, 1964

Notice is hereby given that Curtis Publishing Company, the defendant above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment entered in this action on January 22, 1964.

Welborn B. Cody, Attorney for Defendant.

Of Counsel:

Kilpatrick, Cody, Rogers, McClatchey & Regenstein, 1045 Hurt Building, Atlanta, Georgia 30303, JAckson 2-7420.

[fol. 107]

IN UNITED STATES DISTRICT COURT

NOTICE OF PLAINTIFF'S CROSS APPEAL—
Filed January 30, 1964

The jury's verdict in this case of $3,000,000.00 punitive damages and $60,000.00 general damages for the plaintiff was entered as the judgment of the district court by order dated August 20, 1963. By order entered January 13, 1964 on defendant's motion for new trial the district court ruled that the punitive damages awarded plaintiff by the jury was excessive and that a new trial would be granted defendant unless plaintiff, within 20 days, remitted in writing filed with the Clerk all the punitive damages awarded above the sum of $400,000.00, leaving the $60,000.00 for general damages undisturbed.

Plaintiff, Wallace Butts, having neither the financial nor physical resources to conduct a second trial and faced with either remitting $2,600,000.00 of the punitive damages or having a new trial granted, yielded to the mandate of the district court and remitted in writing, filed with the clerk January 20, 1964 all punitive damages awarded by the jury above the sum of $400,000.00. Thereafter, on January 22, 1964 the district court set aside the judgment for plaintiff for $3,060,000.00 entered on August 20, 1963 and substituted in lieu thereof judgment for the plaintiff against the defendant in the sum of $460,000.00.

From said judgment of the District Court the defendant Curtis Publishing Company filed its notice of appeal in the Clerk's office on January 24, 1964, thereby recording its intention to refuse to accept the District Court's $2,600,000.00 reduction.

[fol. 108] Feeling that the sword should cut both ways, and in order that the action of the District Court in requiring plaintiff to consent to a reduction of the verdict in the amount of $2,600,000.00 as a condition to the denial of defendant's motion for new trial may be reviewed, notice is hereby given that Wallace Butts, plaintiff in the above entitled action, hereby cross-appeals to the United States Court of Appeals for the Fifth Circuit from that part of the order of the District Court entered in this cause on January 22, 1964 which set aside the judgment for plaintiff in the amount of $3,060,000.00 entered August 20, 1963 and substituted in lieu thereof judgment for plaintiff in the amount of $460,000.00, and gives notice of his intention to ask the Circuit Court of Appeals to restore the original award or in the alternative, to fix an amount in excess of that established by the trial court which would be fair and reasonable under the facts of the case.

William H. Schroder, Allen E. Lockerman, T. M. Smith.

Of Counsel:

Troutman, Sams, Schroder & Lockerman, 1605 William-Oliver Building, Atlanta 3, Georgia.

[fol. 109]

IN UNITED STATES DISTRICT COURT

NOTICE OF AMENDMENT OF PLAINTIFF'S CROSS APPEAL—
Filed February 24, 1964

Wallace Butts, plaintiff in the above entitled action, heretofore filed in this Court under date of January 30, 1964 his notice of plaintiff's cross appeal to the judgment of the district court dated January 22, 1964 in order that the action of the district court in requiring plaintiff to consent to a reduction of $2,600,000 of the jury's verdict as a condition to the denial of defendant's motion for new trial may be reviewed by the United States Court of Appeals for the Fifth Circuit in connection with the defendant's appeal to said Court from the district court's judgment of January 22, 1964.

Now comes Wallace Butts the said plaintiff in the above entitled action and within thirty (30) days from the date of the district court's judgment of January 22, 1964 gives notice of this his amendment to his said notice of cross appeal, for consideration and review by the United States Court of Appeals for the Fifth Circuit of the pretrial ruling of the district court as made by said court on July 29, 1963 that the second defense of the defendant, Curtis Publishing Company, as set out in its answer to plaintiff's complaint, was a valid plea of justification. A consideration and review of said ruling of the district court regarding the defendant's alleged plea of justification is sought by plaintiff only in the event the decision of the United States Court of Appeals for the Fifth Circuit reverses the judgment of the district court and sends the case back for a new trial; [fol. 110] otherwise, a review and consideration of the district court's said ruling regarding the defendant's alleged plea of justification is not sought.

William H. Schroder, Allen E. Lockerman, T. M. Smith, Jr., Attorneys for Plaintiff.

Of Counsel: Troutman, Sams, Schroder & Lockerman, 1605 William-Oliver Building, Atlanta, Georgia 30303.

IN UNITED STATES DISTRICT COURT

DEFENDANT'S REQUESTED INSTRUCTIONS TO JURY

Defendant's Request to Charge No. 3

Wallace Butts v. Curtis Publishing Company, Case No. 8311 George Code Section 38-1806, which is as follows:

"38-1806. (5884) WHAT CREDIT TO IMPEACHED WITNESS; QUESTION FOR JURY.—When a witness shall be successfully contradicted as to a material matter, his credit as to other matters shall be for the jury, but if a witness shall swear wilfully and knowingly falsely, his testimony shall be disregarded entirely, unless corroborated [fol. 111] by circumstances or other unimpeached evidence. The credit to be given his testimony where impeached for general bad character or for contradictory statements out of court shall be for the jury to determine. (59 Ga. 63; 93 Ga. 488 (21 S.E. 66); 722 Ga. 254.)"

Defendant's Request to Charge No. 6

Wallace Butts v. Curtis Publishing Company,
Case No. 8311

Whenever a party presents himself as a witness and his evidence is contradictory, vague or equivocal, his testimony must be construed most strongly against him.

Defendant's Request to Charge No. 8

Wallace Butts v. Curtis Publishing Company,
Case No. 8311

In order to establish the defense of truth the defendant must establish the substantial truth of the charge which is made in the article. However, the defendant need not prove the truth of any statements contained in the article which

are made about someone other than the plaintiff nor need the defendant prove the truth of any statements in the article about him which are not a part of the libelous charge. Therefore, in determining whether or not the defense of truth has been established, you will disregard any inaccurate statements contained in the article which are not about the plaintiff, or which are about the plaintiff but are not a part of the libelous charge.

Ga. Code Ann. §*105-701*

[fol. 112] Defendant's Request to Charge No. 14:

Wallace Butts v. Curtis Publishing Company,
Case No. 8311

You cannot award plaintiff punitive damages unless plaintiff has sustained his burden of persuading you by a fair preponderance of the evidence that defendant acted with actual malice in publishing the charge made of plaintiff in the Post article.

Restatement of Torts, ¶908, comment (b) (1938)

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S REQUESTED INSTRUCTIONS TO JURY—
Filed February 7, 1964

Plaintiff requests the Court to give to the jury the following instruction:

* * * * * * *

5.

I instruct you that when read in its entirety, the court construes the article complained of in the Saturday Evening Post as charging plaintiff as being corrupt and with rigging and fixing the 1962 Alabama-Georgia football game, which statements tend to injure the plaintiff in his trade,