Supreme Court

Appellate Division — First Department.

659

JACK REDMOND,
Plaintiff-Appellant,

against

COLUMBIA PICTURES CORPORATION,
Defendant-Respondent.

CASE ON APPEAL

BERNARD L. BASKIN,
Attorney for Plaintiff-Appellant,
No. 274 Madison Avenue,
Borough of Manhattan,
New York City, N. Y.

SCHWARTZ & FROHLICH,
Attorneys for Defendant-Respondent,
No. 1450 Broadway,
Borough of Manhattan,
New York City, N. Y.

The Hecla Press, 225 Varick Street, N. Y. C. Tel. WAlker 5-1480.

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PLAINTIFF'S EXHIBITS.

DEFENDANT'S EXHIBITS.

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Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT.

JACK REDMOND,
Plaintiff-Appellant,

against

COLUMBIA PICTURES CORPORATION,
Defendant-Respondent.

2

Statement Under Rule 234.

This action was commenced by the service of the summons and complaint on defendant on August 19, 1936. Issue was joined by the service of defendant's amended answer on November 9, 1936.

Plaintiff appeared by Bernard L. Baskin (William Weisman, of counsel) and defendant appeared by Schwartz & Frohlich.

The full names of the parties appear above. There has been no change of parties or of attorneys herein.

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4

Notice of Appeal.

SUPREME COURT
OF THE STATE OF NEW YORK,
COUNTY OF NEW YORK.

JACK REDMOND,
Plaintiff,
against
COLUMBIA PICTURES CORPORATION,
Defendant.

5

Sirs:

PLEASE TAKE NOTICE, that the plaintiff, Jack Redmond, hereby appeals to the Supreme Court, Appellate Division, in and for the First Judicial Department, from the judgment of this court bearing date May 20th, 1937, made by Hon. Ferdinand Pecora, Justice, and entered in the office of the clerk of the County of New York on May 20th, 1937, and that said appeal is from each and every part of said judgment as well as the whole thereof.

Dated, New York, June 8th, 1937.

Yours, etc.,

6

BERNARD L. BASKIN,
Attorney for Plaintiff,
Office & P. O. Address,
274 Madison Avenue,
Borough of Manhattan,
City of New York.

To:

SCHWARTZ & FROHLICH, Esquires,
Attorneys for Defendant,
Office & P. O. Address,
1450 Broadway,
Borough of Manhattan,
City of New York.

Summons.

SUPREME COURT

OF THE STATE OF NEW YORK,

COUNTY OF NEW YORK.

JACK REDMOND,
Plaintiff,
against
COLUMBIA PICTURES CORP.,
Defendant.

To the above-named Defendant:

YOU ARE HEREBY SUMMONED to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear, or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Dated, August 19th, 1936.

BERNARD L. BASKIN,
Plaintiff's Attorney,
Office and Post Office Address,
274 Madison Avenue,
Borough of Manhattan,
City of New York.

10 **Complaint.**

SUPREME COURT

OF THE STATE OF NEW YORK,

COUNTY OF NEW YORK.

[SAME TITLE.]

Plaintiff, by his attorney Bernard L. Baskin, complaining of the defendant, respectfully shows and alleges:

AS AND FOR A FIRST CAUSE OF ACTION:

11 FIRST: Upon information and belief that at all the times hereinafter mentioned, the defendant was and still is a domestic corporation organized and existing under and by virtue of the laws of the State of New York.

SECOND: That the plaintiff at all the times hereinafter mentioned was and still is one of the outstanding professional golfers in the United States and is known in the golfing professional world as a "Trick Shot Artist."

THIRD: That at all the times hereinafter mentioned, the defendant was and still is engaged in the business of manufacturing, leasing, licensing,
12 selling, distributing, displaying and circulating photographic films for use in motion picture machines.

FOURTH: That during the Spring of 1935, the plaintiff gave a private exhibition of "Trick Shots" for the Fox Movietone News at a Country Club at Eatontown, New Jersey.

FIFTH: That immediately after the said private exhibition, given by the plaintiff to the Fox Movietone News, the said Fox Movietone News did show the picture as a news event.

SIXTH: That the plaintiff received no compensation from the Fox Movietone News for his services in the news reel.

SEVENTH: That heretofore and at various and divers times subsequent to May 15th, 1936, the defendant in its business aforesaid and for commercial and advertising purposes did unlawfully and without the written consent of the plaintiff use pictures, portraits and likenesses of the plaintiff together with using the plaintiff's name several times during the course of the picture in connection with the sale and distribution of one of its motion pictures known as "Golfing Rhythm."

EIGHTH: That the pictures, portraits and likenesses of the plaintiff used in the picture of "Golfing Rhythm" are the same pictures, portraits and likenesses for which the plaintiff posed for the Fox Movietone News in the Spring of 1935, at a Country Club in Eatontown, New Jersey.

NINTH: The picture "Golfing Rhythm" was leased to many moving picture shows for exhibition.

TENTH: That the said picture "Golfing Rhythm" was used by the defendant as a matter of business and profit and contrary to the prohibition of the Statutes, Sections 50 and 51 of the Civil Rights Law.

ELEVENTH: That the defendant unlawfully and without either the written or oral consent of the plaintiff released and distributed the motion picture known as "Golfing Rhythm" to various motion picture houses in the State of New York and throughout the United States, and that the defendant caused the release and distribution of said motion picture known as "Golfing Rhythm" which contained the plaintiff's picture and name and caused said motion picture to be shown for profit in the various picture theatres in the State of New York and throughout the United States.

17 TWELFTH: That the use by the defendant of the plaintiff's name, pictures, portraits and licenses aforesaid was entirely unauthorized and without the plaintiff's oral or written consent and such use by the defendant was knowingly unlawful.

THIRTEENTH: That the defendant asserts the right to use the plaintiff's name, pictures, portraits and likenesses in connection with the picture known as "Golfing Rhythm" and threatens to continue to use the plaintiff's name, picture, portraits and likenesses notwithstanding that the plaintiff has duly demanded that the defendant cease such use thereof.

18 FOURTEENTH: That at the time the defendant released the picture "Golfing Rhythm" for profit, the plaintiff was negotiating with other moving picture concerns for the purpose of obtaining a contract for a golfing picture.

FIFTEENTH: That since the release and distribution by the defendant of the motion picture "Golfing

Rhythm" the other concerns with whom the plaintiff was negotiating have refused to enter into a contract with the plaintiff for the production of the golfing picture.

SIXTEENTH: That by reason of such unlawful use by the defendant of the plaintiff's name, pictures, portraits and likenesses, and, if the defendant is permitted to continue the use of the plaintiff's name, pictures, portraits and likenesses in connection with its motion picture known as "Golfing Rhythm," plaintiff will be irreparably damaged and in a manner and to an extent beyond money compensation damages. 20

SEVENTEENTH: That plaintiff has been damaged in the sum of Twenty-Five Thousand ($25,000.00) Dollars.

AS AND FOR A SECOND CAUSE OF ACTION:

EIGHTEENTH: Plaintiff repeats, reiterates and realleges each and every allegation contained in paragraphs marked "First," "Second," "Third" and "Fourth."

NINETEENTH: That heretofore and at various and divers times and between the 1st day of May, 1936, and the 31st day of May, 1936, the defendant 21 in its business aforesaid and for commercial purposes did unlawfully and without the oral or written consent of the plaintiff use his name in connection with advertising one of its motion pictures known as "Golfing Rhythm" in two of its publications known as the "Columbia Mirror" and the "Columbia Beacon."

TWENTIETH: That during the month of May, 1936, the defendant caused the plaintiff's name to appear in connection with a certain written advertisement and stated that "Jack Redmond, the magician of the course shows us some trick stuff, such as driving golf balls off a young lady's foot; shooting a golf ball right through a wooden box; then through a Bronx telephone book."

TWENTY-FIRST: That the above quotation was written in an article by James Ulysses Upton for the defendant herein.

23 TWENTY-SECOND: That the defendant caused numerous copies of the written advertisement aforesaid to be distributed by mail and otherwise to various and divers persons in the City of New York and vicinity and throughout the entire United States.

TWENTY-THIRD: That the use by the defendant of the plaintiff's name in the defendant's publications, the "Columbia Mirror" and the "Columbia Beacon" was entirely unauthorized and without the plaintiff's oral or written consent and that such use by the defendant was contrary to the prohibition of the Statutes, Sections 50 and 51 of the Civil
24 Rights Law.

TWENTY-FOURTH: That the defendant asserts the right to use the plaintiff's name in connection with the advertisement contained in the "Columbia Beacon" and the "Columbia Mirror" and threatens to continue using plaintiff's name in connection therewith notwithstanding the fact that the plaintiff has duly demanded that the defendant cease such use thereof.

25

TWENTY-FIFTH: That the defendant used said advertisements for the purposes of sales and distribution of one of its pictures known as "Golfing Rhythm."

TWENTY-SIXTH: That the plaintiff has been damaged in the sum of Twenty-Five Thousand ($25,000.00) Dollars.

WHEREFORE, plaintiff demands judgment of this Court in the sum of Fifty Thousand ($50,000.00) Dollars, and that this Court forever restrain the use by the defendant of the plaintiff's name, pictures, portraits and likenesses for the purposes of 26
advancement of its business and award the recovery of such damages as the Court shall determine the plaintiff has suffered up to the trial hereof, together with the exemplary damages and the costs and disbursements of this action.

BERNARD L. BASKIN,
Attorney for Plaintiff,
Office & P. O. Address,
274 Madison Avenue,
Borough of Manhattan,
City of New York.

(Verified August 19, 1936.)

27

28 **Amended Answer.**

SUPREME COURT

OF THE STATE OF NEW YORK,

COUNTY OF NEW YORK.

[SAME TITLE.]

The defendant, Columbia Pictures Corporation, for its amended answer to the complaint herein, by Schwartz & Frohlich, its attorneys:

1. Denies any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs "Second," "Fifth," "Sixth," "Eighth," "Fourteenth" and "Fifteenth."

29

2. Denies each and every allegation contained in paragraphs "Fourth," "Seventh," "Tenth," "Eleventh," "Twelfth," "Thirteenth," "Sixteenth," "Seventeenth," "Nineteenth," "Twenty-first," "Twenty-second," "Twenty-third," "Twenty-fourth," "Twenty-fifth" and "Twenty-sixth."

3. Denies each and every allegation contained in paragraph "Third," except that the defendant admits that it is in the business of licensing and distributing motion pictures for exhibition in motion picture theatres.

30

4. Denies each and every allegation contained in paragraph "Ninth," except that the defendant admits that it licensed the picture "Golfing Rhythm" for exhibition.

5. Denies each and every allegation contained in paragraph "Eighteenth," except as heretofore admitted.

6. Denies each and every allegation contained in paragraph "Twentieth," except that the defendant admits that during the month of May, 1936, there appeared the following language in a publication known as the Columbia Mirror:

> "Jack Redmond, the magician of the course shows us some trick stuff, such as driving golf balls off a young lady's foot; shooting a golf ball right through a wooden box: then through a Bronx telephone book."

AS AND FOR A FIRST, SEPARATE AND DISTINCT DEFENSE TO BOTH CAUSES OF ACTION DEFENDANT ALLEGES:

7. That the motion picture entitled "Golfing Rhythm" is one of a series of motion pictures portraying events of public interest, to wit: various forms of sports as practiced throughout the world, the series being known as "News World of Sports"; that it portrays truthfully, actual public sport events as they took place, including a public sport event in which plaintiff participated, and a talking voice accompanies the picture to explain the events portrayed and thus enlightens those who view the picture.

AS AND FOR A PARTIAL DEFENSE TO BOTH CAUSES OF ACTION AND IN MITIGATION OF DAMAGES DEFENDANT ALLEGES:

8. Upon information and belief, that plaintiff consented to and posed for the picture complained of; that he consented that said Fox Movietone News, referred to in the complaint, make unlimited use of said picture, and exhibit it or cause or

license others to exhibit it as a sport event. That said Fox Movietone News pursuant to such license and consent, did thereupon license the exhibitions of said picture to this defendant. That plaintiff at the times aforementioned did license said Fox Movietone News to use plaintiff's name in printed heralds, posters and other suitable forms of publicity in connection with the showing of the picture; and the use of plaintiff's name in the manner complained of was with the consent and acquiescence of plaintiff.

35 9. That thereafter, Fox Movietone News licensed this defendant to use said picture in conjunction with the exhibition of public news sport events and in the defendant's series "News World of Sports," and pursuant to said license this defendant licensed to others the exhibition of plaintiff's picture as part of a short reel depicting public news sport events.

WHEREFORE, defendant demands judgment dismissing the complaint of the plaintiff, together with the costs and disbursements of this action.

SCHWARTZ & FROHLICH,
Attorneys for Defendant,
36 Office & P. O. Address,
#1450 Broadway,
Borough of Manhattan,
City of New York.

(Verified November 9, 1936.)

Plaintiff's Bill of Particulars.

37

SUPREME COURT

OF THE STATE OF NEW YORK,

COUNTY OF NEW YORK.

[SAME TITLE.]

Sirs:

Plaintiff, as and for his verified bill of particulars, submits the following:

1. There was no contract, either written or oral between the plaintiff and the Fox Movietone News.

2. The Fox Movietone News requested plaintiff 38
to pose for part of a news reel and which news reel was shown the same or the following week.

3. The private exhibition was given on or about the 23rd day of June, 1935 at the Mammoth County Country Club at Eatontown, New Jersey.

Dated, New York, April 30, 1937.

Yours, etc.,

BERNARD L. BASKIN,
Attorney for Plaintiff,
Office & P. O. Address,
274 Madison Avenue, 39
Borough of Manhattan,
City of New York.

To:

SCHWARTZ & FROHLICH, Esqs.,
Attorneys for Defendant,
1450 Broadway,
New York City.

(Verified April 30, 1937.)

40 **Extract from Clerk's Minutes.**

SUPREME COURT,

NEW YORK COUNTY,

TRIAL TERM—PART XVIII.

May 18th, 1937.

JACK REDMOND,
Plaintiff,

v.

41 COLUMBIA PICTURES CORP.,
Defendant.

I DO HEREBY CERTIFY that this cause was tried before Hon. Ferdinand Pecora on the 12th and 13th days of May, 1937, and a judgment rendered therein for the plaintiff for the sum of Six Cents as nominal damages.

This being a non-jury case, it was stipulated by counsel that findings of fact and conclusions of law be waived and that the Court may grant judgment with the same force and effect as though a jury were present and a verdict directed.

ALBERT MARINELLI,
42 Clerk.

Judgment Appealed From. 43

SUPREME COURT,

NEW YORK COUNTY.

JACK REDMOND,
of 325 W. 45th St., N. Y. C.,
Plaintiff,

against

COLUMBIA PICTURES CORPORATION,
of 729 Seventh Ave., N. Y. C.,
Defendant.

44

The issues in this action having been regularly brought on for trial before Mr. Justice Ferdinand Pecora without a jury at Trial Term, Part XVIII of this Court, held on the 12th and 13th days of May, 1937, at the County Courthouse in the Borough of Manhattan, City of New York, and the parties having stipulated by counsel that findings of fact and conclusions of law be waived, and that the Court could grant judgment with the same force and effect as though a jury were present and a verdict directed, and the issues having been duly tried, and the plaintiff appearing herein by Bernard L. Baskin (William Weisman, Esq., counsel) and the defendant appearing herein by 45
Schwartz & Frohlich (Louis D. Frohlich, Esq., counsel), and a verdict in favor of the said plaintiff Jack Redmond and against the defendant Columbia Pictures Corporation for six cents as nominal damages having been duly rendered by direction of the Court,

NOW, on motion of Schwartz & Frohlich, attorneys for the defendant, it is

46 *Judgment Appealed From.*

ADJUDGED that the plaintiff Jack Redmond recover against the defendant Columbia Pictures Corporation the sum of six cents ($.06) as nominal damages.

Dated, New York, May 20th, 1937.

Judgment signed and entered this 20th day of May, 1937.

ALBERT MARINELLI,
(Seal) Clerk.

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Case and Exceptions.

SUPREME COURT,

NEW YORK COUNTY.

TRIAL TERM—PART XVIII.

[SAME TITLE.]

New York, May 12th, 1937.

Before: HON. FERDINAND PECORA, *J.*

48

APPEARANCES:

B. L. BASKIN, Esq., attorney for plaintiff, by WILLIAM WEISMAN, Esq., of counsel.

MESSRS. SCHWARTZ & FROHLICH, attorneys for defendant, by LOUIS D. FROHLICH, Esq., IRVING MOROSS, Esq., and MAX H. GALFUNT, Esq., of Counsel.

Mr. Weisman: If your Honor please, I move to amend the title of the action so as to indicate the defendant's name is Columbia Pictures Corporation, spelled out, instead of "Corp."

Mr. Frohlich: No objection.

The Court: All right.

Mr. Weisman: And I move to amend paragraph First of the complaint to correct a typographical error; the word "leased" should be the word "licensed."

Mr. Frohlich: No objection.

The Court: Granted.

Mr. Weisman: And paragraph Twelfth of the complaint, the word "licenses" should be "likenesses." 50

Mr. Frohlich: No objection to that.

The Court: All right.

PLAINTIFF'S PROOFS.

JACK REDMOND, the plaintiff, called as a witness on his own behalf, being first duly sworn and stating his address to be Plymouth Hotel, New York City, testified as follows:

Direct examination by Mr. Weisman. 51

Q. Mr. Redmond, you are the plaintiff in this case, are you not? A. Yes, sir.

Q. What is your profession? A. I am a golf professional.

Q. How long have you been a golf professional? A. About nineteen years.

Q. How old are you? A. Forty-four years old.

Q. Is there any specialty of golf professionalism in which you are engaged? A. Yes; I do a trick shot exhibition. I am known as a trick shot player. That is what I make my living at, making those trick shots.

Q. And how long have you been making a living out of being a trick shot exhibitionist in golf? A. I should judge around fourteen years.

Q. And where have you exhibited your specialty? A. You mean where have I played?

Q. Yes. A. I have played in mostly every country in the world. I played in Africa; I have played
53 in Australia, New Zealand, Belgium, Holland, England, Scotland, Ireland, every State in the United States, every State in Canada, mostly all the countries in South America.

Q. And you get paid, of course, for your exhibitions? A. That is the way I make my living; yes, sir.

Q. And are you engaged in any other business or profession? A. No, I am not.

Q. And for how many years has golf professionalism and trick shot exhibition been your profession? A. About thirteen or fourteen years.

Q. Have you, in addition to playing and exhibiting on the links, given exhibitions in theatres? A. Yes, I have.

54 Q. Where? A. I have played practically every theatre in the United States for the Keith time and the Interstate time; I have played for Earl Carroll's Vanities on Broadway for about nine months and on the road for about twelve months; I have played the theatres in Scotland, England and Ireland; and that is outside of my exhibits at country clubs.

Q. Will you please tell us the nature of the trick shots—describe them as nearly as you can—which constitute your performance? A. You mean in the theatre or on the links?

Q. If they are different, then describe both of them. A. Well, the exhibition on the links runs about an hour. Do you want to have me describe—

Q. The nature of the shots; what makes it a specialty? A. Oh, well, the average golfer hits the ball straight, or tries to hit it straight, and in my profession and in my specialty of doing trick shots I hit the ball blindfolded; I tee one ball on top of the other, drive the bottom ball out; I tee them
56 up and drive the top ball out; I hit the ball—instead of hitting it the right way, I hit cross-handed; I slice and hook at will; I tee balls one on top of the other and drive them out at will, the center ball or top, bottom ball, as the audience might call for; I tee different balls at different heights and get them up at different heights in the air from the same height on the ground; I knock golf balls from wedges without breaking the wedges; I have hit golf balls off people's heads for a good many years—right off their foreheads—in shows and on the links; I step on golf balls and I drive them with the driver and they jump up in the air and I catch them; niblick shots, I can hit a ball with one ball teed on top of the other and hit it 50 or
57 60 feet in the air and catch it; I can lay a ball on the ground, on the surface of the grass, and hit a full shot with the niblick and it jumps in the air and I can catch it; and can put three balls one after the other, hit them with a driver, slice one and hook one and hit the next one straight without disturbing the other two balls, one in back of the

other; and then there are so many request shots of shanking and topping that I can do at will when the audience requires it.

Q. In addition to hitting the ball off a human being's forehead, as you described, do you hit a ball off any other part of a human being's body? A. Yes; I hit the ball in all my exhibitions off the toe of someone in the audience, about that height off the toe (indicating); knock the ball 225 to 250 yards down the center of the fairway.

Q. You use the toe of a human being as a tee? A. As a tee, yes, sir.

59 Q. Do you also give exhibitions with bottles? A. Yes, I do.

Q. Will you describe those, please? A. I have taken as many as five or six bottles in a row, and I guess they are about 8 inches high; I tee a ball on top of each bottle so it is right on the bottle, put a little artist's clay on each bottle and place a ball on top of it and stand astride the bottle as though I was teeing off a tee, and go through, hitting each one of these balls down the fairway practically 200 yards without breaking the bottles or the clubs or spilling the balls; they are perfect shots. Instead of teeing the ball on the ground like you would by a little peg or some sand, I use these bottles in a row and hit the balls off the

60 bottles one after the other.

Q. Do you also use a bottle for a target in exhibiting your shots? A. Yes, of course.

Q. Describe that, please. A. I take a bottle and put it on a tripod about 60 feet away from me. That is about this high (indicating).

Q. How high is that? A. I should judge about 3 feet. I drive a stake into the ground or tripod;

sometimes I use a wooden stake; I place a bottle on top of this and get back about 60 feet and tee a ball on the ground and drive that ball away from me and smash the bottle.

Q. At a 60-foot distance? A. At about practically 35 or 40 or 50 or 60 feet—different distances.

Q. Do you recall in 1935 giving an exhibition to be used by the Fox Movietone News? A. Yes, sir, I do.

Q. Where was that exhibition given? A. It was taken over in Jersey.

Q. Where? A. At the Monmouth County Country Club, at Long Branch, New Jersey. 62

Q. Was that a private or a public exhibition?

Mr. Frohlich: I object to that as calling for a conclusion.

Mr. Weisman: I will reframe the question if you like.

The Court: Yes, you had better.

Q. Was there an audience witnessing that exhibition? A. Several caddies and I think some of the people employed in the country club, the manager and several other people that happened to come out.

Q. Do you know whether that exhibition was advertised as a public exhibition? A. It certainly was not. 63

Q. Altogether, how many people do you say witnessed that performance? A. I would not say any more than six, counting the cameramen and the actors and the people that were in the picture.

The Court: What was the date of that exhibition, Mr. Redmond?

64 *Jack Redmond—Plaintiff—Direct.*

The Witness: It was on June 23rd, on a Sunday, in 1935.

The Court: Where did you say it was given?

The Witness: At the Monmouth County Country Club, in Long Branch, New Jersey.

The Court: Does that refer to the place set forth in paragraph Fourth of the complaint?

Mr. Weisman: Yes, sir.

Mr. Frohlich: I think it is. I think Eatontown is the name of the exact town.

65 The Witness: That is the name of the town.

Mr. Frohlich: It is right near Long Branch.

The Witness: It is right out of Long Branch—Eatontown.

Q. Did you get paid for that exhibition? A. No, sir.

Q. Now, later, in May or June of 1936, you were in Chicago, were you not? A. Yes, sir.

Q. Did you attend a moving picture there? A. I did.

Q. Can you recall the name of the theatre? A. I know it was on Randolph Street, right around
66 the corner from the hotel I was living at, the Sherman Hotel. I think it was the old Garrick Theatre that used to be a legitimate playhouse. I am not sure.

Q. Did you witness the showing of the picture called "Golfing Rhythm"?

Mr. Frohlich: I object to that on the ground any exhibition outside of the State

of New York is not within the scope of this action. This plaintiff is bound to show only use of his name or portrait or exhibits within the State of New York. Anything shown outside of this State does not come within the province of the Civil Rights Law, which has no extra-territorial effect, and for that reason I object to the question.

The Court: The action is brought under Sections 50 and 51 of the Civil Rights Law of the State of New York, is it not?

Mr. Weisman: That is right; and I am showing that, your Honor, in order to bring 68
forward the fact it was exhibited; it was made into a picture; and then I will bring out it was shown in New York State as well. I am just doing that for the purpose of connecting this, sir.

Mr. Frohlich: The section reads, your Honor, "Any person whose name, portrait or picture is used within this State."

Mr. Weisman: I am not claiming any additional damages for having it shown in the State of Illinois.

The Court: Then why go beyond the statutory cause of action?

Mr. Weisman: I am not, your Honor. I am simply trying to show what the picture 69
was like, and then show that the same picture was shown in New York. Obviously, the picture could not be different in New York than in Illinois.

The Court: If you show the picture was shown in New York, is not that sufficient for the purposes of your action?

Mr. Weisman: Yes.

The Court: Then why go beyond the State?

Mr. Weisman: All right.

The Court: The objection is sustained.

Q. Did you in September of 1936 see the picture entitled "Golfing Rhythm" at the Trans-Lux Theatre on Broadway and 49th Street in New York City? A. Yes, sir, I did.

Q. Was your portrait shown in that picture? A. Both outside of the theatre and inside of the theatre.

71 Q. What did you see outside of the theatre? A. A still picture of me hitting a ball off this girl's foot—three balls off her foot.

Q. And did you witness the picture in the theatre? A. Yes, sir, I did.

Q. Now will you please describe to the Court what part of your performance was exhibited in the picture called "Golfing Rhythm" at the Trans-Lux Theatre in New York? A. Identically the same picture that I did for the Fox people in New Jersey.

Q. Will you describe the whole reel, please—"Golfing Rhythm"? A. It was made up into an elaborate sports reel at the beginning. It showed

72 two big people swinging at the golf balls and showed a man driving a ball out of the water, and it showed lots of people on the driving range, and it showed Gene Sarazen driving balls at caddies, and Lawson Little hitting drives, and down around the end, I think, was the picture of myself hitting golf balls off bottles and off this girl's foot.

Q. Please describe in detail the part of the picture which exhibited you and your exhibition. A. I believe it was second from the last.

Q. I do not care where it was; describe the poses and what you were shown doing.

The Court: The action shown by the moving pictures in so far as it showed you.

The Witness: It showed me with this little girl, teeing the ball off her foot, about a quarter of an inch off her toe, the leather of her shoe, and a second ball and a third ball; and, of course, it is hard to show you without a golf club. If I had a golf club, I could show you how that girl stood with her foot out; and I drove these balls one after the other down the fairway, right in 74
the center of the fairway, about 200 yards; and then it showed me teeing these balls on these six bottles that were laid against one another, and they were about that far apart (indicating), with a ball on the neck of each one of these bottles, and it showed me driving these balls one after the other down the center of the fairway, and not one shot was missed, and they went down around 200 yards—between 190 and two and a quarter; and then it showed me putting a ball on this man's mouth, and when I swung through he swallowed the ball and my club went right across his lips when he swallowed the ball. 75

Q. Did it also show you hitting a bottle? A. Then it showed me, I believe, at that time and this tripod that I put this bottle on, and it showed—I believe they put the camera in back of the tripod and caught me out here driving, and the ball went up and smashed the bottle all to pieces.

Q. Was there any dialogue accompanying your action? A. It wasn't my dialogue.

Q. Was there any comment made on the screen when you saw the picture at the Trans-Lux Theatre? A. Yes; whoever was the fellow who was doing the talk, that used my name five, six or seven times, at various times bringing my name out—"Jack does this," and "and Jack Redmond does this."

Q. And describing the action? A. And describing the action of each shot.

Q. When you gave the exhibition for Fox Movietone, had you used any dialogue at all? A. Yes, I did.

77 Q. And was your dialogue used in the showing of "Golfing Rhythm" at the Trans-Lux? A. Absolutely not.

Mr. Weisman: I ask counsel to produce the dialogue that was used.

Mr. Frohlich: In which?

Mr. Weisman: In "Golfing Rhythm."

Mr. Frohlich: Yes (handing).

Mr. Weisman: I offer in evidence that part of the dialogue of "Golfing Rhythm" produced by the defendant which is——

Mr. Frohlich: I think we ought to have the entire dialogue in evidence, all of it. I do not see why he just offers that.

78 Mr. Weisman: Please let me finish my offer.

Mr. Frohlich: Go right ahead.

Mr. Weisman: That part which refers to the action of the plaintiff, and it is marked off in blue crayon.

Mr. Frohlich: I object to putting in evidence any portion of this dialogue because I think in this kind of an action the use

which is made of this plaintiff's portrait and his name or dialogue connected with it should be before the Court in its entirety—not split up and not put in piecemeal. Here is the dialogue which my friend should put in, and if he does not put it in I would put it in. It is obviating having a witness here to identify it. It gives the dialogue of the entire short reel in which this plaintiff's picture appeared, and I think, your Honor, you ought to have before you the entire dialogue as you are going to have the entire print and the entire picture.

80

The Court: Does the portion, Mr. Weisman, that you offer from this script relate only to the dialogue or oral comment that accompanied that portion of this film called "Golfing Rhythm" which depicted this plaintiff?

Mr. Weisman: Yes, and all of it, and all of the dialogue that accompanied it.

The Court: I gather only from statements of counsel rather than from any testimony that I have heard so far, that this picture which this witness is testifying to having seen showed, in addition to what he had said with respect to himself in action, other persons, other actions wholly dis- 81
associated with plaintiff. Is that right?

Mr. Frohlich: That is right.

Mr. Weisman: He has testified, he mentioned Gene Sarazen and Lawson Little.

The Court: This dialogue that you say, Mr. Frohlich, you think should be received

in its entirety is the script of the oral comment accompanying the showing of the entire reel?

Mr. Frohlich: Yes, your Honor.

The Court: I think that portion of it other than that which is offered by the plaintiff should be offered by way of defense.

Mr. Frohlich: We will do it that way, then. I will withdraw my objection and offer the remainder later.

(Received in evidence and marked Plaintiff's Exhibit 1.)

83 Q. Mr. Redmond, did you authorize the use of the language that accompanied the showing of your exhibition in that newsreel?

Mr. Frohlich: I object to that, your Honor, on the ground it calls for a conclusion. It is for your Honor to gather whether there is authority from all the circumstances as they are developed in the case.

The Court: I think your question is bad as to form, when you ask him did he authorize.

Q. Did you ever see, did anybody ever show you,
84 any of the language that was used in connection with your exhibition at the Trans-Lux Theatre prior to the time that you actually saw it in the theatre? A. No, sir.

Mr. Weisman: Now I ask counsel to produce the magazine called the "Columbia Mirror," which advertises the "Golfing Rhythm" picture.

Mr. Frohlich: I am producing a copy of the "Columbia Mirror," Volume 2, No. 12, for purpose of identification. I do not produce it as any document advertising the name of the plaintiff. With that limitation I have no objection to its going in evidence (handing to counsel).

Mr. Weisman: I offer in evidence that portion of page 14 of the "Columbia Mirror," Volume 2, No. 12, which is entitled "Tips advance information on exceptional short subjects by James Ulysses Upton, 'Golfing Rhythm,' News World of Sports, 86
reel released May 15, 1936."

Mr. Frohlich: No objection.

(Received in evidence and marked Plaintiff's Exhibit 2.)

The Court: Is there any date?

Mr. Weisman: Just May 15, 1936, on the so-called editorial page. I ask counsel to concede that that magazine is published, printed and distributed by the defendant.

Mr. Frohlich: Yes.

Q. Mr. Redmond, have you seen a copy of Plaintiff's Exhibit 2? A. Meaning this "Columbia Mirror"? 87

Q. Referring to "Golfing Rhythm," yes, in the "Columbia Mirror." A. Yes, I have seen it.

Q. Can you tell the Court how you saw it, whether you received it or purchased it or how? A. I was in Chicago and received it through the mail, much to my surprise.

Q. You received it through the mail? A. Yes, sir.

88 *Jack Redmond—Plaintiff—Direct.*

Mr. Frohlich: I move to strike out "much to my surprise."

Mr. Weisman: I will consent to that.

Q. Now, this article or editorial—I do not care what you want me to call it—of Exhibit 2, which refers to you, describes you shooting a golf ball right through a wooden box. Have you ever shot a ball right through a wooden box? A. Never in my life.

Q. Is that a part of your exhibition? A. No, sir, it is not.

89 Q. It describes you hitting a ball through a Bronx telephone book. Have you ever hit a golf ball through any telephone book, whether it was Bronx or any other? A. Never even tried it.

Q. And that is not a part of your exhibition? A. Positively not.

Q. Have you, in addition to playing professional golf, given exhibits as you have described, also written articles on golf? A. Yes, sir, I have.

Q. For whom and for how long a time? A. Well, I guess over a period of eight or nine years. Would you like to know some of the names?

Q. Yes, please. A. Well, the Kiwanis Magazine in Chicago, Golfing Magazine in Chicago, "La Golf" in Paris, "Golfing" in Australia, the "Canadian
90 Golfer," "Golfing"—another magazine called "Golfing" in Chicago. There is one of "Golfer" and one "Golfing." There is a magazine in Baltimore, "The Club"—I believe that is the one. I wrote articles that were in "Spalding's Guide" in 1929 and 1930 and Spalding's "How to Play Golf"; and on my world tour I wrote for the King Features Syndicate, and I have written articles for the press here,

general newspapers, Associated Press, which appeared in their various papers throughout the country.

Q. Mr. Redmond, did you give Columbia Pictures Corporation written consent to use your photograph, your exhibit, in connection with "Golfing Rhythm" or in connection with any other exhibition of yours? A. No, sir, I never did.

Mr. Weisman: Now I ask counsel for the defendant to concede that "Golfing Rhythm," the picture "Golfing Rhythm," was leased by Columbia Pictures Corporation to various theatres in the State of New York, for 92
which it charged license fee.

Mr. Frohlich: I will give you the concession only on condition that you put in evidence the entire list of theatres at which this was distributed in New York State. I have got them here.

Mr. Weisman: I will do that.

Mr. Frohlich: We have three exchanges in the State of New York: one in New York City, which takes in the surrounding territory here, and one in Buffalo and one in Albany. I have caused a compilation to be made by the three exchanges of the exhibitions of this picture, giving the name of the 93
city, the play date and the amount of money received, and I will offer them in evidence.

(Five sheets received in evidence and marked Defendant's Exhibit A.)

The Court: I notice, gentlemen, on Defendant's Exhibit A, the following typewritten inscription in the upper right-hand

corner of the first sheet: "From date of release to October 31, 1937." Is that a typographical error, "1937"?

Mr. Frohlich: 1936.

The Court: Suppose you change it, then.

Mr. Frohlich: Thank you. I will.

Q. In the spring of 1936, Mr. Redmond, were you negotiating with Warner Brothers in connection with the showing of your golfing exhibition as a movie short?

Mr. Frohlich: I object to that, your
95 Honor, on the ground it is incompetent, irrelevant and immaterial; it has no bearing on the issues here. It is hearsay evidence.

The Court: As to whether he had negotiations with anyone, I do not consider that to be hearsay evidence. There is a claim for damages here pleaded in the complaint.

Mr. Weisman: Paragraph Fourteenth.

The Court: Paragraph Fifteenth.

Mr. Weisman: Fourteenth, Fifteenth and Sixteenth.

Mr. Frohlich: He has attempted to plead special damage. I am going to object to any kind of proof of this kind as to special damage. There is a way of proving it directly.
96

The Court: The objection is overruled.

Mr. Frohlich: Exception, if your Honor please.

Q. What is your answer, please? A. Yes, I was.

Q. Will you state the name of the person in Warner Brothers with whom you were negotiating? A. The casting director, Mr. Lee Stewart.

97

Q. Did you sign any contract with Warner Brothers? Did your negotiations result in the signing of a contract between you and Warner Brothers? A. No, sir, they did not.

Q. Was the refusal or the failure to sign such a contract given to you by Mr. Stewart that "Golfing Rhythm" had already exhibited you in a similar picture?

Mr. Frohlich: I object to that on the ground it is——

The Court: Sustained.

Mr. Weisman: That is all.

98

Cross-examination by Mr. Frohlich.

Q. Mr. Redmond, when did you embark upon your career as a trick golfer? A. About fourteen years ago.

Q. And prior to that time had you played professional golf? A. I was a professional at clubs, yes, sir.

Q. And you had earned your living by having employment at various clubs throughout the United States as a professional golfer? A. That is right; yes, sir.

Q. Then a time came when you began to specialize in these difficult trick shots; is that right? A. Yes, sir.

99

Q. And you said that was about fourteen years ago? A. I should judge around thirteen or fourteen years ago.

Q. During the time that you were a professional golfer and up to the time that you specialized in these trick shots had you written any articles on golfing? A. I don't believe so.

Q. Had you up to that period appeared in golfing tournaments throughout the country? A. When I was a professional attending clubs?

Q. I mean at tournaments that were held for professionals. A. Yes, sir.

Q. Did you win any of those tournaments? A. No, I never won any of those tournaments.

Q. Did you get any prizes at those tournaments? A. No, sir, I did not.

Q. Did you enter your name in those tournaments? A. You had to enter your name to get in a tournament.

101 Q. Did you receive any public notice or comment by reason of your entering into those tournaments? A. Yes; when I played the British Open I believe every paper in the country used it.

Q. By "every paper in the country" you mean in the United States? A. Yes, sir.

Q. And they published upon your ability as a professional golfer in that particular tournament, in the British Open? A. In the British Open.

The Court: What year was that in?

The Witness: I believe that was in 1927, 1926 or 1927.

Q. And as you progressed in proficiency in golfing were you playing more and more in these
102 tournaments? A. As I went along.

Q. As you went along in the years? A. At country clubs I spent many hundreds of hours perfecting these trick shots that I did later, for the last fourteen years.

Q. And a time came when you appeared upon the vaudeville stage? A. That is right; yes, sir.

Q. Can you fix the year when you first appeared on the stage? A. It is around 1924 or 1925.

Q. How many years did you play on the vaudeville stage? A. Oh, I guess about five or six years.

Q. And during that period you covered pretty much the entire territory of the United States, did you not? A. Yes, sir, I did.

Q. You appeared in the Loew houses? A. No, sir.

Q. You appeared in the Keith houses? A. Yes, sir.

Q. R. K. O. houses? A. Yes, sir.

Q. You appeared on various circuits? A. Yes, sir.

Q. What other circuits did you appear in? A. 104
The Interstate, lots of independent houses around out of Chicago; I do not know whether you call them circuits, but many independent houses around New York City and all through New York State.

Q. During that four- or five-year period you were appearing in vaudeville theatres located within the City of New York, were you not—many of these theatres were located within New York City? A. Some of them, yes.

Q. And some of them were located in New York State, outside of the City of New York? A. That is right, sir.

Q. And when you appeared in those houses you were billed as one of the attractions, were you not? A. Yes, I was. 105

Q. In getting that billing was not your portrait, was not your name featured in the lobbies of the theatres in which you appeared from time to time? A. Yes, sir.

Q. And were not your portraits and name used freely by the theatrical magazine papers at that time?

106 *Jack Redmond—Plaintiff—Cross.*

Mr. Weisman: I object to the form of the question, whether it was used freely.

The Court: Change the form.

Q. Did not the theatrical papers like the "Variety," "Zit's" and other papers of that kind appearing during those years make comment upon you, write articles about you and print your name? A. I don't know about "Variety." I imagine they do about every professional. They have to. They are giving their show of the week or the show of the day.

107 Q. You were an actor for five or six years? A. Yes.

Q. And as an actor you were interested in seeing what publicity you were getting, were you not? A. There is not a man living that can do without it.

Q. You liked that, did you not? A. It is not a case of liking it. They like to get it for you so as to draw people to the theatres.

Q. It helped the business, did it not? A. It helped their business.

Q. I am speaking about you. Did publicity help your business? A. Yes, it advanced me.

Q. And did you not get a better salary because you were getting better publicity from time to

108 time? A. Yes, I did.

Q. What salary were you drawing when you first went into vaudeville?

Mr. Weisman: Objected to on the ground it is immaterial.

The Court: It has to do with the question of damages, mitigation of damages. The objection is overruled.

Mr. Weisman: I withdraw the objection.

Q. What salary were you getting when you first went into vaudeville? A. I think $400 a week. I am pretty sure it was.

Q. As time went on did you not get an increase in that salary? A. Some weeks I guess I did. No, I don't think so.

Q. You, as a good actor, knowing the value of publicity, you kept a scrap book, did you not? A. Yes, sir.

Q. Have you got it in court? A. Yes, sir.

Q. Will you be good enough to produce that scrap book? A. I have about forty of them.

Mr. Weisman: Which one do you want? 110

Mr. Frohlich: I would like to have all his scrap books.

Mr. Weisman: All right (handing to counsel).

Q. Which of these three scrap books that have just been handed to me by your counsel is the first one in point of time, which of these three books is the first in point of time? A. I have about thirty-two scrap books. These just happen to be two of the ones I brought down.

Q. Is it your testimony that you have in addition to these two scrap books thirty others of similar size? A. Many of them, yes, sir; probably thirty or twenty-eight, I don't know. I have plenty of 111 them.

Q. And do these scrap books that I show you here contain references to your skill as a golfer and your skill as an actor? A. I imagine they do.

Mr. Frohlich: I will offer these in evidence, these two books.

Mr. Weisman: No objection.

(Received in evidence and respectively marked Defendant's Exhibits B and C.)

The Court: Could you state, for purposes of convenience, what period of time is covered by the clippings in each one of those books?

Mr. Frohlich: I will have to interrogate the witness on that. It is rather difficult to tell that.

Mr. Weisman: He may be able to answer the question directly.

113 Q. Will you be good enough to tell us what period of time is covered by this particular book I show you, Defendant's Exhibit B? A. This one here is probably the last four or five or six years. This states a few of the country clubs that I played, sir, in an exhibition at these country clubs, programs from the higher class clubs throughout the country.

Q. Does this book go back to about 1931 or 1932? A. I don't believe so.

Mr. Weisman: Can you say from what date to what date these two scrap books include clippings?

The Witness: No; they are kind of all

114 mixed up.

Mr. Weisman: Can you give it approximately?

The Witness: This is since the trip I made around the world.

Mr. Weisman: When?

The Witness: In 1933.

The Court: This particular book is Exhibit B.

The Witness: Parts of publicity I have had since 1932 and 1933.

The Court: That is about the last four or five years?

The Witness: Yes, sir.

Q. I call your attention, Mr. Redmond, to Exhibit C; can you give us an idea of what years that book covers? A. Well, I notice one right here, when I was at the Golf Show at Chicago in 1927.

Mr. Weisman: Look at the last page and see what year that is.

The Witness: These are not laid out that 116
way. These are back in 1929. Here is Jolson, Moran-Mack, Weismuller; I guess that was in 1928. This one dates back to 1925. This is Clara Kimball Young; that is 1926. This is in Europe. I have some back here as far back as 1924, I believe. This is an exhibition of Paul Runyan, that was in 1927; and here is one back May 22nd, 1925, in San Francisco. I guess that is about back that far, around 1925.

The Court: From about 1925 down to 1932?

The Witness: I believe so, yes.

Q. These last papers, I take it, go with it? A. 117
Yes, sir. These are different magazine articles, different magazines I wrote for. Do you want to see these?

Mr. Weisman: They are in evidence.

Mr. Frohlich: They are all before the Court.

Q. Now, Mr. Redmond, you were quite an expert in making these difficult shots, were you not? A. I suppose I am considered an expert.

Q. Well, do you consider yourself superior to any other golfer in making difficult shots? A. There are about 6,000 professionals in this country.

Q. Do you know of any professional that can do it as well as you? A. Well, I believe there are two or three professionals that are doing trick shots throughout the world, and that is about all.

The Court: Two or three who make a specialty of it?

119 The Witness: Yes, sir.

The Court: And you are one of the two or three?

The Witness: Yes, sir.

Q. You are one of the two, three or four at the top of the ladder, are you not? A. I am so considered.

The Court: Very few up there; he says only two or three altogether. It is a very narrow rung.

Q. This book that your counsel produced, the third book, apparently contains letters of praise

120 and encomium with reference to your skill and ability, does it not? A. Yes, sir.

Q. And these are letters— A. Letters of recommendation.

Mr. Weisman: Mr. Frohlich, that has not been offered.

Mr. Frohlich: I will offer it now.

Q. And these letters of recommendation refer to you as Jack Redmond—you are the Jack Redmond mentioned in these letters? A. Yes, sir.

Q. And the photographs appended to some of these letters are photographs of places at which you played; is that right? A. Yes, sir.

Mr. Frohlich: I will offer this third book in evidence.

Mr. Weisman: No objection.

(Received in evidence and marked Defendant's Exhibit D.)

122 Q. You, of course, used these letters that are contained in Exhibit D to help you obtain jobs with various country clubs, did you not? A. Well, you would not call them jobs; you would call them exhibits.

Q. Well, exhibits. A. Yes, sir.

Q. And, of course, you were paid money for these exhibits; is that right? A. Positively.

Q. And you have been following that profession now ever since you were a very young man; is not that right? A. I believe so.

Q. Now, when for the first time did you pose and do any of your trick shots with reference to motion pictures? A. When was the first time?

123 Q. The first time that you can remember having posed for any motion picture company. A. I believe it was around 1925, in Los Angeles.

Q. Will you tell us the name of the company for whom you posed? A. I believe it was Pathé.

Q. Pathé News? A. Yes, sir.

Q. And where was that? A. I believe it was at the Rancho Country Club.

Q. Where is that located? A. In California.

Q. And did the Pathé News then and there take a picture of you making some of your difficult trick shots? A. Yes, they did.

Q. And, of course, in those days there was no dialogue, you did not speak to the camera? A. No, that was a silent.

Q. They just took your picture as you were making these shots? A. Yes, sir.

Q. And do you remember what shots you were executing at that time? A. It is a long time ago.

The Court: How long ago?

The Witness: 1925. That might not be
125 the exact year, but it is around that time.

Q. Approximately; I do not want to pin you down to any date. A. I just do not remember the right year.

Q. Can you tell us what shots you were doing at that time? A. I believe I knocked a ball off a girl's head. I am pretty sure I did.

Q. Did you do any shots with the bottles at that time? A. No, sir, I did not.

Q. Had you perfected yourself in making shots with bottles at that time? A. I believe I did knock balls off bottles at that time, yes, sir.

Q. Now, did you thereafter see in any theatre
126 an exhibition of the picture of the Pathé newsreel for which you had posed? A. Did I see it afterwards?

Q. Yes. A. Yes. I did.

Q. Was your name advertised or mentioned by Pathé in any publicity, as far as you know, in conjunction with the newsreel? A. I was on the screen.

Q. But were you billed in any document or any writing or any photographs or pictures at that time? A. That I do not remember, it is so long ago.

Q. Do you remember posing for the Pathé newsreel some time in 1932? A. I might have, I don't know. I have had so many of them.

Q. How many of them? A. Over a period of time?

Q. Yes. A. Offhand I do not know. Maybe eight or nine or ten, maybe fifteen, maybe twenty.

Q. Is it your testimony that you may have posed as much as twenty times for the various newsreels throughout the United States over the years? 128 A. I would not pin it down to twenty; it may be less than that and it may be more than that.

Q. It may be fifteen and it may be twenty; is that right? A. That is right.

Q. And how did you come to pose for these newsreels; did they ask you or did you ask them?

Mr. Weisman: I object to that on the ground it is immaterial.

Mr. Frohlich: I think it is quite important. It goes to the question of this man's consent.

Mr. Weisman: May I call your Honor's attention——

129

The Court: It has to do, I think, particularly with the question of damages.

Mr. Weisman: The courts have held just to the contrary of that, Judge.

The Court: Well, in this case the plaintiff is seeking not only an injunction but also money damages; he claims damages as a result of various acts charged against the

defendant here in an alleged unauthorized exhibition of the film and the two publications referred to in the complaint. Now, I think it would be of aid to the Court on the question of quantum damages to have evidence of the sort that is being adduced now.

Mr. Weisman: May I say this to your Honor: That in the case of Franklin against the Columbia Pictures Corporation—Sidney Franklin, the bull fighter, who admitted during that trial that he acted and played in moving pictures with Eddie Cantor, that
131 he had given exhibits all over the world, that he had permitted the Fox Movietone to take a newsreel during a public exhibition of him in Spain—they then took that moving picture that he gave with his consent and they did precisely what they did here, shortened it into a sports reel and called it "Throwing the Bull," and the very same argument was made in that case, that he was an exhibitionist, that he had voluntarily shown himself in pictures, that he wanted the publicity, and so on.

The Court: Was not there an element of slander in that case?

Mr. Weisman: There were three elements
132 in that case: slander and libel were treated as two separate elements, and the Civil Rights Law; and a verdict was awarded of $7,000—$2500, $2500 and $2,000; and the Judge gave three separate amounts and set $2500 for this cause of action, $2500 for this cause of action and $2,000 for this cause of action.

The Court: Allocated the damages into different elements.

Mr. Weisman: Yes, sir; and on appeal to the Appellate Division all of these questions were raised about his having shown voluntarily to Fox Movietone and he was an exhibitionist, and they also raised the question about the slander and the libel and the Civil Rights action being separately couched, and the defendant was denied a motion to compel the plaintiff to elect on which of those counts he wanted to go to trial, and the Appellate Division held unanimously 134
that all of those elements could have been merged in the Civil Rights Law and the verdict was a just one except as to amount, and they reduced it to $5,000. That is the only point that was discussed, the question of the merger; all other points Judge Glennon said were without merit, and the Court of Appeals unanimously affirmed without opinion; and I say to your Honor that this case is almost identical. They did exactly the same thing, went to Fox Movietone, took those pictures for which he posed, except in our case it was a private showing and not a public showing, and that makes a difference. There it was shown it was a newsreel 135
and here it is shown it was a newsreel. Then they took these pictures, put them together with others and made a short and sold it, and they have no right to do it. So, no matter whether he consented a thousand times or it was shown a thousand times, I think that aggravates the damage because

they took away from him the right to make a newsreel or sports reel and go and sell himself. That is his job; he is an actor.

The Court: All of which emphasizes the thought which I have in mind, that this evidence is relevant and material on the score of damages, the quantum of damages.

Mr. Frohlich: And may I point out this essential difference between the Franklin case and this, your Honor. I know they make a great fuss over the Franklin case—

The Court: I think the time to discuss
137 the Franklin case and any other authorities would be at the end of the testimony, when I will be glad to hear from counsel on both sides as to any legal principle they claim is applicable to this case.

Mr. Weisman: And my objection is it is immaterial as to who asked whom. The fact is they were shown.

The Court: The objection is overruled.

Mr. Weisman: Exception.

Q. Will you please answer that question?

(Last question repeated as recorded.)

A. Well, I have had booking agents through my
138 time, my career; I have had publicity men. They might have contacted them. I believe I contacted some of them.

The Court: Do you mean by that that some of these engagements were solicited by you or persons in your behalf, such as publicity agents?

The Witness: These newsreels were probably solicited; they were solicited for a flash so I would get bookings from them.

The Court: That is, solicited by you or in your behalf?

The Witness: Yes, sir.

Q. Did you know a man named Gould Martin at one time? A. Yes, sir, I did.

Q. When did you employ him? A. Did I employ him?

Q. Yes. A. I thought you said did I know him.

Q. Did you employ him? A. That is a long time ago. I don't know whether he was on a fixed, set salary or if he got dates he was to get a commission. I believe he was to get a commission. 140

Q. Did he have something to do with getting you employment from time to time? A. No, sir. I do not believe I ever received—that I got one date from Mr. Martin.

Q. Was he a publicity agent for you? A. I believe so; I don't know.

The Court: We will take a recess now until 2 o'clock.

AFTER RECESS. 141

JACK REDMOND, the plaintiff, resumed.

Cross-examination (continued) by Mr. Frohlich.

Q. Now, Mr. Redmond, in or about June, 1935, when you posed for the Fox Movietone in New Jersey, had you during that month posed for any other newsreel? A. That same year, in 1935?

Q. In June, 1935. A. Yes, I did.

Q. As a matter of fact, you posed for the Pathé newsreel, had you not? A. Yes, sir.

Q. Had you requested the Pathé Company to make a picture of you making these trick shots? A. I may have; I think I did.

Q. And you knew, of course, that these newsreels were widely distributed throughout the United States; did you not? A. Yes, sir, as newsreels.

Q. And you knew that in 1935, in June, 1935? A. Yes, sir.

Q. And you wanted to have your picture making
143 these trick shots widely distributed throughout the United States in June, 1935, did you not? A. In a newsreel, yes.

Q. And you were very glad to have these pictures appear in theatres in these newsreels? A. I don't know how to answer that. I must be pretty good copy or they would not take them.

Q. You wanted it, did you not? A. I believe so, I believe I did.

Q. And you wanted it because it was going to help you in your profession as a trick golfer; is not that right? A. It gets me dates by country clubs.

Q. And engagements for which you receive compensation and earn your living? A. That is right.
144 Q. So the more publicity you get the better chance you had of getting employment; is that right? A. Of that type publicity.

Q. Now, you have testified this morning that in all the years that you were a trick golfer you had had probably fifteen to twenty newsreels at one time or other take your picture making these trick shots; is not that right? A. Yes, I believe so.

Q. And this form of publicity that you received helped you to get employment during all these years, did it not? A. It got me in contact with managers and committees of country clubs.

Q. And when you went to see the manager of a country club did you not call to his attention the fact that you had appeared in newsreels from time to time; did you ever mention it to anybody? A. I do not believe so.

The Court: Just a moment. Mr. Redmond, before you leave the subject, you said that in June, 1935, you posed also for the Pathé News films? 146

The Witness: Yes, I did, your Honor.

The Court: That was a private or public exhibition?

The Witness: That was a private exhibition.

The Court: Generally like the one that you gave for Fox Movietone down at this club near Long Branch?

The Witness: Yes, sir.

The Court: And you say that the Pathé News Film Company exhibited that film over the country as a news event?

The Witness: I don't believe they exhibited that film at all. I am almost certain 147 that they did not use it. As a matter of fact, I know they did not use it.

The Court: Is it the recollection of you gentlemen that there was some testimony on that?

Mr. Weisman: My recollection is that they did not use it.

Mr. Frohlich: Pathé did not use the particular one of June, 1935, because they thought they had the exclusive rights and it turned out they did not, but the witness can testify what happened in 1932.

By Mr. Frohlich.

Q. Pathé had taken your picture in 1932 as well, did they not?

The Court: I understood the witness a few questions back to say, in one of his answers referring to this Pathé newsreel
149 film that was taken of him in June, 1935, that that was distributed as a news event.

Mr. Weisman: No, Judge. It was the form of the question that led you to believe that.

The Court: We will have the record read.

(Record repeated as recorded.)

By Mr. Frohlich.

Q. And you knew, did you not, that all these newsreels that were being taken of you from time to time would be widely distributed throughout the United States, did you not?

150 Mr. Weisman: I submit the question ought to be divided as to Fox and Pathé News. It has already been brought out that both did not distribute them or show them.

The Court: Yes.

Q. Mr. Redmond, over the years—I am speaking of the past fourteen years—that you have specialized in making these trick shots, you testified

that you had on many occasions, either fifteen or possibly twenty, posed for various newsreels for the purpose of having them take your picture; is that right? A. Well, the purpose of that in my mind was to get other dates and to sell myself in a series of short subjects that I wanted to sell to some company.

Q. But the immediate purpose was to have your picture appear on the screen in motion picture theatres in the United States in those newsreels, was it not? A. To build me up for future dates.

Q. And did you from time to time personally see at various theatres your picture in the newsreels after that had been taken? A. Yes, sir. 152

Q. Did you ever object to any of these newsreels taking your picture or showing your picture?

Mr. Weisman: I object to it on the ground it is immaterial.

The Court: I would take it only on the question of its relevancy as to the amount of damages.

Q. Did you ever object to that? A. I believe I would have objected when they took the movie; I would not have let them complete the picture if I was going to object to it.

Q. No. I want you to answer my question. Did you ever yourself object to any newsreel in the United States taking your picture and showing it upon the screen of theatres—did you? A. No, sir. 153

Q. Now, as a matter of fact, the Universal newsreel took your picture in 1935, did they not? A. 1935, yes, sir.

Q. That was up in Massachusetts somewheres? A. Boston.

Q. And did you at that time pose for the cameraman when he took your picture? A. Yes, I did.

Q. And did you know it was the Universal newsreel that was taking your picture? A. Yes, sir.

Q. And did you know that that picture would be widely distributed in various theatres throughout the country? A. Yes, sir.

The Court: Was that picture taken in the course of a public exhibition or private exhibition?

155 The Witness: Positively private; several caddies.

Q. It was taken on the golf links, was it not? A. Yes, sir. It had to be.

Q. Do you remember the name of the club where that was taken? A. I do, but I can't think of it offhand.

Q. Were there other players on the links at the time? A. Yes. I do not think I had the whole course. I was on one tee. Players kept going through.

Q. And there were spectators present when you were executing these difficult shots? A. Several caddies.

156 Q. Several caddies? A. Yes, sir.

Q. Did you have your picture taken by the Hearst International newsreel in 1929 or 1930? A. That is a long time ago. I imagine I did. I am pretty sure I did.

Q. Do you remember an occasion up in Van Cortlandt Park in 1929 or 1930 when the Hearst International took your picture? A. I believe so.

Q. Did you pose for it at that time? A. I believe so.

Q. That was on the open golf links at Van Cortlandt Park, was it not? A. Yes, sir.

Q. And did you see the picture after it was exhibited in theatres? A. I cannot recall. I might have. I am not sure.

Q. Did the Pathé newsreel take your picture in 1932? A. You have got me there. I don't know. I imagine, if you have the stuff of it, they did. They took several of them. I don't know. Maybe three or four of them.

Q. You knew that the Fox Movietone was the 158
Movietone newsreel that had a wide and extensive circulation throughout the country, did you not? A. Yes, sir.

Q. And you felt that if they showed your picture on the newsreel it would help you in your profession, did you not? A. Just like any performer.

Q. And it would give you a certain amount of publicity? A. It would get me a certain amount of dates I would get paid for.

Q. And you were anxious to have those dates through the medium of these newsreels, were you not? A. That and other factors.

Q. But the newsreel was one factor that would
help you obtain dates; is not that right? A. Just 159
a very small size line.

Q. Do you recall the name of the cameraman of the Fox Movietone Company that took your picture in June, 1935, in New Jersey? A. Yes, sir, I do.

Q. What was his name? A. I believe his name was Hammond.

Q. Can you tell us what day of the week it was that your picture was taken? A. I believe on a Sunday morning.

Q. And where was the golf links located? A. Well, in Eatontown, New Jersey. It is right near —I was visiting someone in Long Branch and that is why it was taken down there.

Q. In executing those golf shots on that occasion did you have anybody to help you? A. To help me do my own shots?

Q. Did you have a woman or boy? A. I knocked a ball off a girl's foot and I put a man down on
161 the ground and put a ball on his mouth.

Q. Was this girl employed by you? A. No, sir.

Q. How did you come to get a girl in that picture? A. She was employed in a night club in Long Branch.

Q. Who asked her to go down and take the picture with you? A. I believe I did.

Q. Did you pay her anything for it? A. No, I don't believe she was paid for it.

Q. And did you have a caddie there? A. Caddies were out chasing the balls, I believe.

Q. Did you have any particular caddie who helped you exhibit these shots? A. To help me hit the ball?

Q. Not hit the ball, but help you in the perform-
162 ance. A. No, sir.

Q. You had some bottles there, did you not? A. Yes, sir.

Q. What kind of bottles were they? A. Whisky bottles.

Q. Who supplied the bottles? A. Why, you mean what company owned the bottles?

Q. No; who brought the bottles onto the golf course? A. I believe a man named Hammond, Mr. Hammond's brother.

Q. And these bottles were used by you for the purpose of executing these tricks shots; is that right? A. Yes, like I would use any other bottle.

Q. Did you have any conversation with Mr. Hammond at that time about taking your picture? A. The cameraman?

Q. Yes. A. Just in the regular course of golf, I guess. There was not much to have any conversation about, only just to get a good picture.

Q. You were anxious to have a good picture, 164
were you not? A. I am always anxious to have a good picture.

Q. And the better picture it is the better your prestige and publicity; is not that so? A. The more chance I will have of selling myself where I will get paid.

Q. You have been doing that for a good many years? A. During the course of my career as a golfer I would do it, yes.

Q. This picture that you said you saw, which was distributed by the Columbia Pictures Corporation, showed the identical scene that you had posed for the Fox Movietone; is not that so? A. Except the talk.

Q. Let us forget the talk for a moment. How 165
about the photograph? A. I imagine the photograph was just the same. It would have to be.

Q. Do not imagine. I want you to give us your best recollection on that subject. Was it not the identical picture? A. Yes. It had to be because it was from Fox film. Columbia was not able to take the picture. Fox took the picture and that is the picture that Columbia used.

The Court: Was that reel taken with more than one camera?

The Witness: No, your Honor.

The Court: It was the camera operated by Hammond, of the Fox Movietone?

The Witness: Yes, sir.

Q. There were no additions to that picture, were there? A. Pardon?

Q. There were no additions to the picture as far as you were concerned? A. Of my own personal part that I played in this short?

Q. Yes. A. There could not be.

167 Q. And the picture that the Columbia people distributed was the identical picture that you had posed for in the Fox Movietone? A. For a news event.

Q. Had you told Mr. Hammond at that time that you were limiting this to a news event? A. I don't believe the subject was brought up.

Q. It was never mentioned by anybody, was it: A. I do not believe so.

Q. No writing passed between you and Mr. Hammond with reference to this matter, A. No, sir.

The Court: Mr. Redmond, when you made the answer two or three moments ago, for a news event, just what did you mean by that?

168 The Witness: Well, your Honor, a news event—I am not in the news reel business or motion picture business; when you go and see a theater and there is a news reel, that is a news event; that is supposed to be news of the day and that is a flash that lasts five or six days throughout the country, but the short thing runs for years.

The Court: When you posed for the Fox Movietone Company in June, 1935, if that was the time——

The Witness: Yes, sir.

The Court: Did you pose for it as a news event?

The Witness: Yes, sir.

The Court: And was it to be distributed so far as you knew, as a news event?

The Witness: Only as a news event.

Q. In posing all these years for these various news reels companies, is it not a fact that you posed executing practically the same kind of shots, 170
difficult shots? A. Different trick shots, yes, sir.

Q. You did not pose in any of these news reels in the act of hitting a golf ball in a golf game or golf tournament, did you? A. In these news reels?

Q. Yes. A. Not one.

Q. In all the news reels that you posed for you were shown executing difficult trick shots, is that right? A. In private exhibitions, yes, sir.

Q. And the news reel that was taken in June, 1935, by the Fox Movietone, was only a news reel showing you executing these difficult trick shots, is not that so? A. Yes, sir.

Q. And it did not differ essentially from any of the other news reels that had been taken of you 171
in prior years, did it? A. Different type shots?

Q. With the exception that you may have had some other shots, but essentially they were trick shots, is not that so? A. They were trick shots, yes, sir.

Q. And that was all you posed for at any time for any of these news reels, is not that so? A.

Yes, sir—no, pardon me. I posed for the Paramount at a race track in Florida this past year.

The Court: Making trick shots?

The Witness: No, sir. They just wanted to take a picture of some one there.

Q. I am speaking of occasions prior to June, 1935. In none of those poses or news reels had you posed for anything except posing executing difficult trick shots, is not that so? A. I might have given in some of them instructions. I cannot recall giving physical culture exercises. I believe I did that. I am not sure, but I think I did.

173 Q. But none of these news reels showed you prior to 1935 in the act of hitting a golf ball in a game or tournament, did it? A. No, sir.

Q. You testified that in September, 1936, you went into the Trans Lux Theatre in New York City and saw on the screen the defendant's picture "Golfing Rhythm"; do you remember that? A. Yes, sir.

Q. And in that picture there were shots of various golfers besides yourself? A. Yes, sir.

Q. Do you remember one of Gene Sarazen? A. Yes, sir.

Q. One of Lawson Little? A. Yes, sir.

Q. There was some woman who was a golfing expert that was shown there, is that right? A.

174 Yes. Miss Berg.

Q. And you were shown there? A. Yes, sir.

Q. You said before you went into the theatre you saw your name placarded in front of it somewheres? A. Yes, sir.

Q. You said that was the first time you had seen in use your name? A. No, sir.

Q. You did where else? A. In Chicago I did.

Q. In Chicago you had also seen it? A. Yes, sir.

175

Q. That was the first time you had seen it in New York City? A. Yes, sir.

Q. They were using your name in front of that theatre, is that right? A. Yes, sir.

Q. That was not the first time your name had been used in any theatre, was it? A. The first time I had not been paid for it.

Q. Had you ever received any compensation from any of the news reel companies who had ever taken shots of you in the past fourteen years? A. Never looked for a penny from them.

Q. Never asked them for a penny, did you? A. No, sir.

176

Q. And they never offered to give you any? A. I never asked them.

Q .They never offered to give you any? A. I never asked them.

The Court: Did they ever give you any compensation whether you asked for it or not?

The Witness: No, sir.

Q. So that you had seen your name and had seen your photograph prior to 1935, without having received any compensation for it, is not that right? A. I have seen my name in front of Earl Carroll's Vanities and in front of the Palace Theatre, and received compensation for that.

177

Q. You did not receive compensation for the news reels, did you? A. I did not look for any compensation.

Q. Just what did you see in front of that Trans Lux Theatre in September, 1936? A. They had those big glass mirrors and they had pictures of the events of things that are showing inside. I

recall clearly that there was a photograph of this girl with the three balls on her foot, with me posing there. Well, it was my picture. There is only one me, I guess.

Q. Did you see your name anywheres underneath that? A. I cannot recall, I am not sure of that.

Q. As a matter of fact, you did not see your name anywheres on the outside of that theatre, did you? A. I might have. I am not sure, but I might have.

Q. You have no clear recollection though of having seen it? A. No.

Q. I show you this magazine, the "Metropolitan
179 Golfer," of April, 1928, and ask you whether you recognize that picture (handing)? A. That was taken at the Golf Show in Chicago, in 1928, yes, sir.

Q. Is that your picture? A. That is my picture, yes, sir.

Mr. Frohlich: I will offer this volume in evidence.

Mr. Weisman: No objection.

The Witness: I believe the same thing is in my press book.

(Volume 6 of 1928, "Metropolitan Golfer," received in evidence and marked Defendant's Exhibit E.)

180

Q. I call your attention to this paragraph from Defendant's Exhibit E, of the "Metropolitan Golfer," page 10: "Jack Redmond, the well known vaudeville trick golfer is this year taking Joe Kirkland's place." Do you recall that statement in the article? A. I believe he was there the year before me at the Golf Show, yes, sir.

Q. Who put that article in? A. I believe Mr. Martin owns the magazine. I believe Mr. Martin was the one who wrote the article.

Q. Who is Mr. H. B. Martin? A. That is the gentleman who owns this "Metropolitan Golfer."

Q. And do you know his son, Mr. Gould Martin? A. Very well, yes, sir.

Q. Did Mr. Gould Martin have something to do with your publicity at or about that period? A. I believe so; it is a long time ago.

Q. Had you not engaged him to obtain publicity for you in connection with your theatrical work?

Mr. Weisman: As to what time? 182

Mr. Frohlich: In 1927 and 1928.

A. If I did, there was no salary involved. It was on a commission basis.

Q. Forget the salary for the moment. Did you engage him to do something for you with relation to publicity at that time? A. That is a long time ago. We might have had a verbal agreement or written agreement.

The Court: Did you engage him?

The Witness: I am pretty sure I did.

Q. And did Mr. Martin go out and get publicity for you?

183

Mr. Weisman: I object; it is too far afield and too remote; it has nothing to do with the issues.

The Court: What is the relevancy of this?

Mr. Frohlich: I want to show that this man had publicity, sir.

The Court: He has already testified.

The Witness: Booking agents, not publicity agents.

The Court: Did you also testify during the forenoon session that he was a publicity agent? I think you used that term—both publicity and booking?

The Witness: Yes, I believe so.

Q. And you employed other publicity agents from time to time, did you not? A. I believe they were all booking agents. I was out to make money.

Q. None of them publicity agents? A. Well, they were a combination.

185 Q. They did get you publicity, did they not? A. It would not do them any good to get the publicity unless they got some money out of it, because I did not pay them.

Q. Did they not get publicity for you? A. That I don't remember, it so long ago. I imagine that is one article. I might have got other articles.

Q. Is not your scrap book full of articles giving you publicity?

Mr. Weisman: His scrap book speaks for itself, your Honor; it is in evidence.

The Court: I think the witness has already testified fully about that.

The Witness: Pardon me, can I say some-

186 thing?

Mr. Frohlich: No. Your witness.

Redirect examination by Mr. Weisman.

Q. Mr. Redmond, when you appeared in any and all of the news reels, were you shown alone exhibiting golf shots or in connection with any other golf professionals? A. You mean in the various news reels that I had taken?

Q. Yes. A. I don't believe there was any other golfer on the program.

Q. So that attention was concentrated on your golf, is that correct? A. Yes, sir.

Q. Now, in this short that Columbia used, they had Gene Sarazen and Lawson Little and this woman golfer, is not that correct? A. And driving ranges and different various things to make up the short, yes.

Q. In addition to your own pictures? A. To make up the short.

Q. So attention was not concentrated solely upon you as it was in the news reel, is not that right? 188
A. Yes, sir.

The Court: That portion of the film that was devoted to shots of you, showed you alone making your trick shots?

The Witness: In that particular film, yes, sir.

The Court: In that particular film called "Golfing Rhythm"?

The Witness: Yes, sir.

Q. You testified, in answer to Mr. Frohlich's question, that you shot golf balls off the whisky bottles? A. Yes, sir.

Q. Did Mr. Hammond suggest those whisky bottles to you? A. I do not believe so. 189

Q. Was there any talk about selling a news reel to any whisky concern whose bottles would be used in your news reel? A. Mr. Hammond's brother was going to do that.

Q. And this exhibition was arranged by Mr. Al Hammond, the brother of the Hammond of Fox Movietone, was it not? A. Positively.

Q. Now I show you a book called "Golf Training," and ask you whether that was written by you on golf? A. Yes, sir, 1930.

Mr. Weisman: I offer it in evidence.
Mr. Frohlich: What is the date of that?
Mr. Weisman: 1930, he said.
The Witness: I believe it is 1930.

(Received in evidence and marked Plaintiff's Exhibit 3.)

Q. I also show you a pamphlet, "Path to Par, by Jack Redmond," and ask you if you wrote that?
191 A. Yes, sir.

Q. Can you give us approximately the date? A. Around 1931.

Mr. Weisman: I offer that in evidence.

(Received in evidence and marked Plaintiff's Exhibit 4.)

Q. Have you also been employed to endorse products such as golf balls and golf clubs and golf equipment? A. Yes, I have.

Q. And have you been paid for that? A. Yes, I have.

Mr. Weisman: Now I offer in evidence a
192 copy of the "Columbia Beacon," dated May 9, 1936, and particularly page 5 thereof, "Tips of Advance Information on Exceptional Short Subjects, by J. M. Weisfeld, Golfing Rhythm in the World of Sports."

Mr. Frohlich: I object to that as incompetent, immaterial and irrelevant; no evidence that is being published anywheres.

193

Mr. Weisman: I ask counsel for the defendant to concede for the record that the "Columbia Beacon" is a publication which is printed, published and distributed by the defendant.

Mr. Frohlich: I will make no such concession. I conceded the Mirror; I will not concede this document. There is quite a difference between the two and I am prepared to prove it.

Mr. Weisman: Can I have a concession that the "Columbia Beacon" of May 9, 1936, is a magazine which is published by the defendant?

194

Mr. Frohlich: No.

Mr. Weisman: I will ask it be marked for identification.

(Marked Plaintiff's Exhibit 5 for Identification.)

Mr. Weisman: I ask counsel to concede that the Harry Cohn, whose name appears as president of the "Columbia Beacon," and Jack Cohn, vice-president of the "Columbia Beacon," are the same Harry Cohn and Jack Cohn who hold respective offices in the defendant corporation.

Mr. Frohlich: I make no such concession. The document is not in evidence, and you have no right to go into it.

195

Mr. Weisman: I ask counsel to produce, in pursuance to the subpoena duces tecum which was served, a list of the theatres outside of the State of New York where the picture "Golfing Rhythm" was shown.

Mr. Frohlich: I have no such list. I have here in court the original sheets that have come in from the exchanges. They are in the two large volumes I had on this table this morning.

Mr. Weisman: May I have them, please? Unless you will concede that the picture was shown in approximately 1500 theatres outside of the State of New York.

Mr. Frohlich: I make no such concession. I object to any testimony along the line of the showing of this picture outside of the State of New York.

197 Mr. Weisman: I ask those sheets be produced.

Mr. Frohlich: We will produce them (handing). I thought your Honor this morning limited the showing in New York State.

The Court: There is no offer of evidence yet.

Mr. Weisman: Perhaps we can clarify it. It seems to me in the action so far as the injunction is concerned, that the plaintiff may be limited to a decree directing or prohibiting the showing of those pictures in the State of New York, but with respect to the element of damages, the plaintiff may show

198 that the defendant has profited by the showing of the plaintiff's picture in states other than New York, and it is for that purpose that I am offering that sort of testimony.

Mr. Frohlich: The statute, your Honor, makes no such distinction. It limits everything to New York State.

199

The Court: The right of action given by the Civil Rights Law of this State does not seem to depend for its validity or existence upon whether or not the rights of the plaintiff in such an action result in profit to the person charged with invading those rights, does it?

Mr. Weisman: Yes, your Honor, because the purpose of the sections, both of 50 and 51, is to prohibit anybody from using the photograph of a person for the purposes of trade and advertising.

The Court: Where; using it where?

200

Mr. Weisman: In the State of New York.

The Court: Then what difference does it make what use was made outside of the State of New York?

Mr. Weisman: But, Judge, in assessing damages in a case of that kind, the Court may take into consideration how widely distributed that violation was.

The Court: Of course, in an action of this sort, not only may actual damages be recovered but punitive or exemplary damages may also be recovered.

Mr. Weisman: Yes.

The Court: I think on that score, any evidence purporting to show or offered for 201
the purpose of showing that the defendant was actuated by a desire for profit may be received as bearing upon the question of exemplary or punitive damages. I think it has some relationship to that.

Mr. Frohlich: I think, your Honor, the object of the statute is to prohibit the use of the photograph and name within the

State of New York. As to the question of damage, I think it is incumbent upon the plaintiff to show that he has been damaged. I do not think he sustains that burden, your Honor, when he shows that the defendant made a wide use of that picture. He first must show his damage. If he has not been damaged, then it does not make any difference, I take it, on the question of damage, what we have done with it and how far we have shown it.

The Court: That would be so in so far as effort is made to recover special damage, but special damages and exemplary damages are two different things.

203

Mr. Frohlich: Quite right.

The Court: And the amount of each is not based upon the same factors or elements.

Mr. Frohlich: But, your Honor, the statute has no extra territorial effect, and if your Honor permitted evidence as to what took place outside of New York in states where there are no Civil Rights Laws, which have not been pleaded here and as we know there are none in most of the States of the Union, that would be giving this statute extra territorial effect and permitting them to prove indirectly what they cannot prove under the plain language of the statute. I do not think on the question of exemplary damage that it affects the plaintiff's case at all, on his exemplary damage.

204

The Court: It may not affect his case in so far as proving his cause of action is concerned; but on the question of whether or not exemplary damages should be allowed,

205

if any damages are to be recovered in an action of this sort, I think proof of the kind that plaintiff's counsel is now seeking to introduce is permissible.

Mr. Frohlich: Will your Honor give me an exception on that?

The Court: Surely.

Mr. Weisman: Now, may we, for the purpose of saving time, have some statement?

Mr. Frohlich: I have got something which I think will satisfy my friend, of course, subject to my exception, your Honor, to all this line of testimony.

206

The Court: Yes.

Mr. Frohlich: That there was a total of 2,143 bookings of this picture throughout the country, of the picture "Golfing Rhythm" throughout the country. That means a separate theatre for each booking. Also the total income derived from these bookings throughout the United States was $7,626.08, which is not the profit but which is merely the income against which must be charged the distributors' expenses and so on. It is gross.

The Court: These bookings you say were throughout the United States. That means inclusive of New York State?

207

Mr. Frohlich: Yes, sir.

The Court: Can you allocate between the bookings in New York State and the bookings outside of New York State in that figure of 2,143?

Mr. Frohlich: Well, I can add up the amounts of the bookings that we offered this

morning in our sheets; and I want to make a correction on these figures. My associate here calls my attention to the fact that the figures ought to be as follows: That up to the week ending October 2nd, 1936, the total number of bookings and total income from "Golfing Rhythm" was 1,343 bookings, and the total income was $5,643.88.

The Court: Is that gross or net?

Mr. Frohlich: Gross. All over the United States, gross. These bookings and income were made prior to the elimination of this Redmond sequence because when this action
209 was brought in 1936, the Columbia, acting upon my advice, immediately took out from this "Golfing Rhythm" the entire Redmond sequence, and they have since been putting that out and distributing it and exhibiting it without the Redmond sequence; so the figures I gave your Honor the first time included all of the bookings plus the new ones without the sequence. I think we ought to stick to the original figure, the 1,343 bookings and $5,643.88 gross income.

Mr. Weisman: Of course, while I appreciate the concession——

Mr. Frohlich: You can have the books.
210 They are right here.

Mr. Weisman: While I appreciate the concession, counsel asserts and makes some statements which I do not accept as to, for instance, the gross profit, which I did not ask for, and as to when the plaintiff's picture was eliminated; and I call your Honor's attention, and this is for the record—this plaintiff testified that in September,

1936, he saw his picture at the Trans Lux Theatre; and I add to that that the summons and complaint in this action were served on the 19th of August, 1936, so at least in this one instance we walked into the theatre and saw the picture and the picture was shown subsequent to the service of the summons and complaint in this action.

The Court: Mr. Frohlich calls attention to the fact not immediately upon the start of the action but shortly thereafter.

Mr. Frohlich: Shortly thereafter I told them to take it out. 212

Mr. Weisman: It is important in the determination of this case how soon they did eliminate it.

Mr. Frohlich: I have a witness here as to that.

Mr. Weisman: I am offering the evidence I have got. I have August and September. I cannot offer you what I have not got. That is all.

(Witness excused.)

Mr. Frohlich: Your Honor wants me to give you the figures outside of New York State; that is to say, all the figures less than the New York State figures. I had my associate make a computation here. He has not 213 quite completed it. It will take just a minute. The total of the bookings in New York State, as appears by the Defendant's Exhibit A, these three sheets, is 117.

Mr. Weisman: Number of theatres?

Mr. Frohlich: Number of theatres.

Mr. Weisman: Shown how many times in each theatre?

Mr. Frohlich: Once as far as this shows.

Mr. Weisman: You do not show a picture for one day, and even in one day you might show it at four or five shows.

Mr. Frohlich: You are right. There are some more showings. I will have to revise that. I will have to compute that over again. Some of these showings are two or three days in succession. I can supply those figures later.

Mr. Weisman: Suppose you do that.

Mr. Frohlich: And give my opponent a
215 chance to check up on them.

Mr. Weisman: I ask your Honor to take judicial notice that on April 18, 1935, there was an adjudication made in this court, in the action entitled Sidney Franklin against Columbia Pictures Corporation, in which it was adjudicated that this defendant had no right to take pictures that were posed for specifically for the Fox Movietone News and put them together with other pictures and use them and sell them for a sport news or a short for general circulation in theatres, as an element of punitive damages.

Mr. Frohlich: That is no offer of proof. I understand my friend has asked the Court
216 to take judicial notice. If what he means is that he is going to argue on the Franklin case, I would like to be permitted to say something about that case. The Franklin case was decided a year ago in the Court of Appeals. In that case the defendant, the same defendant, the Columbia Pictures Corporation——

The Court: I think we ought to close the taking of testimony first and then I will be glad to hear both counsel at length on all legal propositions pertaining to the case.

Mr. Frohlich: All right.

Mr. Weisman: Plaintiff rests.

DEFENDANT'S PROOFS.

LEN HAMMOND, a witness called on behalf of the defendant, being first duly sworn and stating his address to be Wellington Hotel, New York City, 218 testified as follows:

Direct examination by Mr. Frohlich.

Q. What is your occupation, Mr. Hammond? A. News reel cameraman.

Q. And by whom are you employed? A. Fox Movietone.

Q. How long have you been employed by that company? A. About nine years.

Q. Have you a brother? A. Yes, I have three brothers.

Q. What is the first name? A. One brother named Al, if that is the one you refer to, who is a professional golfer. 219

Q. Do you recall an occasion in June, 1935, when you were in New Jersey, near Long Branch? A. Yes.

Q. And did you see the plaintiff there, Mr. Jack Redmond, there at the time? A. I did.

Q. Will you tell us the circumstances under which you met him at that time, on that occasion?

A. Well, to the best of my recollection, I would say that I knew Mr. Redmond before that time by reputation and also by sight, having seen him around various golf courses, and we knew that he had made a picture several days previously of some trick shots in Long Island and through the general literature——

Mr. Weisman: I move to strike that out as not responsive to the question.

The Court: Strike it out.

Q. Had Redmond told you he made a picture?

221 Mr. Weisman: I object to that on the ground it is leading.

Mr. Frohlich: Withdrawn.

Q. What day of the week was it, do you recall? A. The picture I made was on a Sunday, June 23rd, 1935, and the arrangements for these pictures had been made by the regular routine.

Mr. Weisman: I move to strike that out. There is no question calling for that.

The Court: Strike it out.

Q. Did you come down to this place in New Jersey yourself with your camera? A. Yes, sir.

222 Q. And who came down with you? A. My soundman, who puts the sound on the film.

Q. Did you meet Redmond there? A. Yes, at a small club or hotel near the golf course.

Q. What was the name of that golf course? A. Monmouth County Golf Course.

Q. Did you have a talk with Redmond at that time? A. I had a talk with Redmond before we went over to the golf course.

Q. Give us the substance of the first talk you had with him. A. By phone two or three days previous to my meeting Redmond down near the golf course, we arranged a rendezvous.

Mr. Weisman: I move to strike that out.

The Court: Strike it out. Just give the conversation in words or substance when you met him.

The Witness: We spoke about the trick shots he was to make. He told us what he could do and had done previously. We told him we wanted something similar, and the question of a golf club came up where we 224 would go, and he suggested one nearby. We went over there and over to the people——

Q. Before we get to that point, have you exhausted the conversation? A. In so far as the pictures are concerned, it was just talk about what shots would be made. We did not discuss anything but the shots themselves.

Q. Did Redmond tell you in that conversation he had made a picture for any other news reel shortly prior? A. Yes.

Q. What company had he made it for? A. He mentioned he made a picture three days previously for Pathé and he explained to me the various shots he had made for Pathé. 225

Q. Then did you and he go to some golf links? A. We went to an adjoining link that was within about, I would say, five miles of the hotel.

Q. And who accompanied you two or you three; you, your soundman and Redmond and who else? A. There was my brother, and his wife was with him at the time; Redmond also had some friends along who were working in a night club, two men,

I believe, and one young lady, and we all drove over to this golf club.

Q. Where was this golf club located? A. In Eatonville, I believe the name of the town is, right near Long Branch.

Q. Did you go into the golf club, did the entire party go in the golf club? A. We went in as a group.

Q. Were there other parties on the links? A. There was a tournament going on on the links.

Q. And did you and Redmond and the rest of your party adjourn to some suitable spot on the links for the purpose of having this picture taken?
227 A. We asked permission of the manager of the club, and he said, "Certainly, you can use the course if you be sure to give credit to the location," and he said, "You can go over and use the twelfth tee."

Q. And what did you do? A. We set our cameras up to record the various shots we wanted to make, and people came through and would stop and watch us and go on, and we would stop once in a while when there was too much sound around to bother us, because we need a quiet spot.

Q. How many people were there viewing this spectacle? A. I would say, other than those who were working, that is Redmond, two caddies, the soundman and myself, my brother and his wife,
228 probably a dozen people who passed by and watched us for different lengths of time. Some would stay for a minute or so and others a half hour, for the duration of the picture.

Q. And did you personally turn the camera? A. Yes.

Q. As Mr. Redmond executed his shots? A. Yes; I did the photographing.

Q. And after that was done did you leave the links? A. Yes, sir, directly we were finished.

Mr. Frohlich: Your witness.

Cross-examination by Mr. Weisman.

Q. Your brother Al is not only a golf professional but he is also a promoter, is he not? A. Well, a promoter—just what do you mean by promoter?

Q. Does he not promote golf professionals at exhibitions? A. If you mean manager, yes.

Q. He books golf professionals in this country and in other countries; you know that, do you not? 230
A. That is true to a small degree.

Q. Did he not take some golf professionals over to Japan? A. On one occasion he had two golf professionals on tour.

Q. And he managed them, is that right? A. That is right.

Q. And do you remember the talk about these whisky bottles at the time the arrangements were made? A. There was some discussion which did not include me, but if you want me to give you my version of it, I will.

Q. Was there some talk about using these whisky bottles for the purpose of interesting the maker or the distributor of that whisky in these golf shots? A. There was some talk of that nature, but I re- 231
fused to have any labels showing in my picture; I had nothing to do with the advertising of pictures.

Q. They asked permission to use the labels and you refused? A. Yes.

Q. What did you do—remove them? A. The labels were turned away from the camera so the lens saw only glass bottles and you could not distinguish them.

232

Q. Your brother's interest was in attempting to manage or to promote Jack Redmond in connection with some business? A. That is right.

Q. And that was the purpose why these shots were arranged for? A. It might have been that purpose. It was not the purpose of our photographing.

Q. In other words, there was a double purpose in taking those photographs. So far as Fox Movietone was concerned, you wanted a news reel? A. Exactly.

Q. So far as Al Hammond, your brother, was concerned, and Jack Redmond was concerned, they
233 wanted to show off these whisky bottles? A. That might have been their angle.

Q. And they asked you for permission to use those whisky bottles and you refused it? A. That is right.

Q. And then the shots were taken anyway? A. Yes, sir.

(Witness excused.)

MAURICE GRAD, a witness called on behalf of the defendant, being first duly sworn and stating his address to be 691 Linden Boulevard, Brooklyn, New
234 York, testified as follows:

Direct examination by Mr. Frohlich.

Q. Mr. Grad, what is your occupation? A. I am director of sales promotion for Columbia Pictures.

Q. How long have you been employed by that corporation? A. Six years.

Q. Have you something to do with the getting out of a paper called "Columbia Mirror"? A. Yes, sir; in so far as the distribution of it is concerned.

Q. And are you in charge of the distribution of that document? A. I am, sir.

Q. Now, I show you this document which was put in evidence as Plaintiff's Exhibit 2; do you recognize that as the paper published by the Columbia Pictures Corporation? A. I do.

Q. How is that paper circulated, to whom is it sent? A. To theatres throughout the country and members of Columbia's field organization.

Q. It is not a paper of general circulation to the public, is it? A. No, none whatever. 236

The Court: Is it sold?

The Witness: No, sir.

The Court: Just distributed gratis?

The Witness: For the exclusive use of theatres and representatives.

Q. And does it contain references to the forthcoming pictures that are going to be distributed by the Columbia Pictures Corporation? A. Yes, sir, current product.

Q. And it is for the purpose of stimulating trade among the exhibitors? A. That is right.

Q. Familiarizing them with what you have to offer? A. Yes, sir. 237

Q. Have you any records that will help you give us the figure of the number of copies of this "Columbia Mirror" that was circulated in the State of New York in April, May and June, 1936? A. Yes, sir, I have.

Q. What are those figures? A. I have them here by various branches. Do you want the total?

Q. I want the total. A. I will give it to you in a minute. To theatres there is a total of 1,283.

Q. Theatres within the State of New York? A. That is right.

Q. And to field agents and representatives of Columbia Pictures Corporation within the State of New York during that period? A. Let me correct that. 1,283 plus 121; there is a total there of 1,406 to theatres.

Q. And then how many distributed to field agents and representatives of Columbia? A. Approximately 150.

239 Q. Added to what 1,406? A. It is a total of about 1,550 copies, approximately.

Q. Now, I show you, Mr. Grad, this document entitled "Columbia Beacon," and ask you whether you recognize that? A. I do, sir.

Q. What is that? A. It is a house organ for the exclusive use of members of Columbia's organization.

Q. In your capacity of being in charge of distribution of various publicity documents by Columbia Pictures Corporation, do you also have charge of the distribution of this document? A. I do, sir.

Q. And is this document sold to members of the general public? A. It is not.

Q. Is it distributed to anybody outside of the
240 representatives and employees of the Columbia Pictures Corporation? A. It is not.

Q. And this particular document, dated May 9, 1936, marked Plaintiff's Exhibit 5 for Identification, do you recognize that as having been printed by the Columbia Pictures Corporation? A. Yes, sir.

Q. In or about May, 1936? A. I do.

Q. Were copies of this document distributed to employees of Columbia Pictures Corporation within the State of New York? A. They were.

Mr. Frohlich: I now offer this document in evidence.

Mr. Weisman: No objection.

(Received in evidence and marked Defendant's Exhibit F.)

Q. Now, Mr. Grad, have you available the figures showing how many copies of this document, Defendant's Exhibit F, were distributed within the State of New York to employees of the Columbia 242
Pictures Corporation, in April, May and June, 1936? A. Yes, I have.

Q. Will you be good enough to give us the total? A. 113.

Mr. Frohlich: Your witness.

Cross-examination by Mr. Weisman.

Q. The "Columbia Mirror" is published by the defendant, Columbia Pictures Corporation, is it not? A. That is correct.

Q. And it is published and sent out for the purpose of stimulating trade, is not that correct? A. That is right. 243

Q. And for the purpose of advertising the Columbia Pictures? A. For the purpose, I would say, of familiarizing the theatres throughout the country with the current product we have to offer.

Q. Which is another form of saying it is for the purpose of advertising the coming pictures which Columbia is selling? A. To our exhibitors, that is right.

Q. The people who will show them, is not that correct? A. That is right.

Q. And you try to describe briefly and intelligently what the picture is about so it will become attractive to these exhibitors, is not that right? A. That is right.

Q. Is not the same thing true of "Columbia Beacon"? A. That is to the member of our field organigation.

Q. Except for the limited circulation, it has the same purpose? A. No, I would not say that.

Q. Is it fair to say that the "Columbia Beacon" is distributed to the members of your organization in
245 order to pep that up in the sale of Columbia Pictures? A. I would say it is to keep them familiar with the product we have to offer.

Q. Is not "Columbia Mirror read by the members of the Columbia Pictures organization, the staff? A. I believe it is.

Q. Now, you notice that in the "Columbia Mirror" of May 15th, the picture "Golfing Rhythm" and describing Jack Redmond's part in that, is written up? A. That is right.

Q. On page 14? A. That is right.

Q. And in the "Columbia Beacon" of May 9th, "Golfing Rhythm" is again written up and this time by a different author, is not that correct? A. Yes,
246 which is a regular procedure on any product we have to offer.

Q. In other words, you duplicate your advertising of the same picture? A. No, we do not.

Q. If the "Columbia Mirror" is received by the members of your staff, then they read about "Golfing Rhythm" once and then when they got the

Columbia Beacon and they read about the same picture, they got it a second time? A. That is not so. The Mirror is not intended for our field organization.

Q. But you testified that your field organization does get and read the "Mirror?" A. But the "Mirror" is not published for our field organization.

Q. I did not ask you that. A. It was not advertising anything to them. I believe you asked me that.

Q. No, I did not. The people who receive the "Columbia Beacon" are limited in number, a limited number, are they not? A. Yes.

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Q. The people who receive the "Columbia Mirror" are a larger number? A. Yes, sir.

Q. A great deal larger? A. They are two separate and distinct publications with two different purposes.

Q. But the people who read the "Columbia Beacon" also get the "Columbia Mirror," do they not? A. Yes. They have an opportunity of seeing it, but I would not say that they read it and study it.

Q. Of course, you do not know whether anybody reads it who gets it? A. That is correct. I am just telling you the purpose it is intended for.

Q. I am asking you about the fact that the people who receive the "Columbia Beacon" also get the "Columbia Mirror," is not that true? A. It is

249

not mailed to them, no. We sent the "Beacon" direct to our representatives. We do not send the "Mirror" direct to our representatives.

Q. And you do say that your field representatives read the "Mirror"? A. I assume they might read the "Mirror" but it is not sent to them for that purpose.

250 Q. What is the total circulation of the "Columbia Mirror"? A. The total circulation of the "Columbia Mirror"——

Mr. Frohlich: Where do you mean, what State?

Mr. Weisman: All over.

Mr. Frohlich: I object to that question.

Mr. Weisman: On the same basis as the other, Judge.

The Court: Objection overruled.

Mr. Frohlich: Exception.

251 A. The total circulation of this particular issue of the "Mirror"?

Q. Yes. A. The date was what?

Q. May 15th. A. 12,920 copies.

Q. And of the "Beacon," of May 9th? A. The "Beacon" of May 9th, 1100.

Mr. Weisman: That is all.

(Witness excused.)

ISIDORA LANDES, a witness called on behalf of the defendant, being first duly sworn and stating her address to be 789 St. Marks Avenue, Brooklyn,
252 New York, testified as follows:

Direct examination by Mr. Frohlich.

Q. Miss Landes, are you employed by the Columbia Pictures Corporation? A. I am.

Q. How long have you been in their employ? A. Six and a half years.

Q. And what are your duties? A. Several, among which are taking dialogues for Censor Board purposes.

The Court: What do you mean by taking dialogues?

The Witness: When a picture is shown in the projection room, there are two ways of doing it. Sometimes I get a script written by the person who has originally written the narrative, and it is turned over to me and all I have to do is check that against the print that is shown to see that every word in the picture is on that dialogue. 254

Q. Now, in or around April, 1936, were you instructed by people of your organization to check on the dialogue contained in the picture called "Golfing Rhythm"? A. I was.

Q. And did you, pursuant to those instructions, have a showing of that positive print? A. I did.

Q. In the projection room? A. Yes, sir.

Q. And as the picture was shown did you take down the dialogue of the commentator? A. I did.

Q. Now, I show you this dialogue, and ask you whether that is a true, accurate and correct transcript of the transcription of that dialogue of "Golfing Rhythm"? A. It is.

Q. It was made by you yourself? A. That is right. 255

Mr. Frohlich: I offer that in evidence.

Mr. Weisman: No objection.

(Received in evidence and marked Defendant's Exhibit G.)

256 *Isidora Landes—For Defendant—Direct.*

The Court: This exhibit is the so-called script, a portion of which was received in evidence upon the offer of the plaintiff this morning?

Mr. Frohlich: Yes, your Honor.

Q. Now, did you in or about April, 1936, also view this picture, "Golfing Rhythm," with a view to making a notation of the continuity of the picture? A. Yes, sir.

Q. And by continuity I mean the scenes and action of the picture. I show you this document, and ask you whether this truly represents the action in
257 continuity of that picture (handing)? A. Yes, sir.

Q. Was that made by you yourself? A. No; the continuity itself is not taken by me. After it is checked by different girls, I have to stencil this and take it back to see that it is exact.

Q. In other words, it is made under your supervision? A. That is right.

Q. And it is correct and true? A. Yes, sir.

Mr. Frohlich: I will offer that in evidence.

Mr. Weisman: I object on the ground it is not any evidence of what actually takes place in the picture. This girl says that somebody checks it and then she rechecks it
258 and has it stenciled. It is obviously improper evidence, but if you will, Mr. Frohlich, make a statement this is correct, I will have no objection to putting this in.

Mr. Frohlich: I am not testifying here and I have got the best evidence on the stand by the young lady who said it was made under her supervision and checked back by her,

and I think that is competent evidence and the best proof will be, your Honor, the picture which is going to be put in evidence here.

Mr. Weisman: That is different.

Mr. Frohlich: But I have a right to put this in.

Mr. Weisman: The picture, yes, or the picture taken together with this is all right. If you say you will show the picture with this, I will withdraw the objection.

The Court: I will receive it. 260

(Received in evidence and marked Defendant's Exhibit H.)

Mr. Frohlich: That is all; your witness.

Mr. Weisman: No questions.

(Witness excused.)

WILLIAM G. BRENNAN, a witness called on behalf of the defendant, being first duly sworn and stating his address to be 245 West 72nd Street, New York City, testified as follows:

Direct examination by Mr. Frohlich. 261

Q. Mr. Brennan, by whom are you employed? A. Columbia Picture.

Q. How long have you been employed there? A. Eight years.

Q. And what are your duties? A. Manager of the print department.

Q. Are you familiar with the picture entitled "Golfing Rhythm"? A. I am.

Q. Did you have something to do with the taking of positive prints from the negative film of that picture in or about April, 1936? A. I did.

Q. I show you this film and ask you whether this is the film representing the picture entitled "Golfing Rhythm"? A. It is.

Mr. Frohlich: I will offer it in evidence.

Mr. Weisman: Just before you offer it—

By Mr. Weisman.

Q. How do you know you had anything to do with that? A. The reel band on the film.

263 Q. On the film itself? A. Yes, sir.

Q. Has your name on it? A. Not my name. I issue the orders to the laboratory for the printing of it.

Q. Your own laboratory or an independent laboratory? A. An independent laboratory.

Q. Not connected with your company at all, is that correct? A. I am almost certain of that.

Q. And do you know the laboratory that did this? A. Not offhand.

Q. It may have been any one of a half a dozen in the City? A. That is right.

Q. And what did you do—send them the negative? A. Sent them the negative picture and dark,

264 with an accompanying order.

Q. And they made it? A. Yes, sir.

Q. That is the end of your job in connection with this picture? A. As far as the original distribution.

Mr. Frohlich: I object to that. This was supposed to be only a preliminary question. I have not exhausted the witness.

Mr. Weisman: You made an offer here and I am trying to——

Mr. Frohlich: You asked preliminary questions on that offer.

Mr. Weisman: That is what I am trying to finish.

Q. That was the limit of your job with respect to this picture; yes or no?

Mr. Frohlich: When, at what time?

Q. At the time you sent it to the laboratory. A. At that time, yes, but it was not the finish of my 266
duties in connection with the distribution of the picture.

Q. I am not talking of the distribution, but the printing of the picture. A. Yes, sir.

Q. The laboratory may have cut, may have spoiled some parts of the picture? A. That is impossible.

Q. Impossible for the laboratory to spoil it? A. Impossible for them to ship prints in that condition because they are checked when they are received in the branch office.

Mr. Weisman: Maybe this whole thing is unnecessary.

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Q. Do you claim this is the picture before the deletion of Jack Redmond's part or after? A. Before the deletion.

Q. As the picture "Golfing Rhythm" was exhibited? A. As the picture was originally exhibited.

Mr. Weisman: I have no objection to its receipt in evidence.

(Received in evidence and marked Defendant's Exhibit I.)

By Mr. Frohlich.

Q. Did you at my request cause to be made a 16 millimeter duplicate of the positive print of this picture now in evidence, "Golfing Rhythm"? A. I did.

Q. I show you this film, and ask you whether that is the 16 millimeter film of "Golfing Rhythm" (handing); examine it carefully and make sure? A. It is.

269 Q. And does this film truly and accurately represent the original picture, "Golfing Rhythm"? A. It does.

Q. With the Jack Redmond episode all reduced to 16 millimeter size on fireproof stock? A. Yes, sir, it does.

Mr. Frohlich: I offer that in evidence, and I may say, your Honor, the purpose of my doing it is that this small 16 millimeter film is fireproof and may be shown, and I was going to ask the Court's permission at the close of the case to show your Honor the picture right here in the court room or in the other room with a small projection screen and the apparatus we have. You cannot do
270 it with the large film. These are inflammable and we cannot possibly do it outside of the projection room and an operator. We can use this one. I now offer it in evidence.

Mr. Weisman: For that purpose I have no objection.

(Received in evidence and marked Defendant's Exhibit J.)

Q. Did a time come when a portion of the positive prints of the picture "Golfing Rhythm" was deleted or cut out? A. It did.

Q. Can you fix the time? A. October 7, 1936—October 2nd, rather, 1936.

Q. Was that done pursuant to instructions from your legal department? A. Yes, sir. I sent out a general letter to have it removed from all prints.

Q. And was that immediately done? A. It was.

Mr. Weisman: I object to it. All he did was to give instructions.

The Witness: Let me finish, please.

Mr. Weisman: Wait a minute. 272

The Court: Had you finished your answer?

The Witness: No, I had not.

The Court: Let him finish his answer then.

The Witness: I sent out instructions and I notified the exchanges to forward affidavits showing that this deletion had been made by the person making the deletion, under my instructions.

Q. And did you get back such affidavits? A. I got back such affidavits.

Q. And has the film been exhibited in theatres throughout the State of New York after October, 1936, in its deleted form? A. It has. 273

Mr. Frohlich: Your witness.

Cross-examination by Mr. Weisman.

Q. The first time that you knew of any complaint by Jack Redmond was when your legal department notified you? A. That is right.

Q. Was that some time in August of 1936? A. I cannot say the time exactly. It must have been immediately prior——

Q. You have established October 2nd exactly, have you not? A. It must have been on that date, on the morning of that day.

Q. So the first time you heard about any instructions to be given was on or about October 2nd, 1936? A. October 2nd.

Q. And then you immediately wrote everybody and told them to delete it? A. That is right.

Q. And then when did you get your affidavits back? A. I think they came back within a period
275 of at least six or seven days from the West coast.

Q. From everybody within six or seven days? A. That is right. I am not certain on that point, but I believe they did.

Q. And all the exhibitors gave you an affidavit that they had deleted? A. Not exhibitors; our own branch offices.

Q. Some of those prints had gone out to picture houses, had they not? A. That I cannot state.

Q. You know that that was the purpose of that picture, to be shown in moving picture theatres? A. That is right.

Q. They did not get any notice from you to delete, did they? A. I did not issue any notice to
276 them.

Q. That is right. You only notified your own exchanges, is not that correct? A. That is right.

Q. And you do not know what notice they sent to the picture houses, do you? A. No, I do not.

Q. Or if they ever sent any notice to them? A. I do not.

Q. So you do not know at what time or at what month Jack Redmond's picture ceased to be shown

in moving picture houses, do you? A. The affidavit gives the exact date the deletion was made.

Q. But the deletion may have been made on prints in the exhibitor's office, but how about in the moving picture houses—they did not delete them, did they? A. No.

Q. So you cannot tell at what date? A. October 2nd, 1936, the pictures were actually shown without Redmond's picture in them. Well, it will follow after the date on the affidavit of the deletion.

Q. In other words, only on pictures that were exhibited by your exchanges after October 2nd or 278
8th, depending on what date you pick, would that deletion be shown, is that correct? A. I do not quite follow your question there.

Q. Up until October 2nd, 1936, all pictures shown had Jack Redmond in them? A. All prints of this particular picture, yes.

Q. That is all I am talking about. A. Yes.

Q. Now, say your exchanges received notice from you the 5th of October; is that a fair statement? A. Possibly.

Q. Now, on the 5th of October, theatres all over the country had prints of that picture which they were showing? A. I cannot agree with you. I cannot make that statement, because I do not know whether they were in the vaults or in transit or in 279
the hands of the exhibitors at the time.

Q. You know the picture was released May 15, 1936, do you not? A. Yes, sir.

Q. Started with May 15, 1936, starting with May 15, 1936, "Golfing Rhythm" was shown in moving picture theatres all over the country? A. That is right.

Q. From day to day? A. But the prints were not always busy.

Q. You mean the prints may not always have been busy? A. That is right.

Q. But it is fair to say that some prints were busy at least once a day every day from May 15th to October? A. I cannot make that statement.

Q. You do not know? A. No.

Q. Then do you know that they stopped showing them? A. I do not follow you there.

Q. You do not know when they were shown; that is correct, is it not? A. Well, to get those facts it would be necessary to examine the branch rec-
281 ords.

Q. I am asking you now about your personal knowledge; you do not know when they were shown and when they were not shown, is not that correct? A. That is right.

Mr. Weisman: That is all.

Redirect examination by Mr. Frohlich.

Q. Mr. Brennan, when a picture is made it is first made on a negative film, is it not? A. That is right.

Q. And from that negative film there are several hundred positive prints struck off, are there not?
282 A. Not several hundred.

Q. Well, I am speaking of the average feature picture, but I suppose I did talk of the small one-reeler. A. A picture of this nature?

Q. Yes. A. Seventy prints on the average.

Q. About seventy prints are made from the negative? A. That is right.

Q. Columbia Pictures Corporation has local exchanges throughout the United States, have they not? A. That is right.

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Q. In certain cities, each one covering a certain territory? A. Yes, sir.

Q. And to each one of these exchanges a number of these prints are sent, is that right? A. Yes, sir.

Q. And from these local exchanges, the branch manager sends out to the theatres in that territory prints as they are required for exhibition in the theatres in that territory, is not that right? A. That is right.

Q. So when your instructions were given, they went to the exchange or branch managers of the Columbia Pictures Corporation, is not that so? A. That is right.

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Q. And then he had to wait until the prints came in from the theatres in his territory before he made the deletion? A. That is right.

Mr. Weisman: If at all. He was not there when they made them, Mr. Frohlich.

Mr. Frohlich: I won't change my question. It has been answered now. If you want to cross-examine, go ahead. There is the picture; you have it.

(Witness excused.)

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NORMAN B. STEINBERG, a witness called on behalf of the defendant, being first duly sworn and stating his address to be 66 Fort Washington Avenue, New York City, testified as follows:

Direct examination by Mr. Frohlich.

Q. Mr. Steinberg, are you a member of the Bar of New York? A. Yes, I am.

Q. And you are also associated with the Fox Movietone News? A. That is right.

Q. Are you an officer of that corporation? A. I am.

Q. What office do you hold? A. Assistant secretary.

Q. And as assistant secretary have you knowledge of the business affairs of the corporation with respect to the making of the news reels by it? A. A general knowledge. I am in charge of the corporate records and not in direct supervision of the making of the news reels.

287 Q. Now I show you this document, and ask you whether you recognize that as a document issued by your company on its stationery (handing)? A. I do.

Mr. Frohlich: I will offer that in evidence.

Mr. Weisman: I object on the ground it is immaterial and irrelevant.

Mr. Frohlich: It is the bill of sale of this shot of Redmond, that was purchased.

The Court: Objection overruled. I am receiving it on the issue of quantum of damages, exemplary, and also as to whether or not the defendant had any permission, although I do not know that this——

288 Mr. Weisman: The statute says written permission from the plaintiff.

The Court: I know that. I think it goes to the question of the spirit that accompanied the defendant's actions and so forth; it bears on the question of exemplary or punitive damages.

Mr. Weisman: Very remote though, is it not, Judge?

The Court: I think where an act is wilfully done in wilful disregard of the rights of others and others have a right to recover exemplary damages for the doing of such acts, that the degree of wilfulness is something to be considered on the amount of punitive damages.

Mr. Weisman: That is right. That is the reason I read into the record the decision in the Franklin case, to show that they have knowledge that they were not allowed to do those things.

(Received in evidence and marked Defendant's Exhibit K.) 290

Q. Have you, under subpoena, produced the records of the Fox Movietone News with reference to the taking of the picture of Jack Redmond in June, 1935? A. Yes, I have.

Q. May I have those records? A. Yes, sir (handing).

Q. I show you this document marked "Library index card Movietone News, Inc., New York, N. Y.," and ask you whether this is your office record showing the character and nature of the shots of Redmond? A. That is correct.

Q. And I show you the accompanying record that you have produced, which purports to give the details of the shots made of Redmond. Is that your office record? A. That is the record of Movietone News, office record is supplied by the cameraman. 291

Q. And these two documents have been kept in your file ever since? A. That is correct.

Mr. Frohlich: I will offer them in evidence as one exhibit.

Mr. Weisman: No objection.

(Two papers received in evidence and marked Defendant's Exhibit L.)

Q. Have you, Mr. Steinberg, any records here taken from your files which would permit you to testify as to the number of showings of the particular news reel of the Fox Movietone News which embodies the shot of Jack Redmond? A. I have records showing the number of theatres that were served with the news reel showing the shot of Jack Redmond.

293 Q. Which record? A. This (handing).

Q. You have handed me this photostat? A. That is right.

Q. Does this photostat contain a record of all the theatres in the United States to which you furnished this news reel containing Jack Redmond's picture? A. That is correct.

Mr. Frohlich: I will offer that document in evidence.

Mr. Weisman: Your Honor, my objection to it is, of course, it is incompetent, irrelevant and immaterial, and on the further ground that the exhibit which is offered of itself is unintelligible; it does not explain

294 anything to me.

Mr. Frohlich: I am going to have him explain it when it is in evidence.

The Court: I was just going to suggest perhaps the witness can supply the element of uncertainty as to its meaning.

Mr. Frohlich: I will interrogate him as to that, your Honor. We will have it cleared up.

The Court: Do you press your objection?

Mr. Weisman: If the offer is withdrawn, there is no sense of pressing my objection.

Mr. Frohlich: I am not withdrawing it.

Mr. Weisman: As it stands, I press my objection.

Mr. Frohlich: There is one column showing all the theatres where this reel was shown. It is clear enough. There is nothing ambiguous about it.

Mr. Weisman: I cannot see from that whether it is 30,000 theatres or 2500 theatres or 394 theatres.

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Mr. Frohlich: It is clear to me.

Mr. Weisman: You may be familiar with it, Mr. Frohlich.

The Court: As I look at it, it would require considerable explanation to acquaint me with its meaning.

Mr. Frohlich: I will interrogate the witness and clear it up.

By Mr. Frohlich.

Q. You produced this photostat and I call your attention to the first column of figures under the lettering "Odd." What does this column of figures represent? A. The accounts served with our odd issue of news. We produce two issues a week, one 297
the odd issue and the other the even issue. The odd issue——

Q. Is that for the first few days of the week? A. Yes, sir.

Q. And the even issue is for the last few days of the week, including the week end? A. Yes, sir.

Q. This was an odd issue? A. That is correct.

Q. And this indicates the number of cities served with this particular news reel? A. That is correct.

Mr. Frohlich: I now renew my offer, your Honor.

By Mr. Weisman.

Q. Do you mean that the first one shows us Albany, sixty-nine theatres? A. Sixty-nine theatres were served out of the Albany exchange.

Q. Out of the Albany exchange? A. That is right.

Q. And what does the thirty-eight stand for? A. Thirty-eight even issues of the news reel were served
299 out of the Albany exchange.

Q. What does the eighty-five mean? A. That is the number of theatres taking the first issue of the news reel, the odd issue.

Q. Well, you have got sixty-nine theatres. A. I beg your pardon. That means the number of theatres taking one issue of news reel. Some theatres take both issues and some take one. One issue served to eighty-five theatres and eleven theatres took both issues. That is issued twice a week.

Q. And the total ninety-six is what—the total number of theatres who have used both issues? A. Total number using both odd and even.

Q. Then the sixty-nine and the thirty-eight do not
300 correspond to ninety-six, do they? A. No, they do not.

Q. Now, please explain it. A. Eighty-five theatres——

Q. Wait. You say sixty-nine.

Mr. Frohlich: You are asking him to explain it and give him a chance, please.

Q. The first figure you see is under the column "odd"? A. That is correct.

Q. And the figure is sixty-nine? A. That is rgiht.

Q. And you say that represents the number of theatres which took the issue on the odd days of the week? A. That is right.

Q. The next column shows thirty-eight, and those are the number of theatres which took it on the even side of the week? A. That is right.

Q. The next one you say is eighty-five, shows the number of theatres that took one issue? A. That is right.

Q. And the next one shows two issues and you say there were eleven theatres that took it? A. That is right. 302

Q. Now, your total ninety-six is an addition of the two previous columns only? A. Yes, sir.

Q. How do you reconcile them with the first two columns? A. I really cannot do that.

Mr. Weisman: Then I object to it on the ground it is incompetent, irrelevant and immaterial.

Mr. Frohlich: We are not interested with any other reel except the reel in which Redmond appeared. This witness has testified and identified from this document the showings of that particular reel, and I do not think, your Honor, that it makes any difference, because he says he cannot reconcile these figures as to other reels. We are only interested in this one reel and he has identified it. 303

Mr. Weisman: There is nothing on this paper offered which indicates anything about a Redmond reel.

Mr. Frohlich: He testified to it.

Mr. Weisman: He does not know what it means.

The Court: Can you tell from that paper, that photostatic reproduction, how many times or in how many theatres in different localities or cities this reel showing these Jack Redmond trick shots was exhibited?

The Witness: Not the number of times it was exhibited. In the number of theatres in which it was shown.

The Court: Shown by that paper?

305 The Witness: Yes, sir.

Mr. Weisman: Then let him give the answer instead of offering the paper. Is not that the way to do it? The paper itself is not explanatory of anything.

By Mr. Frohlich.

Q. Will you add up these figures then, Mr. Steinberg, right now?

Mr. Weisman: They are added at the bottom.

Q. What is the total here? A. 2,728.

The Court: That is throughout the

306 country?

The Witness: Yes, sir.

Q. And that represents the number of theatres to which this particular film was distributed and that which it was exhibited? A. That is right.

The Court: I want one thing cleared up. When you say this particular film, do you

mean the film that has been referred to heretofore in this action as "Golfing Rhythm" or do you mean that portion of it which is confined to the so-called Jack Redmond shots?

The Witness: This means the entire issue of the news reel produced by Fox Movietone News, which contained certain shots of Jack Redmond and other news events.

The Court: Is that so-called news reel, as you term it, the same as the reel that has been referred to in this action hertofore as a reel entitled "Golfing Rhythm"?

The Witness: No. 308

By Mr. Frohlich.

Q. The Jack Redmond sequence of "Golfing Rhythm" was taken from this news reel of the Fox Movietone, was it not? A. I never saw the pictures in which it was put, in "Golfing Rhythm," so I could not say.

Q. But the news reel that you distributed, as to which you have just testified, included not only Jack Redmond sequence but also various other matters of news event for the public, is not that so? A. Yes, sir.

The Court: And not connected necessarily with sport news? 309

The Witness: Not necessarily, no. There were other sport events.

The Court: Just news events of a current nature?

The Witness: That is right.

The Court: And when was distribution made among these theatres of this news film alluded to in that photostatic copy of a record which is before you?

The Witness: On June 26, 1935.

Cross-examination by Mr. Weisman.

Q. Can you tell from your records the last day when the news reel was shown in any theatre which contained the Jack Redmond pictures? A. No.

Q. Does not that show the time of distribution? A. No, it does not. Not the length of distribution. It shows when it was released.

Q. These news reels are shown for three days a week, are they not? A. Three or four days.

Q. That is the most in any one theatre? A. It is possible to show it for a week or so.

Q. But that certainly is the most? A. In one
311 theatre, yes.

Q. And it is unusual for one theatre to show the same news reel the full week, is it not? A. That is correct.

Q. And those news reels are shown at or about the time the news occurs? A. It might be shown some time later if the pictures are taken in far off Africa. It takes some time to get them and show them.

Q. But a scene taken in New Jersey, in June, 1935, would not be shown October, 1936? A. Not in the United States, no.

Q. And the news flashes are intended to be current news showings aside from other parts of the
312 entertainment; is not that correct? A. In our news reels, yes.

Q. And the Jack Redmond pictures stood out alone as golfing pictures in that news reel, did they not? There was no Gene Sarazen or Lawson Little or Miss Berg or anybody else playing golf; that is correct, is it not? A. That is correct.

Q. Have you the dialogue that accompanied the Redmond pictures in that news reel? A. Yes, I have.

Q. May I have it, please? A. This is the dialogue only of our own commentator; not of Mr. Redmond (handing).

Q. Have you the dialogue of Mr. Redmond which was taken at the time he performed for Mr. Hammond in New Jersey? A. We make no record of the dialogue. If it is on the film, it is still there.

Q. Have you any in your records, have you any copy of that dialogue? A. Not of Mr. Redmond, no.

314

Q. You have not? A. No.

Q. You just handed me what you claim is a dialogue accompanying that news reel; is that correct? A. That is correct.

Q. And it is marked "Volume 8, No. 81"; is that correct? A. That is right.

Q. Now, does that contain the dialogue for the entire news reel which included Jack Redmond's pictures? A. It includes a dialogue of the commentators that are employed by us; no outside remarks.

Q. After the pictures are taken, your company has script writers who write dialogue; is not that correct? A. Well, they do not write dialogues. They comment on the news itself.

Q. There is one group of people that write the 315
dialogue; is not that correct? A. No. I believe the commentators did it themselves. They write their own dialogue.

Q. I know you happen to be mistaken, but it is unimportant. A person like Lowell Thomas will write his own dialogue; is that right? A. That is right.

316 *Norman B. Steinberg—For Defendant—Cross.*

Q. But when you hire radio announcers to do a one particular shot, they do not write it, do they? A. We do not hire radio announcers to do one particular shot.

Q. That dialogue is written under the jurisdiction of the company, in any event; is not that correct? A. That is right.

Q. And it is prepared by people that the Fox Movietone employs? A. That is correct.

Q. And the dialogue which you have just handed to me includes dialogue spoken by Ed Thorgenson; is not that correct? A. That is right.

317 Q. You say that Ed Thorgenson wrote that dialogue A. Probably did. I could not say definitely.

Mr. Weisman: I offer it in evidence.

Mr. Frohlich: I object to it. No evidence that we used that dialogue; not binding upon us. We used our dialogue that is in evidence.

Mr. Weisman: That is why I offer it in evidence, to show they did not use the dialogue that was authorized by Fox Movietone.

Mr. Frohlich: There was nothing authorized by the plaintiff.

The Court: The purpose being merely to show that this dialogue used by the Fox

318 Movietone people is not the dialogue that accompanied the "Golfing Rhythm" film. Perhaps the concession that the dialogues are different will obviate the necessity for receiving this in evidence.

Mr. Frohlich: I am willing to give him a concession that the dialogue that was used in "Golfing Rhythm" was a dialogue prepared by an employee of Columbia Pictures

Corporation; that it was not the same dialogue that was originally in the news reel. I think with that concession my friend ought to be satisfied. I do not want to be bound by somebody else's dialogue.

The Court: Does not that satisfy you?

Mr. Weisman: I am grateful for that concession, your Honor, but seriously I offer in evidence this page of dialogue marked "Volume 8, No. 81" in its entirety, to show to your Honor the difference between showing a news reel of the plaintiff and "Golfing Rhythm," which will be shown in court later 320
on, to show what difference there is and what diversion there is, and how unfair it is to say that just because he posed for Fox Movietone, that they have a right to use him in "Golfing Rhythm," and what a different thing it is. They produce this witness and this witness has now produced the dialogue and I offer it in evidence.

Mr. Frohlich: I object to it on the ground it is incompetent, immaterial and irrelevant. It is not even the dialogue that was used by the plaintiff himself. It has nothing to do with the picture and is in no way binding upon this defendant.

The Court: This whole document, con- 321
sisting of perhaps ten or twelve typewritten sheets, includes for the most part script or dialogue in no way related to the Redmond pictures.

Mr. Weisman: That is exactly why I urge your Honor to receive it in evidence.

I want to prove in the record, I want the record to be complete, that a news reel is different than a short subject; that when a man poses for a Fox Movietone he expects it will be shown with other news events that are current and that expire within a few days; but when the Columbia Pictures Corporation took those same films and put them together as a form of entertainment in "Golfing Rhythm" they did something which they had no right to do and of which this man has a right to complain. Mr. Frohlich
323 spent all of his time on cross-examination in showing that Mr. Redmond had consented to news reels, and I want to show that the consent is entirely different even if it is material to what they did.

The Court: I will receive that portion of it which related to the Redmond shots.

Mr. Frohlich: I respectfully except, your Honor.

The Court: I presume that all of that is shown on this one sheet here. I mean the dialogue that accompanied the Redmond shots in this news film.

Mr. Weisman: Just so the record will be clear, I offer in evidence twelve sheets which
324 compose Volume 8, No. 81, and I understand that your Honor just admits in evidence the tenth sheet which refers to Jack Redmond, trick golfer.

The Court: And I will admit also the first sheet which, I take it, is a sort of index of each and every news item contained in this particular news film.

Mr. Weisman: I will ask that the balance of it be deemed marked for identification.

The Court: Yes. The first sheet will give a fair approximate idea of the subjects of this news film, so called, which includes the Redmond shots. The tenth page of this document purports to be the dialogue accompanying only the Redmond shots portion of this news film. I will receive just those two sheets. The rest I do not think is pertinent or relevant.

(Received in evidence and respectively 326
marked Plaintiff's Exhibits 6 and 6-A.)

Q. Now, Mr. Steinberg, have you any other dialogue that accompanied the showing of this picture, the Redmond picture? A. Not of that particular picture, no.

Q. You say you have the entire file here in connection with this news reel? A. Everything that I was able to locate on it, yes.

Q. Did you find any written consent by Redmond to your company? A. No.

Mr. Weisman: That is all.

The Court: Written consent of what? Written consent to show that Movietone 327
with Jack Redmond performing?

The Witness: No.

The Court: Your answer is still "no," is it not?

The Witness: That is correct.

Mr. Frohlich: You do not claim here that Fox Movietone had no right to take this because it did not have a written consent, do you, Mr. Weisman?

Mr. Weisman: I am not raising any question of that at this time.

Mr. Frohlich: I think the Judge ought to be told if that is your claim. We ought to know it.

Mr. Weisman: We are now trying the case against Columbia.

Redirect examination by Mr. Frohlich.

Q. Did you in your file, Mr. Steinberg, find any records showing that the Fox Movietone took any picture of this plaintiff in 1937? A. Yes.

329 Q. Will you produce them, please? A. I have a cameraman's top sheet and a mailing index card. The picture was taken in 1937.

The Court: What date?

The Witness: February 8, 1937.

Q. Where? A. At Coral Gables, Florida, the Miami-Biltmore Golf Course.

Mr. Frohlich: I offer these two documents as one exhibit.

Mr. Weisman: I object as incompetent, irrelevant and immaterial.

The Court: What is the relevancy?

330 Mr. Frohlich: Because it shows a practice on the part of this plaintiff year in and year out to have these news reels take his shots and exhibit them throughout the United States. He is complaining he has been terribly damaged by what we did, and we did no more than take one of these news reels shots and put them in with some other shots and put them on the screen. Here he

comes along after this and he brings a suit against us, and then he has his picture once more by the same people.

Mr. Weisman: Well, do you want him to go out of business? What right has the Columbia Pictures Company to complain?

Mr. Frohlich: Let me finish, please. It seems to me, your Honor, on the question of damage which is involved here, your Honor ought to have before you these facts as showing that this man courted publicity, sought it and wanted it, used it in his business. He said it helped him to get jobs. Here he 332
comes along as late as February, 1937, just a few months ago, and repeats this same thing, and I think your Honor ought to have that in the record here. I urge my offer.

Mr. Weisman: I object to it because not only is it remote but it is entirely irrelevant and immaterial. This man has a right to pose nine times a day for ninety different moving picture companies and it does not give the Columbia Pictures Corporation the right to take these pictures and sell them as entertainment as against a news reel.

The Court: The offer of this evidence by the defendant is not for the purpose of supporting any contention that it has a right 333
by reason of this subsequent conduct of the plaintiff to do what it is charged with doing in this action, but the offer is made avowedly as bearing on the question of damages sustained by the plaintiff.

Mr. Weisman: But this is subsequent to the accrual of our present cause of action, your Honor.

The Court: I know that, but I think if this evidence relates to the taking of shots, moving picture shots of the plaintiff, of a nature generally similar to that which were taken and which is complained of in this action, it has some bearing on the question of the damage, if any, which he sustained from the defendant's acts in this case.

Mr. Weisman: Judge, with respect to this, no one here has stated the circumstances under which these pictures were taken, whether he was——

335 The Court: If your prayer for relief here were limited to an injunction, this evidence would not be considered by me as at all relevant or material; but you are specifically claiming money damages.

Mr. Weisman: That is right.

The Court: You are specifically claiming that the plaintiff has been damaged by reason of the acts complained of in the first cause of action in the amount of $25,000, and in a similar amount by reason of the acts alleged in the second cause of action. Now, if this evidence which the defendant is now seeking to offer purports to show that even since the commencement of this action,

336 while this action was pending and awaiting trial and determination, this plaintiff has lent himself voluntarily to the taking of similar or generally similar motion picture shots of his trick shots, I think it has some bearing on the claim which the plaintiff is making and asserting against the defendant in this action on the score of the damages

which he claims he has sustained as a result of what the defendant is alleged to have done.

Mr. Weisman: But who has said in connection with the offer of this evidence that the plaintiff consented to it? I say to you there is no proof. A man comes here and brings a record and it is offered in evidence.

Mr. Frohlich: I have a witness in court and am going to put him on to connect up with this right now.

The Court: Subject to that, I will take it.

Mr. Weisman: Exception. 338

(Two papers received in evidence and marked Defendant's Exhibit M.)

By Mr. Frohlich.

Q. Mr. Steinberg, have you among your records any documents that will show how many theatres this particular news reel which was taken of Jack Redmond in February, 1937, was released? A. Yes, I have.

Q. You have produced this photostat and I will ask you to look at the document and see if there is any total of number of theatres on that document? A. Yes, there is.

Q. And what is the total? 339

Mr. Weisman: I object to it on the ground it is incompetent, irrelevant and immaterial, remote from the date of the action, has no bearing on the issues raised by the pleadings.

Mr. Frohlich: It is the same thing as the other one.

The Court: I will take it.
Mr. Weisman: Exception.

Q. What is the total? A. 3,431.
(Witness excused.)

WILLIAM J. STORZ, a witness called on behalf of the defendant, being first duly sworn and stating his address to be 89-10 63rd Avenue, Rego Park, Long Island, New York, testifies as follows:

341

Direct examination by Mr. Frohlich.

Q. Mr. Storz, what is your occupation? A. Cameraman.

Q. And by whom are you employed? A. Fox Movietone News.

Q. Were you in February, 1937, down in Miami, Florida? A. I was.

Q. And while you were down there did you have occasion to meet the plaintiff, Mr. Jack Redmond? A. I did.

Q. And did you, on behalf of the Fox Movietone News, take a picture of Mr. Jack Redmond down there in February, 1937, doing some difficult golf

342 shots? A. I did.

Q. Did you have any conversation with Mr. Redmond at the time you took this picture? A. None that I remember except regarding how the picture was going to be made, the shots and things like that.

Q. Did he tell you how he wanted it made? A. No, I do not believe we said anything about that.

Q. He posed for you, did he not? A. Yes, sir, he did.

Q. And did he do any trick shots at that time with bottles? A. No, he did not.

Q. Did he do any trick shots with the woman? A. Yes, sir.

Q. A woman posed for him? A. No, she did not pose for him. The trick shots were done with a Miss Dickerson.

Q. Miss Helen Didrickson? A. Babe Didrickson.

Q. The well-known athlete? A. That is right.

Q. Did Mr. Redmond and Miss Didrickson pose together in the same picture? A. Yes, sir. 344

Q. And did Miss Didrickson do some difficult shots? A. She did; she tried to do and did most of the shots that Mr. Redmond did.

Q. Before you took those shots did you ask Mr. Redmond to pose for you? A. No, I did not.

Q. Did he offer to pose for you? A. The arrangements were all made through the Miami-Biltmore publicity department.

Q. And after the arrangements had been made did you go down to a golf links? A. Yes, sir.

Q. Where was the golf links course? A. In Miami-Biltmore Country Club.

Q. Did you tell Mr. Redmond that you were taking any picture on behalf of the Fox Movietone News? 345

Mr. Weisman: He has already testified, your Honor, he had no conversation with Mr. Redmond. He said the arrangements were all made through the Miami-Biltmore Publicity Department.

346 *William J. Storz—For Defendant—Direct.*

Q. Had you known Mr. Redmond prior to that time? A. I think it was the first time I met Mr. Redmond.

Q. Did he not ask you whom you represented?

Mr. Weisman: I object to that as already testified there was no conversation between them.

The Court: Did you have any conversation at all with Mr. Redmond before you took these pictures?

The Witness: No, sir, I did not.

The Court: Where did he meet him prior
347 to taking the pictures?

The Witness: Prior to the taking of the pictures we went out one day to watch Mr. Redmond show us what he could do. At that particular time we had to leave him there because we had a report that an Army plane was crashing out on the field.

The Court: How long before the date that you took these pictures did you go out with him for the purpose of his showing you what he could do?

The Witness: I can tell you that exactly in just a moment (looking at papers); Friday, the 5th of February.

The Court: And when were these pic-
348 tures taken—on the 8th?

The Witness: On the 8th of February.

The Court: When you went out with him on the 5th of February, was there any conversation between you and him with regard to his meeting you on some subsequent date for the purpose of your taking pictures of him?

349

The Witness: No, there was no conversation directly between him and I. It was made by Mr. Pitt of the Miami-Biltmore publicity department. In fact, I don't think I spoke a word to Jack Redmond that day.

By Mr. Frohlich.

Q. Did you speak a word to him on February 8th? A. Yes, I did, in working the picture, naturally.

Q. Did he see you there with the camera on February 8th? A. He must have. I was there.

350

Q. Did he make any objection at all when you took the picture? A. No, sir.

Mr. Frohlich: Your witness.
Mr. Weisman: No questions
(Witness excused.)

LEO JAFFE, a witness called on behalf of the defendant, being first duly sworn, and stating his address to be 1236 Virginia Avenue, Bronx, New York City, testified as follows:

Direct examination by Mr. Frohlich.

351

Q. What is your occupation? A. Manager of the sales accounting department of Columbia Pictures Corporation.

Q. How long have you been employed by that corporation? A. A little more than seven years.

Q. Do you have knowledge with reference to the picture "Golfing Rhythm"? A. Yes, I have.

352 *Leo Jaffe—For Defendant—Direct.*

Q. In the course of your duties did you have something to do with computing the various costs with reference to the picture "Golfing Rhythm"? A. Not with the computations of cost, no, although I have the information on cost of all pictures; but we do not compute them ourselves. They are furnished by the accounting department.

Q. Will you let us have what figures are available with reference to the cost of making and distributing this picture "Golfing Rhythm"?

Mr. Weisman: I object to that. The witness said he had nothing to do with it and
353 I object on the ground it is incompetent.

The Court: Objection sustained.

Q. Did you, at my request, examine the figures and records of your company with reference to the cost of production and distribution of the picture "Golfing Rhythm"? A. Yes, I did.

Q. And after you made that examination did you jot down the figures? A. I did.

Q. Have you got those figures with you now? A. Yes, I have.

Q. Will you be good enough to tell us what was the cost of the negative of that picture?

Mr. Weisman: I object to that on the
354 ground it is incompetent.

Mr. Frohlich: Is your objection on the ground he is not competent to testify?

Mr. Weisman: That is right.

Mr. Frohlich: I urge the testimony, your Honor. The man testified he has gone to the books and made examinations and he has got the figures.

Mr. Weisman: He does not know anything about the books, whether they are accurate or inaccurate, and he said he had nothing to do with that department.

The Court: That puts you to your proof. Objection sustained.

Q. What in your business is the general cost of distribution of all of your pictures?

Mr. Weisman: I object to that on the ground it is irrelevant and immaterial.

The Court: Sustained.

Mr. Frohlich: Exception. 356

Q. What was the negative cost of "Golfing Rhythm?"

Mr. Weisman: I object to that on the ground it is incompetent.

The Court: You mean that this witness is incompetent to testify?

Mr. Weisman: Yes, sir.

The Court: Objection sustained.

Q. Do you know of your own knowledge what the negative cost of this picture, "Golfing Rhythm" was? A. Yes, sir. I know.

Q. Where did you acquire that knowledge? A. 357
By referring to the books of account of the corporation.

Q. Are the books of account of the corporation kept under your supervision with reference to the negative cost? A. No, sir.

Mr. Frohlich: I will withdraw the witness then.

Mr. Weisman: No questions.

(Witness excused.)

358 *Albert Seligman—For Defendant—Direct.*

ALBERT SELIGMAN, a witness called on behalf of the defendant, being first duly sworn and stating his address to be 265 West 83rd Street, New York City, testified as follows:

Direct examination by Mr. Frohlich.

Q. What is your occupation? A. I am the advertising sales manager for Columbia Pictures Corporation.

Q. How long have you been employed as such? A. Approximately seven years.

Q. Are you familiar with the publicity matter
359 that was issued by the corporation with respect to the picture "Golfing Rhythm"? A. The advertising that is sold to the theaters.

Q. And that is in your department? A. Yes, sir.

Q. I show you this document and ask you whether you recognize it? A. I do.

Q. Does this truly represent the so-called one sheet issued by the company on this picture "Golfing Rhythm"? A. It does.

Mr. Frohlich: I will offer that in evidence.

Mr. Weisman: I have no objection.

(Received in evidence and marked Defendant's Exhibit N.)

360

Q. And is this one sheet generally similar to other one sheets that are issued by the Columbia Pictures Corporation on its sport reels? A. News reel sports.

Q. About how many of these one sheets were printed and distributed by the Columbia Pictures Corporation? A. 225 were made and approximately 175 were distributed.

Q. And these were distributed to whom? A. To the theatres all over the United States.

Q. The Columbia Pictures does not make any stills of its pictures?

The Court: You mean 175 copies of that poster only were distributed among——

The Witness: Throughout the whole United States.

The Court: Well, how were they distributed? As one theatre used them, you took them back?

The Witness: Actually sold them to the theatres. 362

The Court: Those were only used by 175 theatres?

The Witness: That is all.

Mr. Frohlich: Your witness.

Cross-examination by Mr. Weisman.

Q. What other advertising material did you send out to the other theatres in connection with this picture "Golfing Rhythm"? A. No other advertising.

Q. Of course, you sent out the Columbia Mirror, did you not? A. That is not termed advertising in my department.

Q. That is not a part of your department; that 363
is in the sales promotion department? A. That is right.

Q. And the sheet which was just marked in evidence is the only thing which your department sent out in connection with "Golfing Rhythm"? A. That is right.

(Witness excused.)

364 *Harry Foster—For Defendant—Direct.*

HARRY FOSTER, a witness called on behalf of the defendant, being first duly sworn and stating his address to be 1 Sickle Street, New York City, testified as follows:

Direct examination by Mr. Frohlich.

Q. What is your occupation? A. Film editor.

Q. For whom are you working? A. Columbia Pictures Corporation.

Q. How long have you been working there? A. Twelve years.

Q. Did you have something to do with putting
365 together the picture "Golfing Rhythm"? A. Yes, sir.

Q. Will you explain to the Court just what you did in connection in getting up that picture? A. I got an idea to make a golfing picture; I went around to the motion picture libraries and the news reel libraries and selected about 2,000 feet of material, golfing material, and in the course of three or four weeks assembled it and cut it down to 800 feet; I then called in our writers and narrator, prepared a script and recorded it.

Q. Did you go to the Pathe News organization and purchase from them the unit with respect to the Gene Sarazen, Lawson Little and the other in-
366 cidents that are shown in "Golfing Rhythm"? A. Yes.

Q. I show you these documents and ask you whether these are the Bill of Sale and invoices of those prints (handing)? A. That is right.

Mr. Frohlich: I will offer them in evidence.

Mr. Weisman: I object on the ground it is immaterial and irrelevant.

The Court: What is its relevancy?

Mr. Frohlich: We want to show our good faith and to show how we assembled these various shots.

The Court: You have shown it without that exhibit, without that document. The witness's testimony shows how that was done.

Cross-examination by Mr. Weisman.

Q. Do you know Mr. Bray? A. Yes, sir.

Q. And he is the owner of the Bray Pictures Corporation? A. That is right. 368

Q. Is he employed by Columbia Pictures? A. No.

Q. He is an independent— A. A Producer.

Q. And "Golfing Rhythm" was one of the series of shorts prepared and sold by Columbia Pictures Corporation, is not that correct? A. That is right.

Q. And your job is to collect, first select, then collect, then synchronize all these pictures, to make a complete whole of it, is not that correct? A. Well, assemble into the form of a reel.

Q. And your job is to make it a continuous performance, some continuity to the picture, is not that correct?

Mr. Frohlich: I object to that because the 369 continuity in evidence speaks for itself.

The Court: This is cross-examination; he may answer.

A. There is no set continuity.

Q. But when you came to assemble "Golfing Rhythm," it was your job to make an entertaining one reel picture? A. That is right.

Q. Is not that correct? A. That is right.

Q. And you embellished the actual pictures with side remarks or side other pictures to make them humorous, is not that correct? A. That is right.

Q. So that it would be entertaining, is not that correct? A. That is right.

Q. So it would be different say than the news reel, which simply shows the actual performance of the people, is not that correct? A. It is the same series as the news reel unit.

Q. You are familiar with the continuity and the dialogue used by Columbia Pictures in "Golfing Rhythm"? A. That is right.

371 Q. With respect to Jack Redmond, certainly it was different than that used by the Fox Movietone? A. It is the same news story that Fox Movietone used, we used; I selected the same story.

Q. When you say the same news story— A. We call it a story—the complete subject.

Q. As a matter of fact, Ed. Thorgenson related the story in connection with the Fox Movietone, is not that correct? A. He relates his own comments.

Q. There is no comment by the actor, is not that correct? A. That is correct.

Q. I am now referring to the Fox Movietone News, the news reel. The pictures are shown, silent pictures, is that correct, silent moving pictures? A.

372 They are not silent.

Q. The pictures themselves are silent, they are always silent, are they not, the pictures? A. No.

Q. The sound and accompaniment either on the reel or on the disc? A. On the photograph itself.

Q. And then Thorgenson wrote and spoke certain words in connection with the action of the pictures? A. That is right.

Q. When you came to do "Golfing Rhythm" you did not have Thorgenson do the talking? A. No.

Q. And the one who did the talking was an employee of Columbia Pictures Corporation, is not that correct? A. That is right.

Q. And you heard Miss Landes testify that some script writer, employed by Columbia Pictures Corporation wrote the dialogue that accompanied "Golf Rhythm"? A. That is right.

Q. So that the words spoken in connection with Jack Redmond's pictures were different in Fox Movietone News than they were in "Golfing Rhythm"; that is correct, is it not? A. That is right. 374

The Court: Was that a dialogue or was it a monologue?

Mr. Weisman: It is called dialogue. It is a monologue, but it is called dialogue.

Q. And the real technical term is continuity, is it not? A. Of what?

Q. It gives the picture continuity, the words that are spoken? A. Not in this particular type of a reel.

Q. What do you call it? A. News story.

Q. Do you call it dialogue? A. We call it dialogue.

Q. Even though only one person speaks? A. Yes, sir. 375

The Court: Continuity is the sequence, is it not?

The Witness: Yes, sir.

Q. Who writes the continuity—I will withdraw that. Who wrote the continuity for "Golfing

Rhythm"? A. There is no special written continuity for it. It is just a lot of news reel shots assembled into this one reel. It is done the way I use it. I do it myself the way I use it. There is no special continuity written for it.

Q. Then you put it together? A. Yes, sir.

Q. In such form and in such sequence as to make it entertaining? A. That is right.

Q. And then the dialogue is written and spoken so as to make it entertaining? A. That is right.

Q. And to make it funny? A. Not exactly.

Q. Humorous? A. To explain it.

377 Q. And to make it humorous, is not that true? A. Humorous and explaining the things that is happening on the screen.

Q. To make it humorous? A. Wherever you can.

Q. Wherever you can, to get a laugh out of the audience? A. That is right.

Q. It is not only instructive but it is also humorous? A. It is both.

Q. And that makes it a one-reel film? A. That is right.

Q. Which is sold all over the country? A. Yes, sir.

Mr. Weisman: That is all.

378 *Redirect examination by Mr. Frohlich.*

Q. Do not the news reels also have running commentation on their shots and scenes. A. That is right.

Q. And do not the commentators generally speaking in the trade, who make comment with regard to the news reel, attempt to be funny and humorous?

Mr. Weisman: I object to that on the ground what other people attempt as a general thing is immaterial and irrelevant.

The Court: Sustained. I do not see anywhere in the Complaint here any special claim for damages based on the dialogue that accompanied the picture.

Mr. Frohlich: There is not any.

The Court: There has been no evidence on the part of the plaintiff of any elements of damages springing from or arising from the dialogue accompanying this picture, is 380
not that so?

Mr. Frohlich: Yes, sir.

Mr. Weisman: Except to show that they did not do just the same thing and repeat the news reel.

The Court: I think that quite clearly appears.

Mr. Weisman: They tried to make a different thing out of it.

(Witness excused.)

ANGUS J. MACPHAIL, a witness called on behalf of the defendant, being first duly sworn and stating 381
his address to be 239 East Meujer Street, Valley Stream, Long Island, New York, testified as follows:

Direct examination by Mr. Frohlich.

Q. What is your occupation? A. Assistant Secretary and Assistant Treasurer.

Q. Of what company? A. Pathe News.

382 *Angus J. MacPhail—For Defendant—Direct.*
Case.

Q. How long have you been connected with that company? A. Six years, seven years.

Q. Do you know whether in 1932 the Pathe News took the shot of the plaintiff, Jack Redmond? A. Yes.

Q. Do you know where that was taken? A. Taken down in Florida, at Tampa, at a country club in Tampa.

Q. Did you, at my request, reduce the picture that was taken by Pathe at that time to a 16 millimeter film? A. I did.

383 Q. I show you this 16 millimeter film and ask you whether that represents truly the picture taken in 1932, of Mr. Redmond (handing)? A. Yes.

Mr. Frohlich: I will offer that in evidence.

Mr. Weisman: Objected to on the ground it is incompetent, irrelevant and immaterial.

The Court: What is the relevancy?

Mr. Frohlich: Your Honor, I am going to ask you to view a number of these pictures, among them this picture, to show that this plaintiff gave practically the same exhibition and the same performance every time the news reel took him. He is making a lot of

384 noise about news, how timely his pictures were, when as a matter of fact, all he did year after year, was stand up there and make those trick shots.

The Court: Has not he himself given enough testimony about that? He has testified that he posed—I think that was one of the terms used—posed on some twenty occasions more or less, for news reels in the last few years.

385

Mr. Weisman: Fourteen years.

The Court: And I think he has fairly and comprehensively described what those pictures show; that is, they all showed the making of these trick shots. He described the shots, the variety of them and so forth. Do you not think I have enough on that without the necessity of this?

Mr. Frohlich: If your Honor please, there is enough on that point and I will not press it, but I would prefer to have it in evidence in order to have your Honor see at least one reel made by some other company, because I 386
am going to show your Honor the reel that was made, the reel that the Fox people made, and I want to show your Honor the reel that the Pathe made. I think for that purpose we should have it. I have the Universal people in court but I will not put them on.

The Court: I think the plaintiff's own testimony is illuminating enough on that issue to indicate the general nature of these various films for which he posed.

Mr. Frohlich: I will not press it, your Honor. I will withdraw the witness.

(Witness excused.)

387

Mr. Frohlich: Now I have no further witnesses at this time. I would have rested if my friend had not been so technical about the production and distribution cost of that picture of his. I would like to bring my books down. I have a man who knows the figures.

The Court: Perhaps if you and he confer and you tell him what the general figures are, you may reach an agreement about it and let me know.

(Counsel confer.)

Mr. Frohlich: My friend says he does not think the Court is going to take those figures.

Mr. Weisman: What importance is there, how much it cost to produce the picture?

The Court: Merely to show how much they made out of it, if anything, and I think it has some relationship to the question of damages, punitive damages.

389 Mr. Weisman: Right, but your Honor limited the plaintiff, on the objection of counsel, to go into showing anything else outside of the State of New York. Certainly they are not going to take the position they can steal something in New York but by not showing it here they can come in and say, "We have not made any money here and that is all you can recover."

Mr. Frohlich: Your Honor did permit, over my objection, later on evidence——

The Court: I permitted the witness to show the number of theatres outside of the State of New York or rather the number of theatres in the United States exclusive of the State of New York, because you wanted that proof, Mr. Weisman. I
390 allowed it eventually.

Mr. Frohlich: I do not like to take up your Honor's time tomorrow morning and bring down an accountant with a big load of books here.

Mr. Weisman: Do you say there was loss or profit?

Mr. Frohlich: There was a loss of a couple of hundred dollars on this picture, and I am prepared to give you the figures.

Mr. Weisman: I will concede if you brought a witness he would so testify.

Mr. Frohlich: Then is it to be deemed evidence in the case, that on this particular picture "Golfing Rhythm," up to October 7, 1936, this defendant lost the sum of $886.29?

Mr. Weisman: I will concede that if you brought a witness he would so testify. Do not ask me to concede the fact.

Mr. Frohlich: That is all right. I am satisfied with that concession; and in order to make it clear for the record, I will just read off the four individual items making up this figure of the ex- 392
pense.

The negative cost of this picture was $2,802.57; the cost of positive prints was $1,068.04; the other cost, including expense of royalties were $500; the cost of distribution, computed at 37.78 percent, of $5600, is $2,115.68; a total exhibition cost of $6,486.29.

The Court: As against gross income?

Mr. Frohlich: As against approximately $5600. That is a net loss of about $886.

With that, your Honor, the defendant rests.

Mr. Weisman: I want to now read into evidence from the memorandum submitted by Mr. Frohlich with respect to the cost of production, on an Examination before Trial which we sought on this 393
very item.

Mr. Frohlich: In this case?

Mr. Weisman: Yes. I am reading from your memorandum submitted in opposition to our application for an examination, on the cost of production, in which you stated: "This item seeks the cost of production. It is impossible for the de-

fendant to tell what the cost of the production of the picture "Golfing Rhythm" was. The defendant did not take this picture and it was not present at the time the same was taken."

Now you are submitting and offering costs of production.

Mr. Frohlich: That was months ago and since then we have got our figures.

Now, your Honor, the defendant rests. I would like your Honor to see the picture "Golfing Rhythm," which is in issue here. We have the screen, we have the projection machine, and it will only take five or ten minutes, and then we are through with the case.

The Court: All right.

(Motion picture shown.)

(Adjourned until tomorrow, May 13th, 1937, at 10 o'clock A. M.)

New York, May 13, 1937,
10 o'clock A. M.

TRIAL CONTINUED.

SAME APPEARANCES.

Mr. Frohlich: Before I forget it, your Honor, I intended yesterday when I rested, to renew my motion to dismiss, for the record.

The Court: I will reserve decision. I will hear argument now, if you want to address yourselves to the Court on the questions of law that are involved here.

397

Mr. Weisman: Before the plaintiff rests, I ask counsel to produce the letter addressed to the defendant on July 13, 1936.

Mr. Frohlich: We have no such letter. I have never had any such letter.

(Copy handed to counsel.)

Mr. Frohlich: Do you say you sent this letter? If you say you sent the letter, I will accept the statement.

Mr. Weisman: Yes, and I offer that in evidence.

Mr. Frohlich: I object to it on the ground it is incompetent, irrelevant and immaterial, it is a self-serving declaration.

398

Mr. Weisman: I assume counsel is not objecting on the ground I am offering the copy?

Mr. Frohlich: No.

Mr. Weisman: I am only offering it for the purpose of indicating notice to the defendant on July 13th.

Mr. Frohlich: It is after we released that picture.

Mr. Weisman: It is a question of the date.

The Court: This letter does contain statements that are self-serving declarations.

Mr. Weisman: I am not offering it as evidence of the statements contained in it. I am offering it for the limited purposes of showing notice upon the defendant.

399

Mr. Frohlich: Notice after we had released the picture; months after we released the picture.

The Court: Whatever value it may have for that purpose is something to be determined by the trier of the facts. Why would it not serve your purpose, Mr. Weisman, in the event your adversary is willing to concede it, that a letter bearing the date of this document was addressed to the defendant by

whoever it was signed this letter, to the effect that the plaintiff in this action advised the defendant or stated to it that the exhibition of the picture "Golfing Rhythm," which included shots of the plaintiff, were being used without his consent?

Mr. Frohlich: I will make that concession.

Mr. Weisman: And that plaintiff's name also was being used in the Columbia Mirror likewise without the consent of the plaintiff?

Mr. Frohlich: That is right.

Mr. Weisman: And that the date of the letter is July 13, 1936?

Mr. Frohlich: Yes, sir.

401 The Court: And that it is addressed to the defendant at New York office?

Mr. Frohlich: I will concede that communication was sent and received at about that date.

(Both sides rest.)

Mr. Frohlich: Now does your Honor wish to hear argument?

The Court: If counsel wish to address themselves to the Court.

Mr. Frohlich: I will be very brief.

(Mr. Frohlich starts summation on behalf of defendant.)

Mr. Weisman: May I ask this statement be taken by the stenographer?

402 The Court: It will either be all taken or not at all.

Mr. Weisman: Particularly the statement that when this plaintiff permitted the picture to be taken it was not news but were pictures taken of this outstanding golfer.

(Mr. Frohlich continues summation on behalf of the defendant as follows):

Mr. Frohlich: Plaintiff testified that on every one of the occasions when these pictures had been taken over these fourteen years, he did nothing more than pose for these trick shots and execute them; he did not furnish any news to the public. His pose, as he said, was for the purpose of giving him favorable publicity so he could procure employment; it was part of his job, it was part of his work, he wanted the publicity; he sought it, he begged for it. The evidence clearly shows that he posed willingly and voluntarily on every occasion. 404

The reason I make that distinction is that very recently Mr. Justice Shientag had occasion to analyze the Civil Rights Act, in a lawsuit brought against the *Daily Mirror,* where the plaintiff complained that in a special article there had been a wrongful use of the plaintiff's portrait and name; and Mr. Justice Shientag—and this is mentioned on page 10 of my trial brief—made this important distinction—not with reference to motion pictures but with reference to newspapers generally, and he said: "There may be no recovery under the Statute for publication of a photograph in connection with an article current as news or immediate public interest." 405

First and foremost, we come into this case as immediate public news.

The plaintiff seriously claims that he has been damaged in the sum of $50,000. I do not think it will take any extended argument to convince your Honor that there was no damage whatever in this case, because what did we do? We did not distort his picture, we did not garble it, we did not libel

the man; we took this picture fairly and produced it from the Fox Movietone News, having paid $87 for it. We thought we had the rights because he had given the rights to the Fox Movietone News. We relied on that consent. I do not care whether his consent to the Fox Movietone News was oral or in writing; he consented to pose for that picture, and we relied on it, and if we made a mistake in law, our good faith cannot be attacked; and relying upon that right and paying our good money for it, we simply took that picture, showing this man executing these shots, and fairly inserted it in a
407 film in collaboration and in conjunction with other shots—of whom? Gene Sarazen and Lawson Little, men of great standing and great repute as golfers. This man was not libelled, his reputation was not tarnished, he was not injured or hurt because we had taken that news reel shot and put it in our picture.

He knew when he posed for these news reels that they would be disseminated far and wide throughout the country in thousands of theatres, and the proof was that they were released widely throughout the country in thousands of theatres. He knew that, he wanted it; and the proof is that our picture was released at the most in 1,433 theatres.

Now, this man comes along and says, "I saw my
408 name in front of the theater; a great injury has been done to me." A man who has kept 32 scrap books. He produced upon this stand two huge scrap books which contained hundreds of items, showing him in every nook and corner of the world, his name in large type, his photograph in reference to his skill and his prestige. Did we do anything to hurt that? This man who was able to accumulate in the

course of twenty years of professional golfing, 32 scrap books, comes along and says that we damaged him because somewheres in a theatre his name was used. If that is not the height of absurdity, then I do not know what is.

Your Honor, he claims not only damages but he claims exemplary damages.

I think it is a well established rule of law that there can be no exemplary damages where there has been no original compensatory damage. You can not give smart money when a man is not entitled to any damage. That is the rule of law.

What damage did he show? What evidence was 410
adduced by this plaintiff in support of the allegations of the complaint that he suffered special damage? None. There was not a scintilla of evidence.

In the face of this state of the record, your Honor, with no evidence in the case of any damage whatever, with every evidence that this man consented to be posed time and again, for at least fourteen years, with evidence that he posed as recently as February, 1937, in the news reel, how can he urge upon the Court seriously and honestly that he had been hurt?

Is it not evident that he is trying to take a technical advantage of the Statute, which was put on
the books not to protect men like him but to pro- 411
tect the average citizen who lives in obscurity, who seeks no fame or glory, who is supposed to live his life in peace and who does not want to be in the public eye. I say freely, your Honor, that the rule of law here is and has been, and I have supported it with many authorities, that when men seek fame and glory, when outstanding ability and genius and

skill are rewarded by worldly acclaim, those men have no right to privacy, everybody can talk about them. I can write a book today upon the President of the United States or upon a prominent member of Congress or upon Judges. I have a right to take their photographs, and as long as I do not libel them, I may speak of them and mention them, in a decent and honorable way, because those men are giving up that right of privacy for the greater right of glory and fame and immortality.

Now I say, your Honor, this man, this outstanding golfer, who has for twenty years accumulated his thirty-two scrap books, who has been in the
413 public eye, whose name is known in every corner of the United States, cannot come into this court and seriously urge upon your Honor that the right of privacy, the sacred right of privacy given to him, has been destroyed. It is an absurd claim and challenges credulity and challenges reason and logic. An important bit of evidence here is that this man never made any limitation on the consent that he gave to Fox. The record shows that he permitted Fox Movietone Company to take his photograph, he posed for them, he put those balls on top of the bottles, he had the girl there; he did not say to the Fox Movietone people, "I limit you to a news reel." He said, and whether he said it expressly
414 or impliedly is of no consequence, "Here is my picture, take it and use it."

Now I come down to the distinction, and the distinction is important because much has been said before your Honor in this case about the Franklin case. Unfortunately, I represented the victim in the Franklin case; I argued that case in the Court of Appeals, and Judge Crane said to me on the

argument—I urged that there was no case; I said this man Franklin had given up his rights; he said, "Just let me tell you something; you have no right to ridicule and hold a man up to contempt"—because in that case we had committed a serious libel, we had called this man a "bull thrower," and while it was facetious and a play on words and there was no malicious intent, the courts throughout, Judge Carew and the Appellate Division and the Court of Appeals, felt we had overstepped the limits and bounds of decency, and we had to pay and we paid.

What have we done to this man? We have spoken here in the most complimentary terms, and hence his reputation was advanced. That is one of the distinctions with the Franklin case. There is no similarity between these two cases. 416

In the Franklin case the Pathe people wrote in a letter and said, "We want to take the picture of you fighting a bull in the ring." He said, "You can take it as an actuale"—using the French word, as an actual scene of a sport event. There was a limitation. There was no such limitation here, your Honor. This man did not say, "You, Fox, take my picture and use it only as a news reel." He said, "Come along and take it"; that is all. Unlimited consent, so you have that distinction between this and the Franklin case. You have the distinction there was no libel and that is a vital distinction, because when you take the element of libel and throw it out of the case, what is there left here to this case? No proof of damage, actual damage, exemplary damage, any kind of damage, not the slightest proof, but a technical claim that his rights have been invaded. 417

This man who for 20 years sought publicity, employed publicity agents, sought it for the purpose

of getting jobs in country clubs, made his living by it, wrote articles in the magazines—this shrinking violet comes into this court room and says we injured him because we did what the Fox Movietone did with his consent and his express permission.

I think, your Honor, that I have covered the important distinction in this case. I do not want to burden you with law. I have given you a brief; I know your Honor read it carefully. I just want to call your Honor's attention to one thing in this Statute. There has been a recent amendment a few years ago, and it is the very last sentence of Section 51 of the Statute, and it makes this exception,
419 it says, in so many words, that you cannot hold anyone liable for using the name, portrait or picture of any author, composer or artist in connection with his literary, musical or artistic productions.

Now, this man is an artist, this man is a brilliant artist; he posed in the artistic production. He came directly within this Statute.

I do not care whether he received compensation, I do not care whether he asked for it or whether it was given to him or it was not given to him. He did what any other movie star, what any other actor, what any other skillful personage would do —he posed for Fox Movietone News, and when he
420 did that and placed no limitation thereon, the Fox Movietone News had the right to do two things—it had the right to exploit that on the screen, it had a right to sell it to the Columbia Pictures Corporation. They exercised that right properly. We come directly within that section of the Statute, and I say, taking that into consideration, taking the evidence into consideration, the lack of any damage,

the absolute lack of any injury here, I think, your Honor, that this complaint should be dismissed.

(Mr. Weisman summed up the case to the Court on behalf of the plaintiff as follows):

Mr. Weisman: May it please your Honor, every allegation in the complaint, both causes of action, have been affirmatively established by the defendant and its witnesses, and now——

The Court: Including the allegations of damage?

Mr. Weisman: Including the allegation of damage, which is a conclusion of law after all, Judge.

The Court: The plaintiff here has specifically alleged that he sustained damage to the amount of $25,000 in his First Cause of Action and a similar amount in the Second Cause of Action; and when you say that every allegation in the complaint has been sustained by the evidence introduced on behalf of the defendant, do you include in that statement the allegations of damage?

Mr. Weisman: No, your Honor, because when I say every allegation of the complaint, I am talking about every allegation entitling the plaintiff to recover.

The Court: To make out the cause of action outside of the question of damages?

Mr. Weisman: Yes, sir, because the question of damages, to which I will address myself later, is a matter for the Court, anyway. It follows as a conclusion, and the amount he specified in the complaint is unimportant, and the Court has to fix it anyway, the same as a jury would.

Every defense which is pleaded in the answer has likewise been disproved affirmatively by the defendant's witnesses; and may I say to your Honor that when the question of the defenses came up to

be argued in the course of the litigation, before Judge McGoldrick, Judge McGoldrick said that in these cases most often the damages are punitive. He said in this case they are wholly so.

Now, Judge, they can argue here until doomsday and they can not get away from the Franklin case. Franklin permitted the Fox Movietone News to take his pictures. He gave that consent in writing. He said, "You take it for a news reel," and also used the French word "actuale." Fox used it for a news reel and there was no complaint. Columbia Pictures Corporation went to Fox Movie News, the
425 same as they did in this case, took out of their library the very films which Franklin had posed for for the Fox Movietone, colored it, embellished it with humor and with music, as they did in this case, and made a short, exactly as they did in this case.

So, I am not claiming any element of libel here, and fortunately for us there were three distinct causes of action in the Franklin case, three distinct causes of action; items of damage allowed in the Franklin case, and $2500 was allowed for the Civil Rights recovery; and when the Appellate Division came to reduce the verdict, they reduced it by $2,000 because there was an overlapping of libel and slander, it is fair to say, but did not disturb the twenty-five hundred dollar verdict under the
426 Civil Rights Law; and every argument that is made here was made in the Appellate Division and in the Court of Appeals by this defendant and this counsel, and outside of discussing the breaking up of the three causes of action, Judge Glennon, in writing for the unanimous Appellate Division, said: "All other points raised by the appellant are without merit."

427

I do not know what Judge Crane said to Mr. Frohlich across the table, but I know that in 271 N. Y., you will find that the judgment was affirmed without opinion unanimously, and they had to pay.

The only distinction there is between the Franklin case and this one is that in the Franklin case they said it was current news and they had a right to republish and print and re-exhibit what was originally current news, and here he stands up and makes the argument this man did not give news, he was an artist, he was selling himself, selling his pictures, selling his name, that was his trade, that is how he made a living.

428

What rights did they have to steal it and use it for their own business without his written or other consent?

What becomes of every argument, Judge? Now, you say what damage did he suffer? He had a right to complete his negotiations with Warner Brothers. It is possible, Judge, that Warner Brothers would not have contracted with him in any event, but he was negotiating with them and that stands uncontradicted. It stands to reason, Judge, that if Columbia Pictures Corporation throws on the screen a short over every theatre in the country, booking a year in advance, in which this man is shown doing his trick shots, why should Warner Brothers contract to show the same thing? It would be ridiculous.

429

The Court: Is there any proof here as to the outcome of the negotiations with Warner Brothers and what influenced that outcome?

Mr. Weisman: Unfortunately, Judge, I offered that and you excluded it.

The Court: You put it in the form of a question that was improper and I sustained the objection. That did not prevent you from seeking to prove it by other evidence or by asking a question that was not objectionable as to form.

Mr. Weisman: Of course I say to you, Judge, frankly, that I did not think you were excluding it on the question of form, but it was excluded, and I say to you, Judge, that is unimportant because if I had been permitted to prove it, it would simply have been an element of special damage, and I say to you that in all of these cases both the Court
431 and the jury have an element of speculation when it comes to fixing damages in a case of this kind because no one person can really come in——

The Court: Does that element of speculations enter into the field of special damage?

Mr. Weisman: No, Judge, but I am talking about compensatory damages and as to that, your Honor, you have got to speculate. Nobody can measure with a yardstick precisely how far any person was damaged, and if I could have come in—

The Court: What evidence is there in this case that would afford any fair basis for determining compensatory damages, or to put it in a proper way, where is the evidence in this case that the
432 plaintiff has sustained any damage at all?

Mr. Weisman: I will have to go back to the Franklin case again and say——

The Court: I am not going to judge the facts of this case by the facts of the Franklin case. I am familiar with the Franklin case. I was familiar with it before this case came on for trial, but I have studied it with greater detail since this case came on for trial before me because very logically coun-

sel on both sides have argued on the basis of the Franklin case, but I have certain very definite evidence here and whatever decision this Court makes must necessarily be based upon the evidence in this case.

Mr. Weisman: Right.

The Court: Now, the plaintiff here is claiming compensatory damages; he is also asking for an award of exemplary damages. What proof is there here in this case of any damage actually sustained by the plaintiff?

Mr. Weisman: The answer I make to your Honor is that: That I am not asking your Honor 434
to follow the facts in the Franklin case, but rather to follow the law in the Franklin case, and I say to your Honor——

The Court: There is no question that under the law, the law upon which this action is concededly based, Sections 50 and 51 of the Civil Rights Law, plaintiff is entitled to a judgment, in my opinion. I do not hesitate to say that at this time because I have given very careful consideration from the very beginning of this trial to all of the evidence as well as to the legal principles pertaining to it. That is why I am stressing now, in my colloquy with you, the question of actual damage to the plaintiff. What evidence is there of any actual 435
damage sustained by the plaintiff?

Mr. Weisman: I say to your Honor frankly that there need not be any proof of damages.

The Court: There must be some evidence to show that the plaintiff has been damaged where he claims compensatory damages.

Mr. Weisman: I say this, your Honor: That the proof that this man, who is an artist and a show-

man and an expert, has been used in violation of the statute and more—that they used him in a place and for a purpose for which they had to pay him, is sufficient proof to your Honor to speculate as to what the compensatory damages should be.

The Court: I do not agree with that view of law, that in the absence of any proof of actual damage sustained by the plaintiff, that the Court must or should invade the realm of pure speculation for the purpose of determining any damage which the plaintiff may have sustained.

I think where actual damages, compensatory
437 damages, are specifically asked for in the complaint, that before the Court would be justified in making an award of compensatory damages there must be some proof upon which such an award may be made.

Suppose from the evidence in the case it should be quite apparent that absolutely no damage was sustained by the plaintiff, does it then become the business of the Court in any event to award the plaintiff compensatory damages, where the proof excludes every thought, every inference of any actual damage sustained by the plaintiff? Must there be an award of compensatory damages where no damages have been sustained?

Mr. Weisman: I say yes.

438 The Court: I do not agree with you on that.

Mr. Weisman: Obviously you do not, but let me——

The Court: If you can show me an authority on that, that where no compensatory damages have been shown, where no damage has been shown to have been caused, that there nevertheless must

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be an award of compenstory damages—unless you mean that the Court should under such circumstances award nominal damages?

Mr. Weisman: No. Now, Judge, look. Aside from the question which presents itself by your Honor's question, what possible proof can there be——

The Court: It all depends on the facts of the case.

Mr. Weisman: In a case of this kind that has no special damages, and let me again argue with your Honor—I know your Honor is open on this question, and just bear with me a moment—I said a moment ago I would like your Honor, and your Honor is going to do it anyway, to follow the law in the Franklin case, and I say that the proof in the Franklin case with respect to compensatory damages was no greater than it is in this case, and I have read the record very carefully.

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The Court: In the Franklin case it is beyond question, not only from the record of the trial itself, which I have examined, but also from the opinion of the Appellate Division, affirming the judgment for special damages rendered in favor of the plaintiff by the Trial Court, affirming it after a modification by a reduction from $7,000 to $5,000—it appears there beyond all question that in that case there was a very serious factual element presented, which arose from the fact that the exhibition of the motion picture of the plaintiff, Franklin, was accompanied by a monologue, which is called a dialogue in the moving picture world, although it is in fact only a monologue, which was, while it may have been intended solely to pass for humor, nevertheless construed by the

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plaintiff, regarded by the plaintiff and construed by the Court as libelling and slandering the plaintiff. Those factual elements are entirely absent from this case.

Mr. Weisman: But, Judge, I am not arguing that. I am not arguing that except to adjudge on the law that they allowed——

The Court: Your argument is that in the Franklin case there were three separate and distinct causes of action pleaded by the plaintiff: (1) That based upon Sections 50 and 51 or Section 51 of the Civil Rights Law; (2) the cause of action for libel;
443 (3) cause of action for slander. The Trial Court—

Mr. Weisman: Allocated different amounts.

The Court: I was coming to that. The Trial Court held that all three causes of action had been sustained by proof and awarded $2500 damages on the first cause of action, under the Civil Rights, $2500 on the second cause of action, founded in libel, and $2,000 on the third cause of action founded in slander. The Appellate Division reduced the aggregate award of $7,000 to $5,000, and as so modified, affirmed the judgment. The judgment thus entered after modification by the Appellate Division was then affirmed without opinion by the Court of Appeals.

I think you will search in vain in the opinion
444 of the Appellate Division for any statement that when they reduced the allowance for damages from $7,000, which was the aggregate amount, to $5,000, that the Court made a reallocation of the respective awards of damages throughout the three causes of action. Is not that so?

Mr. Weisman: Therefore it follows logically and legally that in that case, that the $2500 awarded

for the Civil Rights Cause of Action, without any proof of compensatory damages, was affirmed by the Court.

The Court: No, I do not think so.

Mr. Weisman: Because they said the total verdict——

The Court: Is not that a matter of inference?

Mr. Weisman: Is it not more honest, is it not more intellectually honest to argue that the Court found the total verdict excessive, which it said; and if it said that $2500 was excessive to allow on the cause of action under the Civil Rights Law because no proof of damage was shown, it would have said so, and failing to say so, I have a right to stand 446 here and argue on that case and say, Judge, the Court of Appeals and the Appellate Division affirmed the award of $2500 on the cause of action based upon the Civil Rights Law. I say that is logical and that is good law.

Now I say to your Honor further that in the Binns case, which went to the Court of Appeals, and which is found in 210 N. Y., there again there was no proof of damages, and the verdict of $12,500 was affirmed. There a telegraph operator who was on a ship that was involved in a collision with another ship, had his picture taken and then it was rephotographed and they rebuilt it, and he sued and he recovered $12,500; and there again there was no 447 proof of compensatory damages; and what I am urging on your Honor, and if you say you want me to seek the law further on the subject, I will do that—that there cannot of necessity be any proof of the compensatory damages. The only kind of proof that we could bring you here would be special damages, and that apparently is not involved here.

The Court: In the Binns case also there was a factual element based upon allegations of libel.

Mr. Weisman: Judge, why does the plaintiff have to come in and argue before a Court an element which is only true before a jury? Now, it is true, Judge——

The Court: The principle of law governing the award of compensatory damages is the same whether the questions of fact, including the quantum of damage, is to be determined by a jury or by a Judge sitting without a jury; the principles of law are exactly the same.

449 Mr. Weisman: Except that I recall Judge Cardozo's language when he was the Chief Judge of our Court of Appeals, in a case not similar to this one, but where also the question of damages gave the Courts and counsel a lot of trouble, and he said the courts having found a wrong to have been committed, they will find the remedy, and if they have difficulty——

The Court: There is no question of damage here. I have already indicated in my opinion the plaintiff is entitled to a judgment in this case, but on the question of compensatory damages I want to know what evidence there is in this record and in your opinion that would constitute a fair and a reasonable and a proper basis for the award of com-
450 pensatory damages to the plaintiff.

Mr. Weisman: And I say to you, Judge, that the proof here is very very little and I say very little not because I am afraid to say there is none but because your Honor must take into account that when he was negotiating with Warner Brothers, although I cannot prove how much he lost by Warner Brothers, that it is a fair inference for your Honor to

make that he lost something, that he was bound to lose something when another picture corporation showed the same photographs of him.

The Court: Without knowing all the facts with regard to those negotiations, what right have I to draw any inferences therefrom? Merely because the plaintiff testified that he entered into negotiations which were not concluded, there may have been any number of reasons, any one of a variety of reasons why the negotiations were not concluded favorably to the plaintiff, but there is no proof shown before me. Now, must I necessarily infer that the termination of those negotiations in a manner unfavorable to the plaintiff, if there was such 452
a termination, was due to the acts charged against the defendant in this case when there is no proof whatsoever of that?

Mr. Weisman: Then I am going to ask your Honor——

The Court: If such damage was sustained by the plaintiff, it would seem to me the proof would be readily at hand to establish it.

Mr. Weisman: Then I say this to your Honor: I am going to ask your Honor then in the interest of justice to permit me to supply that proof.

Mr. Frohlich: That I object to, your Honor. This case is closed.

Mr. Weisman: I think in your Honor's dis- 453
cretion you ought to permit me, if you feel that lack to be so burdensome to the plaintiff. After all, he has been damaged.

The Court: I do not know whether he has been.

Mr. Weisman: All right.

The Court: This case comes into court marked ready by both sides and you start the trial without an intimation that you have not all the proofs

that you think are available to you for submission to the Court, and it comes into court upon a complaint which charges or alleges that the plaintiff was damaged, and it asks for compensatory damages as well as exemplary damages. Now, when lawyers come into court in an action of that sort, with specific allegations of that kind in their complaint, and they say they are ready for trial, I assume that they have at hand all the evidence that they think is competent and relevant and material and available to them for the purpose of sustaining the various allegations of their complaint.

455 Mr. Weisman: Judge, I give you my word that if that objection had not been sustained, we had available on telephone call Mr. Lee Stewart, the person with whom the plaintiff negotiated the making of this Warner Brothers picture, and I was ready to put him on the witness-stand, to put him on to testify as to the negotiations and the reason for breaking up the negotiations, and unfortunately I misunderstood that the objection was sustained because the form was faulty.

The Court: The place for a witness is in the court room and not elsewhere, subject to telephone call.

Mr. Weisman: I should say, should the plaintiff be thrown out of court——

456 The Court: Should a case be tried more than once?

Mr. Weisman: That is a matter for your Honor's discretion. Not tried more than once. Just tried once.

The Court: Should a case be tried in this fashion? If counsel in this case were not capable and experienced counsel, as I personally know them

to be, I would be more indulgent with regard to an application of this kind. Then again there is ample evidence in this case, most of it, if not all of it, substantially coming from the plaintiff himself, on the question of whether or not he was actually damaged by the acts of the defendant exhibiting and circulating this moving picture of his trick shots.

The plaintiff gave testimony substantially to the effect that he has been specializing in the making of these trick shots in golf for about fourteen years, that he has given exhibitions of these trick shots all over the world. So far as his exhibitions in this country are concerned, I think he said that he had 458
given them in every state. He testified that these exhibitions are given by him for hire, that is, he is paid for them. He testified that he employs press agents and publicity agents to help him get engagements for the giving of these exhibitions by him for hire. He testified that on probably as many as twenty different occasions, either more or less, he had posed for moving pictures showing him in the making of these trick shots. He testified that he had done so voluntarily in every instance, and his testimony further was, as I recall it, that he himself or through his press agents, publicity men or other representatives, had solicited many of these private exhibitions at which these moving pictures were taken of him; and that he had done so because 459
he regarded the exhibition of those moving pictures of him executing these trick shots as an aid to his obtaining the engagement for hire, the giving of these exhibitions. The testimony, and this part of it does not come from the plaintiff, but there is further testimony that as recently as February of this year, after the institution of this very action

and while it was awaiting trial, the plaintiff, by arrangement, posed down in Florida for the Pathe News film people and made another exhibition of his trick shots. So that apparently the plaintiff's own estimation as evidenced by his own testimony with regard to his course of conduct in the last fourteen years, has looked upon the exhibition of these moving pictures posed for by him in the execution of these trick shots, as a valuable adjunct to his business or profession, call it what you please, of giving public exhibitions for hire of the execution of his trick shots.

461 Mr. Weisman: Does that entitle them to steal it, to take it without paying for it?

The Court: No. I am not saying that that entitles this defendant without the written consent, as provided for by the Civil Rights Act and Law, with impunity to exhibit any of those motion pictures. I am not holding that. These observations of mine are addressed solely to the question of damage sustained by the plaintiff, if any.

I said at the very outset of this discussion that I felt quite convinced that the plaintiff is entitled to a judgment, but the important question remaining in my mind was on the score of damages, what damage has the plaintiff sustained and for which there should be an allowance to him in this action

462 in so far as this record shows that he has sustained any damage?

Mr. Weisman: I have made my motion on that point and I assume from what your Honor says that you will not entertain it?

The Court: I think in view of this testimony that for the most part has come from the plaintiff himself, that the plaintiff himself has furnished the

Court with ample record upon which the Court may fairly, equitably and adequately determine whether or not the plaintiff is entitled to compensatory damages. 463

Mr. Weisman: And so my motion in that regard is denied?

The Court: I think, under the circumstances, I will deny the motion.

Mr. Weisman: Will your Honor note an exception?

The Court: Yes. I withdraw my decision for the moment on the motion to reopen the case. If you will be good enough to tell me what evidence you say you can introduce. 464

Mr. Weisman: I say I can produce Mr. Lee Stewart.

The Court: And what will he testify to?

Mr. Weisman: The person who will testify that he was negotiating with the plaintiff for the producing of a short picture in which the plaintiff would be shown in a sports short, similar to the one produced by the defendant, doing the trick shots; that when the defendant released and announced the release of this picture called "Golfing Rhythm," that Warner Brothers through this man, Lee Stewart, who was in authority to hire the plaintiff, told him that because Columbia Pictures Corporation is releasing a picture which includes the plaintiff doing the very trick shots which Warner Brothers wanted to incorporate in its short, that negotiations are off. 465

The Court: Is that all that he would testify to?

Mr. Weisman: Yes.

The Court: Then his testimony, his evidence would exclude any testimony as to any terms or compensation that was to be paid by Warner Brothers to this plaintiff?

Mr. Weisman: Standing here on my feet, I will not tell the Court that I know how much was talked about. That is a matter which I would have to inquire of Mr. Stewart before I put him on the stand.

The Court: Then, Mr. Weisman, again I rather marvel that you would come into court and announce you are ready to try this case if you were
467 not aware of the testimony that was available to you to show actual damage.

Mr. Weisman: Your Honor certainly is not going to charge me on this record with having come in here unprepared?

The Court: When you say on this very important question of actual damage, which is one of the important questions in this case, at least important to the plaintiff, I take it, that you do not now know the substance of the testimony that this witness would give if I gave you the right to reopen the case, if I accorded you the right that you ask for, to reopen the case——

Mr. Weisman: I say to your Honor that I still
468 stand here and say that the question of compensatory damages is a matter for the Court to speculate on. The Court has ruled; you have indicated you do not agree with me.

The Court: The question of compensatory damages is not one for the Court to speculate upon.

Mr. Weisman: Then I am wrong, Judge.

The Court: That is, if I correctly understand what you are contending for. The amount of com-

pensatory damages in any case where the damages are in their nature not liquidated, not capable of being ascertained, there is an element of speculation that enters into any determination involving an award of compensatory damages in an unliquidated damage case, but there is no speculation on the question of whether or not a plaintiff claiming compensatory damages has shown by proper proof that he has sustained any damage.

If the record be barren of any evidence showing that the plaintiff has sustained any damage, then the question should be disposed of right then and there. He should not receive any compensatory 470
damage in the event of an absence of proof to show that he has sustained any damage.

I will agree with you that the element of speculation enters into the question of quantum of damages after the right to compensatory damages has been established by proof that there has been actual damage sustained by the plaintiff.

Mr. Weisman: Now I say to your Honor that maybe I have misused words, and let me restate what I think is the law as I see it in this case. The right of a plaintiff to recover damages depends upon his proving the elements of his complaint which constitute a cause of action. The element of damages is, under the law, a conclusion except 471
where special damages are asserted and claimed, and with respect to those the law requires a plaintiff to plead it as well as prove it. Once a plaintiff has proved the bare elements of his complaint, the law says he is entitled to compensatory damages even if it is only six cents.

The Court: Very well. I agree with you as to that.

Mr. Weisman: Let me finish, Judge. Thereafter the elements of speculation arises; how much more than six cents should he receive? And in considering that element, your Honor——

The Court: Pardon me. The very term "compensatory damages" suggests the answer to that question. He should receive that sum which from the evidence would fairly and reasonably compensate him for the pecuniary loss.

Mr. Weisman: Right. Now, your Honor has before you a plaintiff who is an actor, who is a performer, and your Honor must come to the con-
473 clusion that when the defendant takes away from him the possibility, not only the probability, of duplicating their picture, because you have got to reason that another company is not going to put him out simultaneously when the Columbia Pictures Corporation are showing the very shots, that your Honor has a right to say that there is some further degree than six cents he has thereby been deprived of compensation.

The Court: Where the evidence justifies such a conclusion, yes, but where is there evidence here to such effect?

Mr. Weisman: Because the Columbia Pictures Corporation filmed, produced, distributed and sold
474 "Golfing Rhythm" for money; money that he would have gotten they have pocketed.

The Court: Wait a minute. There is the evidence also that he voluntarily posed for these pictures in June of 1935 for the Fox Movietone Company.

Mr. Weisman: Yes. As to what?

The Court: And that the Fox Movietone Company did not pay him for that.

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Mr. Weisman: Yes.

The Court: And does not the evidence also show that on probably as many as twenty occasions more or less—I am using the figures testified to by the plaintiff himself—he had similarly posed for movie picture concerns without compensation to him for such posing, and does not the evidence further show that he himself on many of those occasions sought the opportunity to pose for the moving picture companies because he regarded the exhibition of those pictures of him executing these trick shots as an aid to him in the pursuit of his business or profession, that of holding and giving public exhibitions for hire of his execution of the trick shots?

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Mr. Weisman: Judge, I never want to match memories with you, but let me say this, that on that point which your Honor has now stressed three times, with all due respect, you are mistaken.

The Court: If I am, I would be grateful to you if you point it out.

Mr. Weisman: Let me recall the testimony to you.

The Court: If I am in error, I want an opportunity to be corrected.

Mr. Weisman: On cross-examination the plaintiff was asked how many times he had posed for the news reels and his answer was, "I don't know, five, six or seven times," and then the question was pursued, and the examiner said, "Will you say as many as fifteen times?" and he said, "I don't know, it may be."

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The Court: First he said eight, ten, maybe fifteen times.

Mr. Weisman: Five, six or seven times.

The Court: He said it may be more or maybe less.

Mr. Weisman: Five, six or seven times, and after Mr. Frohlich had gotten him to say yes, maybe that many, he said it may have been as many as twenty times.

The Court: It might even have been more, he said.

Mr. Weisman: I do not think the question of more ever came up.

The Court: So long as you do not want to match memories with me, I will not ask you to do it, but
479 I am going to ask the stenographer to go back to the record and read that part of the testimony.

(Record repeated.)

Mr. Weisman: Now let me leave that subject a moment and let me go to the question of punitive damages.

Compensatory damages are damages which you award to a plaintiff for loss, as you say, that he sustained. Punitive damages are damages which you assess against a defendant. It is true the plaintiff gets it; and then you come into a different element of assessment. If the defendant does this admittedly wrong, illegal or unlawful thing innocently, then the Courts may overlook it, but when a defendant does it deliberately, then I think it is the
480 duty of the Court to assess punitive damages.

The Court: Where an act is done by one to the injury of another under circumstances which enable the recovery of exemplary or punitive damages, the degree of wilfulness with which such act is done certainly should always be considered.

Mr. Weisman: I say to your Honor this, that in the beginning of 1935, there was an adjudication in

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this court against this very defendant, in which they were told that they were mistaken as to the law of what constituted pictures in the public demand, what constitutes consent to have a man's picture taken and re-exhibited, and they said to him, "You violated Franklin's Civil Rights by doing that," and they assessed damages against them. With that decision hanging on their wall, they then proceeded to do precisely the same thing to this plaintiff.

Now, what greater wilfulness, what greater contempt for a judgment of the Supreme Court can any person or any corporation show than by immediately repeating the very act which has just been condemned? And when they say that upon protest they deleted the plaintiff's picture, let me call your Honor's attention to the fact that the proof here is to the contrary. They released the picture on May 15, 1936. On July 13, 1936, we wrote them, and obviously they received the letter on July 14th. They waited until October 2nd, 1936, before they gave word to cut that film out.

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Now, golf enthusiasm is shown during July, August and September. Naturally that is so. They milked the picture until October, milked the plaintiff out of his rights during those months, and they said "Cut him out" in October.

I do not know of any other case, I cannot think of it, if I was trying to use my imagination, where a defendant should be punished, where any law requiring punitive damages could more properly, more honestly be assessed than against the defendant who committed the acts as this defendant in these two cases.

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The Court: Assuming that no actual damage was sustained by the plaintiff from the acts of the

defendant, would you say then that exemplary or punitive damages should be awarded?

Mr. Weisman: Yes, because the two elements do not depend one upon the other.

The Court: Do you know of any authority for that?

Mr. Weisman: On my feet, no. The arguments which I gave to your Honor I did not just think of but I looked them up and I think they are logical; it is good sound reasoning.

The Court: If you can find authority to support the proposition that in a case where the law by
485 statutory rule gives a plaintiff a right to exemplary or punitive damages, that such damages may be awarded in a case where the evidence shows the plaintiff sustained no actual damage, I will be very glad to give heed to your plea for an award of punitive damages in this case.

Mr. Weisman: And how much time do you want me to take? I only want a couple of days.

The Court: A couple of days?

Mr. Weisman: A day. Give me as much time as you want.

The Court: How much time do you think you need?

Mr. Weisman: I will get to work now and I will say to you if I find none, I will come in and say so.
486 The Court: Then suppose we do this: I will take a recess in this case until 10 o'clock tomorrow morning. Do you think that will give you enough time?

Mr. Frohlich: I have to be in the Appellate Division tomorrow, Judge.

The Court: What time?

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Mr. Frohlich: Tomorrow is motion day and I have an appeal there. Two o'clock tomorrow I will be through.

The Court: If there is any other question of law in the case that you want to address yourself to or that may suggest that there are other propositions you might want, either one of you might want to give attention to now, I will hear you.

Mr. Frohlich: I have nothing else.

The Court: Have you any?

Mr. Weisman: I will have to do a little thinking.

Mr. Frohlich: Will your Honor allow me to supply you a memoranum on that point of compensatory and punitive damages? I have had that recently in an unfair competition case. 488

The Court: Yes. Decision reserved and case continued until 2 o'clock tomorrow afternoon.

(Adjourned until tomorrow, May 14, 1937, at 2 o'clock P. M.)

New York, May 14, 1937,
2 o'clock P. M.

TRIAL CONTINUED.

SAME APPEARANCES.

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Mr. Weisman: Your Honor, I assume it is my burden to carry on?

The Court: I have read the memorandum that I received from you Mr. Weisman, devoted particularly to the question that I suggested you brief, and that was, whether or not in this State at least an award of punitive or exemplary damages may

be made in a case where such damages are allowable even though the plaintiff may be shown not to have sustained any actual damage, and I want to compliment you on the memorandum. It is very comprehensive and enlightening. Also the one I received from your adversary on the same question. I say this after reading both these memorandums: It seems to me that while the rule may differ and does differ throughout the various jurisdictions in this country, I think there is ample authority in this State to support the proposition that in a case where exemplary or punitive damages are sanctioned by the law, such an award may be made to a plain-
491 tiff even though the plaintiff may not have sustained any actual or special damage. I think that under the authorities that have been called to my attention, particularly in the memorandum of the learned counsel for the plaintiff, that that may be safely asserted to be the rule prevailing in this state, although there are decisions that Mr. Frohlich has called to my attention, which may cast some doubt upon it.

Mr. Frohlich: I did wish to call your Honor's attention that under this very Statute punitive damages are discretionary. You are not bound to grant them, and I think in view of the evidence in this case your Honor ought to exercise this dis-
492 cretion and refuse punitive damages. It is not mandatory.

The Court: No. The Statute specifically says that punitive or exemplary damages may in the discretion of the jury be allowed in a case involving a violation of one's rights under Sections 50 and 51 of the Civil Rights Law.

Mr. Weisman: I think it is fair to state that in every case where punitive damages are permitted, it is always a "may" clause.

The Court: It always rests in the discretion of the triers of the facts.

Mr. Weisman: In connection with that, your Honor, I cite Mr. Justice McGoldrick's decision in this case there when he said, "In this case the damages are wholly punitive," and I call your Honor's attention to the fact that both Judge Gaynor, who wrote the opinion in the Daily Eagle case, and Judge Churchill, who wrote very carefully on the question of punitive damages, and analyzing the 494
conflicting decisions in the various States and in this State, and the Circuit Court of Appeals in the Press Publishing Company case, said that is the only way you can protect a plaintiff and punish a defendant, and that was the purpose of the statute.

It is a penal statute really, Sections 50 and 51.

The Court: I feel persuaded that not only upon the authority of the cases that you have cited but also upon reason and principle, punitive damages may be awarded in a case where the law sanctions an award of punitive damages even though the plaintiff may not have sustained an actual or special damage from the acts complained of.

Mr. Weisman: That is right.

The Court: I think on reason and on principle 495
that is a sound rule. Now the question here is whether or not under the facts peculiar to this case, such an award should properly be made. I will hear both of you on that proposition.

Mr. Weisman: In arguing that point, and I have already argued it once, I am going to repeat it briefly—we can disregard the plaintiff entirely;

we can address ourselves entirely to the acts and conduct of the defendant. Mr. Frohlich, in his closing argument, said, "We did it innocently, we paid $87 for this film and we made this picture."

And my answer to that is this, Judge: That if any defendant in any case should be punished and punished severely for violating a statute, it is this defendant in this case because, as I say, they were deliberately definitely told by three courts in this State that they were doing the wrong thing and they were already once punished and being punished, being told they could not do it; in contempt of the
497 Courts' decisions and rulings in the case, they repeated the wrong.

Now, certainly they did not do this for the amusement of the general public. They did it to make a profit in disregard of the Court's judgment.

I say, in view of that history and that last recent adjudication against them, what possible excuse can they have for again violating the statute? This time against a different plaintiff.

The Court, in exercising its discretion, must take into consideration whether the defendant was mistaken as to the law, mistaken as to the facts, whether the facts were any different. They were not, Judge. In the Franklin case the man was——

The Court: They were different not only as to
498 the actual violation of the civil rights of the person that was involved both in the Franklin case and in this case recently, but they are different in the manner of the violation.

Mr. Weisman: In the degree.

The Court: Yes.

Mr. Weisman: Only in the degree.

The Court: In the Franklin case the violation was accompanied by acts which the Trial Court

and the courts of review, in my opinion, properly held caused a damage to the plaintiff in the Franklin case.

Mr. Weisman: By the use of one word "Bull Thrower," which was held is synonymous in colloquial language to the word "liar." That is exactly the argument that was made, and I say it makes a substantial difference; but that is on the element of libel, on which the Court gave the plaintiff $2500; but I say to your Honor again that in the Franklin case as in the Binns case, there was no proof of any pecuniary loss to either of the plaintiffs; and in both cases they were allowed substantial awards for 500
the violation of their civil rights.

In the Franklin case they paid them an additional sum because he was called in colloquial language a liar.

The Court: Well, the mere violation of one's rights of privacy under the provisions of Section 51 of the Civil Rights Law does not in and of itself call for the allowance of damages. Damages would be allowed only in a case where by virtue of such violation the plaintiff had sustained a damage.

I am speaking now of compensatory damages as distinguished from punitive damages. I mean by that that the mere fact that one violates Section 50 and Section 51 of the Civil Rights Law does not make it mandatory in an action brought by the one 501
whose rights were violated, there shall be an award of compensatory damages irrespective of whether or not damage was sustained by the plaintiff.

Section 51 merely gives a right of action; it does not impose a penalty. It gives a right of action to sue for and recover damages and in addition thereto, in the discretion of the Court, the jury, ex-

emplary damages may also be awarded. So that when it is argued that in the Franklin case and in the Binns case substantial damages of a compensatory character were allowed by the Trial Court and upheld on appeal, I do not think that that is the same thing as saying that in every case for violation damages must follow whether or not actual loss or damage has been sustained.

Mr. Weisman: I say yes, and the only difference is the question of amount and the question of degree. Now we are still talking on the first item I talked to you about, compensatory damages.

503 The Court: Yes.

Mr. Weisman: And I say it is all a question of degree and amount. For instance in the Binns case——

The Court: Let us assume that one's private rights are invaded in a manner that affirmatively benefits that person, he still would have a right of action to the injunctive relief that the statute gives him, but does that mean, where it might be clearly shown in such an action brought under the provisions of Section 51, that the plaintiff, instead of having sustained any damage, has actually been benefited by the violative acts of the defendant, that there must in any event be an award of damages

504 regardless of whether the amount be nominal or substantial?

Mr. Weisman: I say yes, Judge, and I will tell you why. I say it because the statute talks about injunctive relief and damages in one breath, and then it goes on to the question of——

The Court: But the statute says "may also sue and recover damages for any injury sustained."

505

Mr. Weisman: Right.

The Court: There must be an actual damage sustained before there may be a recovery.

Mr. Weisman: Not damage. Injury sustained. The injury is the violation of the law and the rights.

The Court: Recover damages for any injury sustained. Where the acts complained of, which concededly may be a violation of the Civil Rights Law, are of a character that actually benefits the person whose rights have been invaded, is it an injury for which damages must be allowed?

Mr. Weisman: Yes.

506

The Court: In the absence of any proof that there has been a damage?

Mr. Weisman: Yes, and I will tell you why. Judge, let me communicate to you——

The Court: That is a new theory of the law of damages as far as I conceive it.

Mr. Weisman: Let me communicate to your Honor what is in my mind on that subject.

The Court: I will be glad to hear it.

Mr. Weisman: The nature of the action is penal. The entire section is penal, the same as if I committed a wrong——

The Court: Under Section 51, which is the section which gives the plaintiff in this case the right of action which is asserted by him, merely gives him a right to sue for and recover damages, in the language of the statute, for any injury sustained by reason of such use, unlawful, unauthorized use of one's name, picture and so on.

507

Mr. Weisman: Every court that has had Section 51 under consideration, and written about it, has said that the action is penal in its nature. That is

the language used. It is penal in its nature. It is really more an action against the defendant than action——

The Court: Section 50 is by its terms a penal statute.

Mr. Weisman: It probably belongs in the penal law and yet it is not.

The Court: But it is in terms a penal statute. It defines the acts there alluded to, to be a misdemeanor. It creates a substantive crime of those acts.

Mr. Weisman: That is right.

509 The Court: But Section 51 simply gives one whose rights are invaded a cause of action to sue for and recover damages for any injury actually sustained by him as a result of the violation, and in such an action, under the terms of the statute, exemplary damages may in the discretion of the Court also be allowed—call it a penal statute or anything else—it is a mere matter of terminology; it does not alter the phraseology of the statute nor does it affect the rule embodied in the statute.

Mr. Weisman: Of course, when we get all through arguing about this, it resolves itself down to this: That the Court must determine in accordance with its own conscience and in accordance with

510 the decisions, how much it will award against the defendant in view of its deliberate conduct in this case; and I am not going to presume to stand up here and argue on that point any longer. That is why when I opened my argument I said every allegation in the complaint has been proved affirmatively by the defendant in this case because the wherefore clause is something for the Court to determine and nothing for us to prove unless we have special damages to prove, and we did not prove any.

511

The Court: Well, I will hear you, Mr. Frohlich, if you care to be heard.

Mr. Frohlich: I will be just very brief on the question of the so-called punitive damages.

As your Honor has stated, the evidence in this record affirmatively shows that the plaintiff suffered no injury. At the most, what did this defendant do? This defendant merely released and distributed the very news reel, the very shot that he had made in the news reel, which he said was a benefit to him. It was vital to him in his business, to give him opportunity for employment. He courted it; he wanted it for fourteen years. Time and again he 512
had done this thing; so it may very well with reason and logic be argued that this defendant did not injure the plaintiff. It helped him.

We also did what the Fox News Reel did; we also showed this man doing the trick shots, and for all we know, he may have obtained some employment on the strength of it. There is no proof to the contrary, and every presumption is that it helped him because he has testified that the others helped him, and he cannot get away from his testimony, and no matter what argument his counsel makes, the record and the testimony of the plaintiff conclusively established that there was no injury.

Now, counsel for the plaintiff asks this Court 513
very seriously, in view of the fact that a man has not been injured, in view of the fact that it may possibly be held that he was actually benefited, that the Court must impose punitive damages upon a defendant; and he says this defendant violated the rule laid down in the Franklin case.

The only rule laid down in the Franklin case, and I say this seriously, was that you can commit

libel when you are using a man's name and his photograph. There is nothing in the opinion in the Appellate Division, and there was no opinion by the Court of Appeals, which establishes a rule that a motion picture company may not go to the old news reels and take a portion of these old news reels and use them.

My friend has mentioned the Binns case. A very splendid analysis of the Binns case and of the Blumenthal case, another recent case, was made by Mr. Justice Shientag a few weeks ago in a case against the Daily Mirror, and he pointed out that in
515 the Binns and in the Blumenthal case the defendant had gone to the plaintiff's portrait, the plaintiff's name, and had used it in fiction, had fictionalized it.

There is the distinction. We did not do that here, your Honor. We did not fictionalize this plaintiff. We simply showed him as he had appeared in the news reel. All that we did was to put him in a collocation of pictures with Gene Sarazen and Lawson Little and men of the highest standing as golfers. We enhanced his reputation. We did not mislead the public. There is nothing there to indicate that Mr. Redmond's name or photograph was used as part of a fiction story, so that the Binns case and the Blumenthal case do not apply.

516 As far as the Franklin case is concerned, it stands on its own feet. We were derelict because we had no right to libel the man. We have not libelled this plaintiff. Now can my friend ask this Court to decide this case upon the Franklin case?

The Court: I do not think the right of recovery in the Franklin case was upheld merely because in that case there was factually an element of libel and

an element of slander which accompanied the evasion of the private rights or the rights of privacy of the plaintiff.

Mr. Frohlich: The thing that motivated the Court at all times was unquestionably the slander and libel element.

The Court: They may have been the factors that went to enhance the amount of damages more than any other element or factor in the case but the right of recovery there was not sustained by the courts merely on the proposition that the violation of the rights of privacy of the plaintiff was one accompanied by libel and slander. I do not agree with 518
that.

There is nothing in the opinion of the Appellate Division in that case from which it may be argued that the recovery that was allowed to the plaintiff was allowed solely because the violation of the plaintiff's rights of privacy was accompanied by elements of libel and slander.

Mr. Frohlich: Not solely perhaps, but chiefly.

The Court: The very fact there were three causes of action set forth in the complaint in the Franklin case, one founded on libel, the second on slander and the third an invasion of the civil rights —I do not profess to give them in the way in which they were pleaded.

Mr. Weisman: In reverse order, Judge; and 519
separate verdicts given.

The Court: In effect, what the Appellate Division did was to say that all of those causes of action might well have been asserted and the damages sustained by the plaintiff by virtue of each and every one of those three causes of action or the acts

constituting those causes of action might very well have been claimed and asserted in one action based solely upon Section 51 of the Civil Rights Law.

Mr. Frohlich: No question about that.

The Court: It precludes any thought that the affirmance in favor of the plaintiff in that case was due solely to the elements of libel and slander which were present factually in that case.

Mr. Frohlich: But the Franklin case must be considered on its own particular set of facts. By no analogy or argument can you apply the Franklin case to this case. They are as different as night and day.

521 The Court: They are alike only to the extent that an invasion of one's rights of privacy as those rights are defined in the Civil Rights Law, gives rise to a cause of action.

Mr. Weisman: And a similar procedure.

The Court: In which damages may be recovered.

Mr. Weisman: And the plaintiffs holding similar positions in the entertainment field and the similarity of men posing for Fox Movietone News, and they come into their library and take out the film and reincorporate it.

Mr. Frohlich: And the right to take the picture was given by Franklin with a restriction; he said, "You can take my picture only as an actuale."

522 There is no such restriction in this record. The proof shows the man permitted the Fox Movietone News to take his picture without any restriction or imposing any condition, and this defendant had a right to rely upon that and it had a right to go to the Fox Movietone people and say, "Sell me that shot of Redmond."

At least, they may be mistaken in the law but they did it and did it in good faith. 523

Now, punitive damages always connotes bad faith and bad motive and intent to injure. I do not have to give your Honor authorities on that. You know it very well.

Now, where is there a scintilla of evidence in this case that this defendant went out deliberately to injure this man? There is not the slightest; and in view of the fact that this defendant actually lost money on the picture and made no unconscionable profits and did not profit by the transaction, I urge upon your Honor that no punitive damage should be allowed and that no compensatory damage should be allowed, and I urge that the complaint should be dismissed. 524

The Court: I am not prepared to say that any virtue can be claimed by the defendant because it lost money on its exhibition of this film. I venture to say that if the defendant at the time it lent itself to the exhibitoin of the film knew that it was going to lose money on it, that it would not have exhibited the film. The fact that it lost money is purely an adverse circumstance.

Mr. Frohlich: It had hopes and it was disappointed.

The Court: I mean it cannot claim any virtue here because it lost money where it probably expected only to make money. 525

Mr. Weisman: Your Honor, one more word and I am through. In the Binns case, the Court of Appeals deliberately said that it is not concerning itself with the element of libel. It said so in so many words.

The Court: There was nevertheless the factual element of libel in that case but it was not depended upon by the courts in order to sustain the recovery.

Mr. Weisman: Of $12,500.

The Court: The statute itself, the statute upon which this action is avowedly based, is all-sufficient to give the plaintiff a right of recovery here, in my opinion. The only question is as to quantity.

Now, on the question of compensatory damages, I cannot avoid the conclusion from all of the evidence, that the plaintiff here not only has utterly failed to show that he has sustained any actual
527 damage as a result of the acts, but I think that the evidence affirmatively shows that if anything, plaintiff benefited by this exhibition. The plaintiff's own testimony goes further than any other evidence in this case to give support to my conclusion in that respect. As I pointed out in my colloquy with counsel yesterday after both sides rested, the evidence as given principally by the plaintiff himself throughout this whole case shows that the plaintiff has by training, by practice, possibly by instruction, become an adept, acquired a peculiar degree or skillfulness and expertness in the making of these so-called trick golf shots; he has so perfected himself in that field that it seems to have become his means of livelihood. He gives public
528 exhibitions of these trick shots for hire. In order to get engagements of that nature, he has testified that he employed and has used press agents and publicity agents. He has also testified that on many occasions, as many as twenty, more or less, he himself has voluntarily posed for moving picture companies in the execution of these trick shots; that he solicited those opportunities to pose for

529

moving picture companies because he felt that the exhibition of those films, for which he voluntarily posed without compensation, were an aid to him in obtaining engagements for which he was paid for the execution of these trick shots.

The evidence shows that the moving pictures of him executing these trick shots which were shown by the defendant as part of a reel entitled "Golfing Rhythm" were pictures that were specially posed for by the plaintiff by arrangement with the Fox Movietone Company in June, 1935, at what was not a public exhibition but an exhibition arranged solely for the purpose of enabling the Fox Movietone Company to make this film of the plaintiff executing these trick shots.

530

The evidence shows that sometime in 1936 the defendant, Columbia Pictures Corporation, purchased from the Fox Movietone the film which it had taken in June, 1935, of the plaintiff and made it part of its reel called "Golfing Rhythm," which was a reel that also portrays, by moving pictures, actions of golfing individuals like Gene Sarazen and Lawson Little.

It is not claimed that there is anything in the exhibition of this film by the defendant which held the plaintiff up to scorn, ridicule or contempt. The dialogue, so-called, which accompanied that portion of the film depicting the plaintiff in action in the execution of these trick shots, is not made the basis of any complaint at all by the plaintiff in this action.

531

So far as appears from the evidence in this case, all that the defendant here did was to make that kind of exhibition of these motion pictures of the plaintiff which the Fox Movietone could have made

532 had it wanted to with the consent of the plaintiff. If the Fox Movietone Company had exhibited these pictures instead of the Columbia Pictures Corporation doing so, I do not think anything in this complaint would be urged in court against the Fox Movietone Company.

Mr. Weisman: May I interrupt your Honor?

The Court: Yes.

Mr. Weisman: The plaintiff very definitely testified that he permitted the Fox Movietone News to take it only as a news reel, and Mr. Steinberg, an
533 officer of the Fox Movietone, defined the differences.

The Court: It is not for the plaintiff to say whether a private exhibition which he gives avowedly for the purpose of enabling him to be exploited, with a view of getting engagements for public exhibitions, is a news event.

Mr. Weisman: Only the plaintiff has control.

The Court: The plaintiff cannot label that a news event to suit his own purpose. Even so, it was a private exhibition that he lent himself to for the purpose of helping him get engagements at public exhibitions.

Mr. Weisman: Judge, only the plaintiff can control the method and means of anybody using his picture.

534 The Court: That may all be true as far as it bears on the question as to whether or not the defendant here has violated Sections 50 and 51 of the Civil Rights Law. I am devoting myself, however, to a consideration of the question of the damages which ought to be awarded the plaintiff.

I have already said that in my opinion the plaintiff is entitled to a judgment, but on the question of quantum of damages, I feel from all the evidence

535

in this case that the plaintiff is not entitled to recover more than nominal damages, which are awarded him in the sum of six cents; and although the evidence here now is to the effect that last October the defendant discontinued the execution of this picture, this film complained of here, if the plaintiff wants injunctive relief incorporated in the judgment, it can have that, too.

Mr. Weisman: What about the question of punitive damages here?

The Court: I do not think this is a case where punitive damages should be allowed. I think the plaintiff here has sustained, if he sustained any damages at all, purely nominal damages, for which he is awarded a judgment of six cents.

536

Mr. Weisman: What about the award against the defendant, Judge? That is what all these cases hold. That is what you asked me to brief for you.

The Court: I have upheld your contention despite the fact that the question is still clouded in doubt, that in a case where the Statute allows an award of punitive damages in addition to compensatory damages, punitive damages may be allowed even though no compensatory damages are granted, but I do not think in the exercise of my discretion and exercising it in a manner that is influenced entirely by the evidence in this case, that this is a proper case for the allowance of punitive damages to the plaintiff.

537

Mr. Weisman: Then you are letting a defendant who repeats the wrong out, are you not?

The Court: I am considering only the circumstances in this case. The circumstances in this case are quite peculiar. They differ inherently, I think, from the circumstances of any other case where an

action was brought under Section 51 of the Civil Rights Law that so far has been called to my attention by either side.

This is a case where the plaintiff set out himself in order to enhance his own means of livelihood, to have these moving pictures taken of him and exhibited of him, with a view of his getting engagements for public exhibits in the execution of trick shots.

I cannot get away from the evidence which has been given here which consists principally of the testimony of the plaintiff to that effect. I think
539 that those facts predominate in this case. It is a case where the plaintiff's rights have been violated without damage to him.

Mr. Weisman: I respectfully except.

The Court: Now, if you want injunctive relief, you may have it. I think you are entitled to it. You may include it in the judgment. Do you want to submit your form of judgment here?

Mr. Weisman: I do not think your Honor has any authority to grant an injunction in this case.

Mr. Frohlich: This case was noticed here in the law part of the Court, so I think they abandoned their equitable relief.

The Court: In your complaint you ask for an
540 injunction.

Mr. Frohlich: But I think they abandoned that, your Honor.

Mr. Weisman: It is merely in the wherefore clause, your Honor.

The Court: If you do not want it, I do not insist on your having it. If you think you are entitled to an injunction, if you want an injunction, you have asked for it in your complaint, you asked the Court

—forever restraining use by the defendant of the plaintiff's name, pictures, portraits and likenesses and so forth; and I think you are entitled to such an injunction if you want it in this State.

Mr. Weisman: Will your Honor direct that the defendant deliver up to the plaintiff all of its film and negative that it has containing the plaintiff's photographs?

The Court: I do not think I have any power to do that.

Mr. Frohlich: It is not a copyright case. There is no infringement here.

The Court: The defendant purchased that from 542
the Fox Movietone people.

Mr. Weisman: It has no right to use it.

The Court: The injunction will take care of that. It will restrain the use of it. I do not think I have a right here in this action to take what avowedly belongs to them, which they bought and paid for, and turn it over to the plaintiff, from whom they did not buy it. I think the injunction restraining them from using it in this State——

Mr. Weisman: Suppose they go and sell it to somebody else across the river?

Mr. Frohlich: We are not violating injunctions, as a matter of fact.

The Court: You can be heard on that when 543
such an act occurs.

Mr. Frohlich: We are certainly not going to use it, and will respect your Honor's decision to the hilt all through the country. My friend need not fear about that.

544 **Plaintiff's Exhibit 1.**

(Taken from dialogue of "Golfing Rhythm." See Defendant's Exhibit G for complete dialogue.)

Jack Redmond, a magician of the links, continues the trick stuff by driving 3 balls off this young lady's foot. Either she has confidence in him or she needs a chiropodist and doesn't mind having a divot taken out of her shapely tootsie.

You win Jack. Her foot is still there. What? Bottles for tees? Come now, Mr. Redmond. If you break them you'll have to play out of a hazard full of 8-year old rye. And wouldn't that be tough? Ah but he never misses. If we duffers could drive
545 as well under normal conditions as Jack does off a bottle or a lady's toe, we'd be as happy as a tiger lunching on an explorer. Hitting a target is a hard trick, but socko—there it goes. Now don't worry sir, Mr. Redmond is a gentle soul, and careful—ah very, very careful, and if anything goes wrong he can always get a new set of clubs. Oh well.

546

Plaintiff's Exhibit 2. 547

COLUMBIA MIRROR

(Page 14)

TIPS! ADVANCE INFORMATION ON EXCEPTIONAL SHORT SUBJECTS

By JAMES ULYSSES UPTON

GOLFING RHYTHM

(News World of Sports)

1 reel—(Released May 15, 1936)

548

They say ten million people in the United States play golf, and at every tournament they turn spectator. They differ from audiences at other sporting events, for they have competed themselves. They know the thrill of shots well made, and they'll tramp for miles under a blistering sun, or driving rain to watch the stars perform. There's no cure for the golf bug.

Columbia Pictures this month is releasing one of the best reels on golf ever made into a film. Every conceivable play is sharply focused in close-up camera views so that in addition to being highly entertained by some of the nation's crack players, we really learn some things about the game we never knew before. 549

Gene Sarazen demonstrates some marvelous iron shots that will make your eyes pop out. Jack Redmond, the magician of the course, shows us some trick stuff, such as driving golf balls off a young lady's foot; shooting a golf ball right through a wooden box; then through a Bronx telephone book.

550 *Plaintiff's Exhibit 2.*

Then there is Lawson Little demonstrating a few "explosive" shots, which calls for power and finesse acquired only after years of practice.

Lady golfers are impressive in several fine exhibitions, particularly Patty Berg, 17-year-old youngster from Minneapolis. Her form and drives will make a lot of male golfers wince with envy.

The film cleverly finishes with a very amusing match between two tiny golfers, three and one-half year olds, that keep the audience roaring.

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551 **Plaintiff's Exhibit 3.**

Book entitled "Golf Training," 1930.

Plaintiff's Exhibit 4.

Pamphlet, "Par to Par," by Jack Redmond.

Plaintiff's Exhibit 5 for Identification.

"Columbia Beacon," dated May 9, 1936, page 5,
552 as to "Golfing Rhythm." Admitted as Defendant's Exhibit F (see *infra,* p. 191).

Plaintiff's Exhibit 6. 553

VOL. 8, #81

SCREEN CREDITS

LAURENCE STALLINGS
Editor

LOWELL THOMAS
Narrator

FOX
MOVIETONE
NEWS
Produced by TRUMAN TALLEY

1. BALLET CORPS STAGES A DANCE ON LINER'S DECK
(Described By LOUISE VANCE)

554

2. SCIENCE—ENGINEERS CREATE BOLTS OF LIGHTNING

(Prepared By RUSSELL MUTH)
(Announced By LOWELL THOMAS)

3. NEWSETTES—ROM-TOM LEHR SAYS BOO TO THE ZULUS

(Announced By LEW LEHR)

4. AVIATION—AIR QUEEN SOARS OVER SEA QUEEN
(Prepared By BEN MIGGINS)
(Announced By LOWELL THOMAS)

5. SPORT FLASHES

(Supervised By TOM CUMMISKEY)
(Announced By ED THORGERSEN)

555

(LOCAL) 6. BLACK HELEN WINS AMERICAN DERBY AT CHICAGO

(Reported By ED THORGERSEN)

556 **Plaintiff's Exhibit 6-a.**

Fox Movietone News "Screen Credits"—page 10

3—JACK REDMOND—TRICK GOLFER:

"Professor Redmond who knows his form presents the neatest trick of the week on the turf of New Jersey's Monmouth County Country Club. Now keep your eye on the ball—gentlemen. Having completed the first lesson in form, the professor is now getting himself all teed up—so the subject naturally will be "How to acquire a body swing"—this is very important men—on that 19th hole.

The Professor will next sample the glassware so
557 stand by for a crash. The subject for homework will be "When to use a useless caddy in playing the ball out of a trap—Watch the ball men—sometimes the trap is quicker than the eye—Wise guy."

558

Defendant's Exhibit A.

559

From date of release to Oct. 31, 1936

New York Exchange Billings

Golfing Rhythm

Playdate	*Town*	*Theatre*	*Amount*	
7/31 - 8/6/6	New York City	Gaiety	5.00	
8/21 - 7/6	" " "	Eltinge	5.00	
6/18 - 24/6	" " "	Music Hall	125.00	
9/5 - 8/6	" " "	Trans-Lux (Madison Ave.)	20.00	
9/5 - 8/6	" " "	Trans-Lux (Bway.)	30.00	
10/4 - 10/6	" " "	Globe	17.50	
10/30/6	Bronx	Luxor	3.50	
9/25 - 8/6	New York City	Grand	12.00	
10/6 - 8/6	" " "	Fairmount	11.00	
10/13 - 4/6	" " "	86th St.	8.00	
10/2/6	" " "	83rd St.	4.00	
10/6 - 8/6	Bronx	Burland	11.00	560
10/6 - 8/6	"	Burnside	11.00	
10/6 - 8/6	"	Boulevard	11.00	
9/29 - 10/1/6	N. Y. C.	Avenue B	11.00	
9/30 - 10/1/6	"	Apollo	8.00	
9/22 - 4/6	"	72nd St.	11.00	
9/29 - 10/1/6	"	Orpheum	11.00	
10/6 - 8/6	"	167th St.	11.00	
10/3/6	"	116th St.	6.00	
10/9 - 10/6	"	Lincoln	8.00	
9/22 - 4/6	"	Lexington	11.00	
9/23 - 5/6	W. New Brighton	Capitol	7.50	
10/7 - 9/6	Stapleton, S. I.	Liberty	7.50	
9/16 - 7/6	New Dorp	New Dorp	3.00	
9/23 - 5/6	Tottenville	Stadium	5.00	
8/26 - 8/6	Stapleton, St. George	Paramount St. George	15.00	
8/18	Mattituck	Mattituck	1.50	
8/2 - 3/6	New Paltz	New Paltz	2.50	
10/13 - 4/6	White Plains	Pix	5.00	
7/5 - 7/6	Pt. Jervis	Ritz or Strand	6.00	
6/14 - 6/6	Southampton	Southampton	5.00	
6/21 - 3/6	Sayville	Sayville	2.00	
6/21 - 2/6	Sag Harbor	Sag Harbor	Gratis	
6/21 - 3/6	Riverhead	Suffolk	5.00	
6/7 - 10/6	Patchogue	Patchogue	7.50	561
6/14 - 6/6	Easthampton	Edwards	5.00	
7/5/6	Center Moriches	Center Moriches	Gratis	
6/6 - 9/6	Bayshore	Bayshore	7.50	
6/21 - 3/6	Babylon	Babylon	4.00	
6/21 - 3/6	Amityville	Amityville	3.00	
6/21 - 3/6	Westhampton	Westhampton	3.00	
7/19 - 21/6	Bronxville	Bronxville	6.00	
7/10 - 1/6	Suffern	Lafayette	7.50	
7/26 - 8/6	Scarsdale	Scarsdale	6.00	

562 *Defendant's Exhibit A.*

From date of release to Oct. 31, 193

Playdate	*Town*	*Theatre*	*Amount*
6/16 - 9/6	Rockville Center	Fantasy	10.00
7/17 - 23/6	Jamaica	Merrick	22.50
6/5 - 6/6	Peekskill	Peekskill	5.00
9/29 - 10/1/6	Yonkers	Yonkers	11.00
9/29 - 10/1/6	New Rochelle	New Rochelle	11.00
9/29 - 10/1/6	Mt. Vernon	Mt. Vernon	11.00
10/6 - 8/6	Flushing	Prospect	11.00
10/6 - 8/6	Corona	Plaza	11.00
10/2 - 5/6	Astoria	Astoria	13.00
8/28/6	Hempstead	Mitchell Field	2.00
9/18/6	Bayside	Ft. Totten	2.00
9/1/6	Ocean Park	Ft. Mammoth	2.00
10/2 - 8/6	Brooklyn	Warwick	8.00
9/29 - 10/1/6	"	Palace	11.00
10/9 & 11 - 2/6	"	Melba	11.00
9/29 - 10/1/6	"	Kings	11.00
563 10/12 - 3/6	"	Century	5.00
			$623.00

Albany Exchange

Bookings Golfing Rhythm—Before Sequence Was Removed from Film

Theatre	*Town*		*Playdate*	*Amount*
Gov. Lehman	Albany	N. Y.	5/28/6	N. C.
Palace	Albany	"	6/4 - 10/6	$25.00
Leland	Albany	"	6/14 - 6/6	3.50
Proctor's	Troy	"	6/19 - 22/6	22.50
Strand	Watervliet	"	6/26 - 7/6	1.50
Auditorium	Lyon Mountain	"	7/1/6	2.00
Grand	Watervliet	"	7/4/6	2.00
564 Brown's	Old Forge	"	7/12 - 3/6	2.50
Palace	Oneonta	"	7/19 - 20/6	3.00
Palace	Saratoga Spa	"	7/22 - 23/6	5.00
Capitol	Ilion	"	7/26 - 7/6	3.00
Pine Plains	Pine Plains	"	7/30 - 8/3/6	2.00
Hippodrome	Gloversville	"	8/12 - 3/6	3.00
Park	Cobleskill	"	8/8/6	2.00
Strand	Amsterdam	"	8/12/6	5.50
Orpheum	Tannersville	"	8/22 - 3/6	1.50
Lake	Lake George	"	9/10/6	2.00
Victoria	Watertown	"	9/18 - 9/6	2.00
Rialto	Massena	"	9/26/6	2.50
Women's Relief Corps	Oxford	"	10/2/6	1.45
Rialto	Glens Falls	"	11/21 - 3/6	5.00
			Total:	$96.90

Defendant's Exhibit A. 565

"GOLFING RHYTHM" (Buffalo)

Situation	*Income Received*	*Playdate*
St. Bonaventure's, Allegany, N. Y..	$ 1.50	9/21/36
Capital, Auburn, N. Y.....	5.00	5/29 - 6/1/36
Regus, Binghamton, N. Y.....	2.50	9/8/36
Strand, Binghamton, N. Y.....	5.00	5/23 - 26/36
Suburban, Binghamton, N. Y.....	2.50	8/21 - 22/36
Lyric, Binghamton, N. Y.....	5.00	8/26 - 27/36
Strand, Brockport, N. Y.....	2.50	6/17 - 18/36
Lafayette, Buffalo, N. Y.....	20.00	6/11 - 17/36
Palace, Buffalo, N. Y.....	6.00	8/13 - 19/36
Rivoli, Buffalo, N. Y.....	3.00	8/9 - 10/36
Palace, Corning, N. Y.....	3.00	8/9 - 10/36
Temple, Cortland, N. Y.....	3.50	6/21 - 23/36
State, Dunkirk, N. Y.....	4.00	6/21 - 23/36
Colonial, Elmira, N. Y.....	7.50	7/1 - 3/36
Lyric, Endicott, N. Y.....	2.50	8/25 - 27/36
Fort Niagara, Fort Niagara, N. Y..	2.00	10/5/36
Hollywood, Gowanda, N. Y.....	2.25	9/10 - 11/36
Corona, Groton, N. Y.....	2.00	7/22 - 23/36
Temple, Ithaca, N. Y.....	5.00	6/7 - 9/36
Enjoy, Johnson City, N. Y.....	3.00	9/4 - 5/36
LeRoy, LeRoy, N. Y.....	2.50	9/20 - 22/36
Palace, Lockport, N. Y.....	5.00	7/26 - 29/36
Library, Marathon, N. Y.....	2.00	7/11/36
High School, Newark Valley, N. Y.	1.50	9/26/36
Cataract, Niagara Falls, N. Y.....	6.00	6/4 - 6/36
Palace, Olean, N. Y.....	5.00	5/28 - 30/36
Capitol, Oswego, N. Y.....	3.50	7/30 - 31/36
Temple, Pulaski, N. Y.....	2.50	PNU 8/11/36
Lyric, Rochester, N. Y.....	2.00	7/31 - 8/1/36
Cameo, Syracuse, N. Y.....	4.00	7/3 - 4/36
Empire, Syracuse, N. Y.....	3.00	10/1 - 2/36
Star, Tonawanda, N. Y.....	3.50	6/26 - 27/36
Grand, Westfield, N. Y.....	2.00	7/17 - 18/36
Auburn Prison, Auburn, N. Y.....	No Charge	9/12/36
	$130.25	

566

Defendant's Exhibit B. 567

Scrap Book.

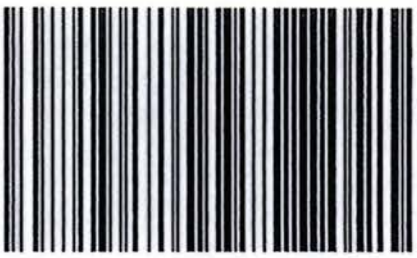
Defendant's Exhibit C.

Scrap Book.

Defendant's Exhibit D.

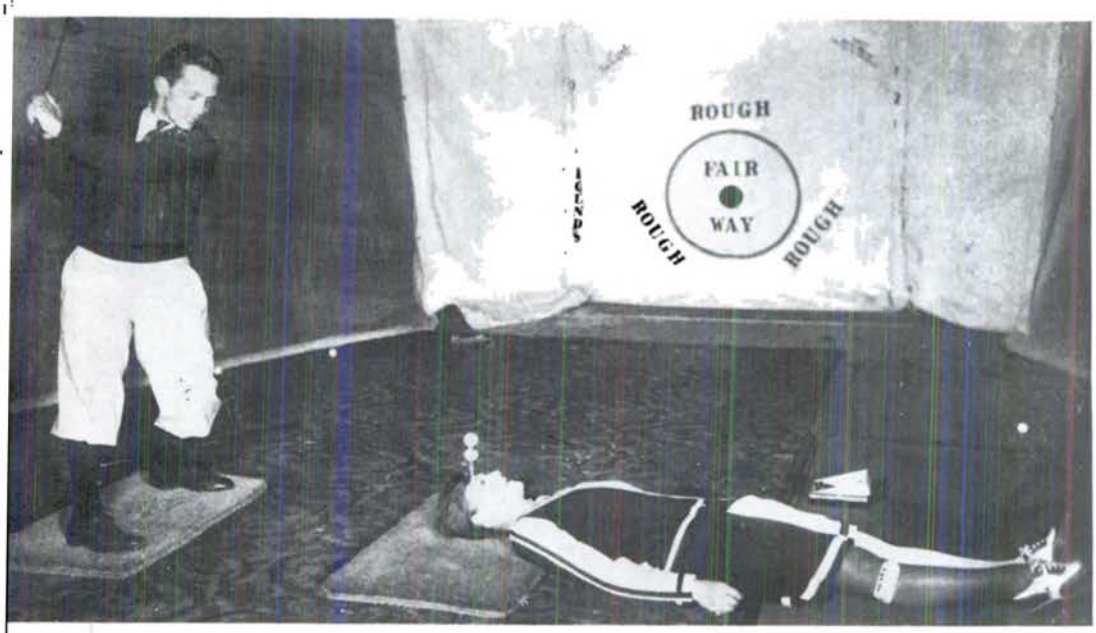
Scrap Book.

Defendant's Exhibit E.



Golf Show a Big Success

By H. B. Martin



ck Redmond **demonstrated his uncanny accuracy at the Golf Show by driving golf balls from this young lady's head. Note the fashionable garter for the little wooden tees.**

THE Chicago Golf Show is now a thing of the past and those who exhibited and those who attended are waiting for another year. It was a success every way and the first time according to the anagement that the balance at the end of the week s on the right side of the ledger.

Next year, early in February according to the present ans, New York will hold a similar show, promoted d put on by the same management, the International lf Show Company, of which Messrs. Lewis and affer are the head and shoulders, and the underning as well.

The show was held in the Sherman Hotel at Chicago is year for the second time, although it was not as tisfactory an exhibition place as it was possible to tain. Three large rooms were used including the acious ballroom and gallery. Here is where the actors rformed afternoon and evening on an elevated stage. ost of the golf stars were there with Walter Hagen ading the list and occupying the center of the stage times when he was not entertaining in his own oth. Jack Redmond, the well known vaudeville trick lfer was this year taking Joe Kirkwood's place. rthur Ham was there also with his trick stuff and ained dogs. Ham's water spaniels find balls wherer they are buried or hidden.

The Chicago golfing public missed Joe Kirkwood and lt that he should have been there with all the others. all about twenty pros entertained, a surprising amount when one considers that Miami Beach was staging a big open golf tournament, the biggest ever put on, giving the lie to the free rumors that have been circulated around about Miami losing its grip on winter tourists. It appears that there are enough pros these days to go around no matter what opposition is on.

It was New York that held the first golf show four years ago and as there has been a wide gap between these shows in the east it is expected that the Metropolitan District will be interested. Now that Chicago has shown us what is possible New York will endeavor to put on an event in the Grand Central Palace that will outdo anything of this kind ever held.

The machinery exhibition at Chicago was impressive and the exhibitors sold their products. Heretofore the club had to shop around looking over this and that catalogue but now the show gives them a chance to see them all at the same time.

One of the best looking exhibits was supplied by the Nieblo Mfg. Co., who shared a booth for Reddy Tees with the Nee-Tee Garter, a recent novelty that has made a big hit in the East and will make good all over the country.

Most of the manufacturers were represented and showed their clubs and balls to advantage. The Kroydon and Macgregor clubs were well advertised and the Vulcan Company had a big display. Hagen's clubs were on exhibition and the Burke Company showed its

(*Continued on page 38*)

Defendant's Exhibit F. 571

(Plaintiff's Exhibit 5 for Identification.)

COLUMBIA BEACON, May 9th, 1936

(Page 5)

TIPS ADVANCE INFORMATION ON EXCEPTIONAL SHORT SUBJECTS

by M. J. WEISFELDT
"GOLFING RHYTHM"
(News World of Sport)
1-reel

Released May 15th, 1936 572

They say ten million people in the United States play golf, and at every tournament they turn spectator. They differ from audiences at other sporting events, for they have competed themselves. They know the thrill of shots well made, and they'll tramp for miles under a blistering sun, or driving rain to watch the stars perform. There's no cure for the golf bug.

Columbia this month is releasing one of the best reels on golf ever made. Every conceivable play is sharply focussed in close-up camera views so that, in addition to being highly entertained by some of the nation's crack players, we really learn some things about the game we never knew before. 573

* * * * * *

Gene Sarazen demonstrates some marvelous iron shots that will make your eyes pop out. Jack Redmond, the magician of the course, shows us some trick stuff, such as driving golf balls off a young lady's foot; shooting a golf ball right through a wooden box, then through a Bronx telephone book.

574 *Defendant's Exhibit F.*

Then there is Lawson Little demonstrating a few "explosion" shots, which call for power and finesse acquired only after years of practice.

* * * * * *

It is said there are some 20,000 cinemas in the U.S.A. and if this is so, this reel should have 20,000 bookings—It's that good.

Defendant's Exhibit G.

575 (Plaintiff's Exhibit 1 appears in black face type.)

DIALOGUE

ON

GOLFING RHYTHM

Almost ten million people in the United States play golf, and at every tournament they turn spectator. They differ from audiences at other sporting events, for they have competed themselves. They know the thrill of shots well made, and they'll tramp for miles under a blistering sun or driving rain even, to watch the stars who rate headlines. There's no cure for the golf bug.

576 With millions of players, there are, naturally millions of different swings, most of them bad, as you can see on any driving range. The swing is the foundation of golf, as important as a necktie to a well-dressed man. If you wonder why the average score runs well above the hundred mark, take a look at the way some of them handle their clubs—for instance Mrs. Dingleberry from down

the street, and then watch how grandma pulls away and how grandpa heaves and hammers. But no golfer ever gave up the game because he failed to improve. He is the most incurable optimist in the world.

One proof of his optimism is this doohickey, which is supposed to develop a perfect swing for even a one armed paperhanger from Fallen Arches, New York. The club follows a perfect arc along the metal frame, and the idea is that if you practice long enough you'll get so grooved, your swing will look like Bobby Jones' at his best. That's the theory, but if it were true all you'd have to do to 578
acquire championship form would be to buy one of these machines, so don't bet on it.

Still assume that you have become adept with the aid of the gadget, how fast would you swing a golf club? Do you know? I'll bet you don't. This timing device, thru the medium of the photo-electric cell, measures speed, and it takes plenty to send that ball on its way, from 100 to 150 miles an hour. Here's a winsome young lady, with good looks and plenty of punch at the finish of her swing. Watch the way she goes about it. What's her speed? 120 miles an hour—some speed we'll say. But then we have a professional, one of those big fellows, who belts a drive so far down the middle that the spec- 579
tators say—oh and um and ah. What pace does he develop? He has what it takes. But how fast? 140 miles an hour. You can't fool the photo-electric cell.

The best—as well as the worst players—find water a hazard, but most of the golfing ten million would be willing to consider a ball lost if it popped into this lake. Not our friend here, if the price

is a penalty shot and a 75 cent ball. No siree, he wades in, looking for the darned thing—down, down to the bottom. Oh having trouble, eh? You can't find the durn thing, eh? Well go tell the girl friend about it. She knows all the answers, including the location of that elusive pill. Yep she'll show him, the woman always does. Say no wonder the poor fish are goggled eyed. Ah there it is. Now you know we're really lying. The shot can't be played with a mashie niblick—but it will be with the aide of a movie camera. Look.

It's all right to kid about golf once in awhile,
581 but we had better get serious now, for golfers take their game more seriously than a poker player does a royal flush. They have to, to get their clubs out in the kind of weather Yellowstone Park offers in the winter time. Even a good golfer looks about as graceful as a cow in a field of fly paper under those conditions. Nobody can divot on snow-shoes and every time you take a divot you get a snowball in the eye. That's what the good old Scotch game does to you. You can't take it or let it alone, even when it's 40 below. You take it and plenty.

Gene Sarazen would not go in for arctic golf, but under kinder skies he'll hit iron shots that will make your eyes pop out. The caddies are will-
582 ing targets. They figure that while they're ducking Sarazen they're ducking work too. Gene rips into each ball viciously and off they go as straight as a wire and fast as a bullet. Right on the button. Keep ducking boys. Sarazen has the range.

If this fellow gets a ball off as fast as Gene does it'll take more than that box to stop it. Whango—right thru. But a telephone book is a different matter, though. But Alex Edney has the

power and the snap behind it to put it thru more wrong numbers than your telephone operator can give you. Here goes. Swish. Right there. And if you find a number in it now you're a better man than I am, Gunga Din.

Jack Redmond, a magician of the links, continues the trick stuff by driving 3 balls off this young lady's foot. Either she has confidence in him or she needs a chiropodist and doesn't mind having a divot taken out of her shapely tootsie.

You win Jack. Her foot is still there. What? Bottles for tees? Come now, Mr. Redmond. If you break them you'll have to play out of a hazard 584
full of 8-year old rye. And wouldn't that be tough? Ah but he never misses. If we duffers could drive as well under normal conditions as Jack does off a bottle or a lady's toe, we'd be as happy as a tiger lunching on an explorer. Hitting a target is a hard trick, but socko—there it goes. Now don't worry sir, Mr. Redmond is a gentle soul, and careful—ah very, very careful, and if anything goes wrong he can always get a new set of clubs. Oh well.

Let's pass up the tricksters and watch the ladies who form a not inconsiderable portion of the millions seeking golfing rhythm. They're doing all right, and some of their drives make robust gentlemen wince with envy. Not only off the tee, but 585
in blasting out of the sandy trouble of a trap. What a shot. What a shot. And if as they tell us, putting is vitally important in golf, you can see one reason why so many women are scoring in the 70s. Say if I could do that maybe somebody would congratulate me after a match.

But for such fellows as Lawson Little the 70s hold no thrill. He does still better, because of the smooth flow of power you see in those tremendous shoulders and arms. The explosion shot calls for power and finesse that's acquired only after years of practice. But believe me, Lawson Little has it. And see how carefully Little digs in to make sure of his balance. And watch the slow, controlled backswing, the sureness with which he drives the club-head into and thru the ball. It rises like September Morn from her bath and then settles down right close to the pin. Lawson has another
587 gift, the velvet touch of a champion on the green. Click and straight across the clipped green and into the cup.

We'll leave the big shots behind and watch the match of the century, the Dempsey-Firpo brawl of the links between 2 young men whose first conscious acts were to swing brassies instead of rattles. If great golfers start young these 2 should be open champions say around 1956. Come, come, sir, don't stare into the camera. On down the fairway. There's work to be done. The average kid of their age thinks buckets and shovels are the proper tools for a sandpile, but these valiant warriors go in for niblicks and the overlapping grip. Nice out fellow.
588 Ah too bad, but never say die. Lay that next one right up close. A beauty. Hey there on the green. Whoa, wait a minute Brevity. Hold him caddie. All right if you're so anxious to putt come on and shoot. Hey there that's not allowed. Hey—but it's one way to win a tough match. Hail to the champion!

THE END

PRINTED IN U.S.A.

Defendant's Exhibit H.

589

SOUND CONTINUITY & TITLE SHEET

ON

GOLFING RHYTHM

1.	56	0		From start mark to end of credit title.
				A COLUMBIA PRODUCTION
				diss.
				NEWS WORLD OF SPORT
				diss.
				COLUMBIA PICTURES CORPORATION
				Presents
				GOLFING RHYTHM
				Narrative by Jack Kofoed — Described by Ford Bond
				R. C. A. PHOTOPHONE RECORDING
				PASSED BY NATIONAL BOARD OF REVIEW
				COPYRIGHT MCMXXXVI
				COLUMBIA PICTURES CORPORATION
				APPROVED CERTIFICATE #01012
2.	7	7	ELS	Golf course.
3.	4	11	LS	People.
4.	5	3	LS	Crowd.
5.	4	2	LS	People and players.
6.	4	8	MS	People.
7.	3	7	ELS	People.
8.	4	13	LS	People.
9.	3	8	LS	People walking. FADE OUT.
10.	7	6	FADE IN LS	People practising.
11.	65	14	LS	Girl PANS right to other people WIPES to MS Man practising stroke.
12.	11	2	CU	Machine.
13.	10	4	LS	Man watching man.
14.	10	10	MS	Man WIPES to man driving ball.
15.	13	9	MS	Ball and register.
16.	8	6	MS	Man, PAN to man at machine.
17.	1	13	MCS	Machine.
18.	12	4	MS	Girl and man.
19.	9	12	MS	Man near machine.
20.	22	6	LS	Man near machine.
21.	2	11	MS	Machine and golf ball.
22.	16	8	MS	2 men and machine DISS to MLS 2 men and lady.
23.	4	5	MS	Under water.
24.	15	14	LS	2 men and lady.
25.	14	10	MS	Man under water.
26.	19	7	LS	Man and lady, lady enters water.
27.	16	12	MS	Man under water, lady enters.
28.	2	7	MS	Lady under water.
29.	13	0	MS	Lady and man.
30.	11	1	MS	Surface of water DISS to LS people in snowshoes.
31.	7	0	MS	Man playing golf in snow.
32.	8	13	MS	Man playing golf in snow.
33.	8	1	MS	Man.

590

591

34.	12	11	MS	2 men.
35.	7	3	MS	People.
36.	11	1	LS	Group DISS to Caddies.
37.	4	8	LS	Player.
38.	2	8	MS	Player.
39.	4	1	LS	Boys duck down.
40.	7	0	LS	Boys in b.g.
41.	6	6	MCU	Balls on ground, man hits them.
42.	6	9	LS	Boys in b.g.
43.	9	7	CU	Balls—DISS to LS.
44.	5	4	MS	Man.
45.	5	11	MS	Man drives ball thru target.
46.	11	1	MS	Man.
47.	5	3	MLS	Man, man and lady in b.g.
48.	11	4	CU	Telephone book, ball and stick, ball goes thru book.
49.	3	7	MS	Lady and 2 men, man in f.g. picks up book.
50.	4	7	CU	Telephone book.
51.	13	12	MS	2 men and lady DISS MS Man and lady.
52.	3	1	CU	3 balls propped on lady's foot.
593 53.	12	12	MS	Lady and man.
54.	8	15	LS	Man near bottles.
55.	22	6	MS	Man hits balls off bottle.
56.	7	2	ELS	Player and spectator.
57.	9	13	MS	2 men.
58.	6	3	MCU	Man with ball in mouth.
59.	11	9	CU	Same WIPES to LS player and spectator.
60.	22	10	MS	Girl and spectators DISS to MS Man and spectators.
61.	17	14	MS	Players and spectators DISS to LS Lady player and spectators.
62.	27	5	MS	2 ladies and spectators in b.g. DISS to MS Man player.
63.	16	13	MS	Player and spectators PAN R to caddy.
64.	8	6	MS	Player.
65.	3	5	MCS	Player's feet, stick and ball on ground.
66.	6	11	MS	Player.
67.	2	13	CU	Ball being hit.
68.	18	15	LS	Player camera follows ball.
69.	5	4	MS	Spectators, player and caddie.
70.	3	15	CU	Ball being hit.
71.	17	10	MS	Player, spectator and caddie DISS MLS Baby player and spectator.
72.	10	11	MS	Baby.
594 73.	8	1	MS	Baby and spectators.
74.	9	1	LS	Baby and spectators.
75.	13	15	MS	Baby and spectators.
76.	14	3	LS	Baby and spectators.
77.	5	8	LS	Spectator.
78.	8	12	MS	Baby.
79.	4	0	LS	Spectators.
80.	3	0	MS	Baby.
81.	13	11	LS	Baby and spectator.
82.	7	3	MS	Baby and spectator.
83.	5	3	MS	2 babies and spectators. FADE OUT.
84.	16	12	Title—	THIS IS A COLUMBIA PICTURE THE END

REEL FOOTAGE = 892 ft. 7 frs.

Printed in U. S. A.

Defendant's Exhibit I. 595

The Film of "Golfing Rhythm."

Defendant's Exhibit J.

16 M.M. Reproduction of the Film.

Defendant's Exhibit K.

In Account with
MOVIETONEWS, INC. 596
Producers of
FOX MOVIETONE NEWS
460 West 54th Street

Telephone Columbus 5-7200 No. 6731

Your Order No. 183A 4/13
Our Order No. 45888

Columbia Pictures Corporation
729-7th Avenue
New York, N. Y.

Attention of Mr. Ben Schwalb

Date April 17, 1936 597
Terms—Net Cash

Description	Amount
To one lavender duping print—Jack Remond trick scenes—	
87 ft. at $1.00 per ft.	$87.00
Plus 2% N. Y. City sales tax	1.74
	$88.74

598 **Defendant's Exhibit L.**

LIBRARY INDEX CARD
MOVIETONEWS, INC.
New York, N. Y.

File Under No.
Redmond, Jack (Trick golfer) NJ
Negative Filed Under No. 25—7 4 3.
Subject & Scenes

EATONTOWN, NJ—JACK REDMOND, TRICK GOLFER
Cross References
Eatontown, NJ (Golfer, trick)
Redmond, Jack (Trick golfer) N. J.
599 Trick golfer, Jack Redmond, N. J.
Golfing stunts, Jack Redmond, NJ
Monmouth club, golf stunts, N. J.
Stooge, trick golfer, Jack Redmond

Stooge crowns Redmond, patter leads up to driving balls off bottles sequence. Driving ball off man's mouth as he lies down, man swallows ball. Ball off caddy's toe, caddy does backflip. Driving balls off liquor bottles. 3 balls off girls toe, two at a time, top one flies into girls hat. Smashing liquor bottle from 50 feet. Driving ball off crown.
Name of Cameraman Hammond

Address 40187
600 Date Submitted 6/24/35
Used 8/81
Length 750

Defendant's Exhibit L. 601

40187

FOX MOVIETONE NEWS

CAMERA MAN'S DOPE SHEET

Camera Man Hammond
Sound Man Girolami
Crew No. AU#1.

Date & Location Eatontown, New Jersey
June 25, 1935

Footage 750 Feet Super "X"
Light Conditions Variable 602
Quality of Sound Fair

An accurate description of each individual scene including names of persons figuring therein is necessary.

In group shots always give names from left to right, making certain they are spelled correctly.

JACK REDMOND KING OF TRICK SHOT GOLFERS DEMONSTRATES A FEW OF HIS TRICKS AT THE MONMOUTH COUNTY COUNTRY CLUB

Scenes:

1. Redmond being crowned as trick shot king by a stooge an exchange of patter between the two leading up to 'driving balls off bottles sequence.' 603
2. Closeup shot of Redmond and stooge with comment leading from bottle sequence to sequence of Redmond driving ball off stooge's mouth. Long shots, medium shots, and closeups of latter sequence.

3. Caddy doing backflip after Redmond hits ball off his toe
4. Redmond driving balls off liquor bottles
5. Redmond driving 3 golf balls off girls toe and also hitting two balls at same time with a niblick so that top ball flies into girls hat
6. Redmond smashing liquor bottle with full drive shot from a fifty foot distance.
7. Two key shots of Redmond driving ball off top of crown.

605 Also Covered By:

NOTE: Pathe made similar story several days ago with Jack Redmond at the Engineers Club where they had a full day to work out all necessary details. Redmond, and his stooges time were very limited when this story was made as it was a last minute arrangement.

Please mention MONMOUTH COUNTY COUNTRY CLUB

READ CAREFULLY

Be sure that this dope sheet is accurately filled and submitted with the negative, together with all available newspaper clippings. Mail dope sheets "Special Delivery" to Movietone News Editor, 460
606 West 54th Street. Enclose duplicate with film (but NOT inside tin box.)

Always ship film "Parcel Post—Special Handling." DO NOT SHIP BY EXPRESS.

Defendant's Exhibit M. 607

LIBRARY INDEX CARD
MOVIETONEWS, INC.
New York, N. Y.

File Under No.
Redmond, Jack (Trick golf shots)
Negative Filed Under No. 30—4 5 2
Subject & Scenes

CORAL GABLES, FLA.—BABE DIDRIKSON AND JACK REDMOND IN TRICK GOLF SHOTS

Cross References
Coral Gables, Fla. (Golf trick shots) 608
Trick golf shots, Jack Redmond (F)
Redmond, Jack (Trick golf shots)
Didrikson, Babe (Trick golf shots)
Fancy golf shots, Redmond & Didrikson
Ball into cup, trick golf shots

Redmond hitting bottom ball and sending upper one into air and catching it. Babe doing it. Various trick shots as both of them do it. Babe's "high-ball" shot. Various CU with DeVry. Knocking ball off watch and watch gets it. Various trick shots on green, long and close up shots.

Name of Cameraman Storz
Address 52183
Date Submitted 2/8/37 609
Used 19/44
Length 520

610 *Defendant's Exhibit M.*

52183

FOX MOVIETONE NEWS

CAMERA MAN'S DOPE SHEET

Camera Man Bill Storz
Sound Man J. Gleason
Crew No. 65
Date & Location 1-8-37 Coral Gables, Fla.
Miami-Biltmore Golf Course.
Footage 520
Stock Super-X
611 Light Conditions Good
Quality of Sound Fair
An accurate description of each individual scene including names of persons figuring therein is necessary.
In group shots always give names from left to right, making certain they are spelled correctly.

Subject:

BABE DIDRICKSON, THE ALL ROUND GIRL ATHLETE, DOESN'T THINK JACK REDMOND IS SO GOOD WITH HIS TRICK GOLF SHOTS—AND PROCEEDS TO SHOW HIM SHE CAN DO THEM TOO—PLUS A FEW TRICKS OF HER OWN.

612 Roll #1—350 Ft.

Sc. 1—1" shot Redmond hitting bottom ball & sending upper one into air & catching it

2—2" shots of Babe doing it

3—Various trick shots as both of them do it

4—Here's Babe's "high-ball" shot

Roll #2—70 Ft.

Defendant's Exhibit M. 613

5—Various c/u shots made with DeVry
Roll #3—100 Ft. (DeVry)

6—Knocking ball off watch & watch gets it

7—Various trick shots on green long & c/u
Also Covered by: Paramount

READ CAREFULLY

Be sure that this dope sheet is accurately filled and submitted with the negative, together with all available newspaper clippings. Mail dope sheets "Special Delivery" to Movietone News Editor, 460 West 54th Street. Enclose duplicate with film (but NOT inside tin box.) 614

Always ship film AIR EXPRESS if possible. (DO NOT SHIP BY EXPRESS).

Defendant's Exhibit N.

Sheet issued by defendant on picture "Golfing Rhythm."

615

616 **Certificate as to Evidence.**

The foregoing case contains all of the evidence adduced and proceedings had upon the trial of this action, together with the exceptions of both sides taken on said trial.

Affidavit of No Opinion.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

WILLIAM WEISMAN, being duly sworn, deposes
617 and says: I am an attorney and trial counsel for plaintiff-appellant herein.

No written opinion or memorandum was given by the Trial Judge in this case.

WILLIAM WEISMAN.

Sworn to before me this
✓ Ch day of November, 1937.
Norman Laidhold
Notary Public,
New York County.

618

Stipulation Settling Case. 619

IT IS HEREBY STIPULATED that the foregoing record contains all the evidence given upon the trial of this action, together with the exceptions of both sides taken on said trial, and that the same be settled and ordered on file as the case on appeal and annexed to the judgment roll herein.

Dated, New York, November 7th, 1937.

BERNARD L. BASKIN,
Attorney for Plaintiff-Appellant.

SCHWARTZ & FROHLICH,
Attorneys for Defendant-Respondent. 620

Order Settling Case.

On the above stipulation, I HEREBY CERTIFY and IT IS HEREBY ORDERED that the foregoing case contains all the evidence introduced upon the trial of this action, together with the exceptions of both sides taken on said trial, and that the same is hereby settled as the case herein and is hereby ordered to be filed in the office of the Clerk of this Court.

Dated, New York, November 7th, 1937. 621

FERDINAND PECORA.
J. S. C.

622 **Stipulation Waiving Certification.**

Pursuant to Section 170 of the Civil Practice Act, it is hereby stipulated that the foregoing consists of true and correct copies of the notice of appeal, judgment roll, and case and exceptions as settled, and of the whole thereof, now on file in the office of the Clerk of the County of New York, and that certification thereof by the Clerk of said county, pursuant to Section 616, is hereby waived.

Dated, New York, November 26, 1937.

BERNARD L. BASKIN,
Attorney for Plaintiff-Appellant.

623

SCHWARTZ & FROHLICH,
Attorneys for Defendant-Respondent.

Order Filing Record in Appellate Division.

Pursuant to Section 616 of the Civil Practice Act, it is

ORDERED that the foregoing printed record be filed in the office of the Clerk of the Appellate Division of the Supreme Court in the First Department.

624

Dated, New York, November 26, 1937.

FERDINAND PECORA.
J. S. C.

Stipulation as to Exhibits. 625

SUPREME COURT

OF THE STATE OF NEW YORK,

APPELLATE DIVISION—FIRST DEPARTMENT.

JACK REDMOND,
Plaintiff-Appellant,

against

COLUMBIA PICTURES CORP.,
Defendant-Respondent. 626

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto that the printing of the following exhibits, marked in evidence during the trial of the above-entitled action, be and the same hereby is waived and dispensed with, and that instead thereof, the said exhibits shall be physically in the Courtroom of the Appellate Division, in the possession of the respective counsel, so that any or all of said exhibits may be handed up to the Appellate Division of the Supreme Court, First Judicial Department, during the argument and the submission of the 627
appeal by either counsel, and either side may refer to said exhibits upon the argument of said appeal:

PLAINTIFF'S EXHIBIT "3": A booklet 6 inches by 9 inches entitled "Golf Training" by Jack Redmond, International Golfing Star. The cover of this booklet indicates that it deals with instructions as to how to play and understand golf, and is sold

for 50¢. The booklet consists of 32 pages and has a foreword by Jack Redmond in which he dedicates the book to the aid of millions of golfers. Throughout the booklet there are pictures of the plaintiff-appellant in various poses with a golf club, demonstrating how to hold the club, the proper stance, how to swing a club, and indicates the time to use each club.

PLAINTIFF'S EXHIBIT "4": A booklet approximately 3 inches by 5 inches, consisting of 32 pages, entitled "Path to Par" by Jack Redmond. The
629 cover indicates that it was given with the compliments of the Chicago Meadows Public Golf Course. The foreword is by the plaintiff and is dedicated to helping the golfing public. The booklet demonstrates how to play golf correctly.

DEFENDANT'S EXHIBITS "B," "C" and "D": These exhibits are three scrap books kept by the plaintiff-appellant covering the years 1923 to date. These books contain about 75 pages each, are approximately 3 feet by 2½ feet in size, and consist of thousands of news items and pictures relating to the career of the plaintiff-appellant. These news items report the meetings of the plaintiff-appellant with famous people all over the world, and describe
630 his exhibitions of trick shots in golfing all over the world. The pictures show the plaintiff-appellant in various poses as he executed trick shots in golf. In most of these news items the name of the plaintiff-appellant appears in large type. Most of these news items and pictures originally appeared in the sport sections of the leading publications in the various states of the United States and countries of the world.

631

DEFENDANT'S EXHIBIT "I": The film of the picture "Golfing Rhythm" which includes the plaintiff-appellant exhibiting his trick shots in golf. This exhibit is a duplicate of the film actually exhibited in the various motion pictures houses all over the country.

DEFENDANT'S EXHIBIT "J": The film of the picture entitled "Golfing Rhythm" which is the same as Defendant's Exhibit "I," except that this film is smaller and is non-inflammable. This film was exhibited to the Trial Court.

632

DEFENDANT'S EXHIBIT "N": A large sheet, 4 feet by 3 feet, advertising the picture "Golfing Rhythm." The words on said sheet read as follows:

GOLFING
RHYTHM

20 Million Golfers
Can't Be Wrong

A Columbia
NEWS
WORLD
OF
SPORT
Reel

633

The words "Golfing Rhythm" and 3 inches high and are in blue. The words "News World of Sport" are 4 inches high and are in red. The sheet also bears drawings of the various sports, the first one being that of a golfer.

634 *Stipulation as to Exhibits.*

This stipulation shall be printed at the foot of the record.

Dated, New York City, October 27, 1937.

BERNARD L. BASKIN,
Attorney for Plaintiff-Appellant.

SCHWARTZ & FROHLICH,
Attorneys for Defendant-Respondent.

So Ordered:

635 ..... F. P.
J. S. C.

SO ORDERED
F. M.

636

To be argued by

WILLIAM WEISMAN.

Supreme Court

OF THE STATE OF NEW YORK,

APPELLATE DIVISION—FIRST DEPARTMENT.

JACK REDMOND,
Plaintiff-Appellant,

against

COLUMBIA PICTURES CORP.,
Defendant-Respondent.

APPELLANT'S POINTS.

Statement.

This is an appeal from a judgment for the plaintiff for six cents after a trial before Mr. Justice Pecora at a Trial Term without a jury (fol. 41). The action was brought under Sections 50 and 51 of the Civil Rights Law. Without the written or oral consent of the plaintiff, defendant used his pictures and name in a motion picture entitled "Golfing Rhythm," which it sold and distributed throughout the country as a part of a series called "News World of Sport," and in its publications "Columbia Mirror" and "Columbia Beacon."

Pleadings.

In his verified complaint and for his first cause of action, the plaintiff alleges that he is one of the outstanding professional golfers in the United States and is known as a "trick shot artist" (fol. 11); that in the Spring of 1935 he gave a private exhibition of "trick shots" for the Fox Movietone News at a country club at Eatontown, N. J., and that said Fox Movietone News exhibited the picture as a news event (fols. 12, 13); that at various times subsequent to May 15, 1936, the defendant, a domestic corporation engaged in distributing films for use in motion picture theatres, did unlawfully and without the written consent of the plaintiff use the plaintiff's pictures, together with his name, in a motion picture known as "Golfing Rhythm" which it sold and distributed (fol. 14); that the motion picture "Golfing Rhythm" was leased to many motion picture theatres for exhibition in connection with the business of the defendant in violation of Sections 50 and 51 of the Civil Rights Law (fol. 15); that the defendant continued to use the plaintiff's pictures and name in the picture notwithstanding his demand that it cease such use (fols. 16, 17); that since the release of said motion picture by the defendant, plaintiff's negotiations to sell his pictures to other concerns have been terminated (fol. 19); and that the plaintiff has thus been damaged (fol. 20).

For a second cause of action plaintiff alleges that between May 1 and May 31, 1936, the defendant, in its business, did unlawfully and without the oral or written consent of the plaintiff use his name in connection with the motion picture "Golfing Rhythm" in two of its publications, "Columbia Mirror" and "Columbia Beacon" (fol. 21); that

the defendant caused numerous copies of said publications to be distributed by mail and otherwise to various persons throughout the United States, all of which was in violation of Sections 50 and 51 of the Civil Rights Law (fols. 23, 24), and that the defendant continues to use the plaintiff's name in connection therewith, notwithstanding his demand that the defendant cease such use (fol. 24); and that by reason thereof the plaintiff has been damaged (fol. 25). The plaintiff demanded a judgment in the sum of $50,000, together with exemplary damages and a judgment restraining the defendant from further using the plaintiff's name and pictures for the purposes of trade (fol. 26).

In its amended answer the defendant denies the material allegations of the complaint except that it admits it was in the business of licensing and distributing motion pictures for exhibition in motion picture theatres (fol. 29); that it licensed the picture "Golfing Rhythm" for exhibition (fol. 30); and that during the month of May, 1936, the plaintiff's name appeared in a publication known as the "Columbia Mirror" (fol. 31).

As and for a defense to both causes of action, the defendant alleges the motion picture "Golfing Rhythm" is one of a series of motion pictures portraying events of public interest, and that it portrays truthfully actual public sport events as they took place, including one in which the plaintiff participated (fol. 32). As and for a partial defense to both causes of action and in mitigation of damages, defendant alleges, upon information and belief, that the plaintiff consented to and posed for the picture complained of; that he consented that the Fox Movietone News make unlimited use of said picture and exhibit it or license others to exhibit it as a sport event (fols. 33, 34); that the

Fox Movietone News did license the exhibitions of said picture to the defendant (fol. 35); and that the plaintiff similarly consented to the use of his name in connection with publicity matter issued by the Fox Movietone News.

Statement of Facts.

The appellant is a professional golfer (fol. 51). His specialty is making trick shots, and he has been a trick shot exhibitionist for about fourteen years (fol. 52). He has exhibited in nearly every country in the world—Africa, Australia, New Zealand, Belgium, Holland, England, Scotland, etc., as well as every State in the United States (fol. 53). In addition, he has exhibited in practically every theatre in the United States for the Keith Circuit and Interstate Circuit, as well as on Broadway in Earl Carroll's Vanities for about nine months (fols. 54, 102-105). As an actor on the vaudeville circuit, the appellant received $400 a week (fol. 109).

The appellant makes his livelihood solely as a golf professional and exhibitionist, and he has no other business or profession (fol. 98).

The appellant's stock in trade is his so-called "routine"; he hits a ball blindfolded; he tees one ball atop another and drives the bottom ball or the top ball as he chooses; he swings the golf club cross handed; he slices and hooks a ball at will; and he hits a golf ball off the head or toe of a human being (fols. 56-61).

The appellant's skill is so unusual that there are no more than two or three other golf professionals in the world who can duplicate his feats (fols. 118-120). To the average golfer who often finds it difficult to hit a golf ball straight, plaintiff's skill is

uncanny. Appellant's many scrap books testify to the unusual news value of his wizardry (fols. 110-122; Deft's. Exs. B, C, D). The appellant was "good copy," for he had on various occasions from 1925 on exhibited his trick shots for such news reels as Pathe, Universal and Hearst International (fols. 123-157). All of these pictures were taken at private exhibitions given by the appellant at various country clubs all over the country (fol. 155).

On June 23, 1935, the appellant gave an exhibition of his skill for the *Fox Movietone News* at the Monmouth Country Club at Long Branch, New Jersey (fols. 61-62, 219-226). It was witnessed by several caddies, the manager of the country club, and only such other employees who happened to be around, in all not more than twelve people (fols. 63, 228). The appellant was not paid for that exhibition (fol. 65).

On or about April 17, 1936, the respondent purchased the lavender print of the scenes of the appellant's trick shot exhibition from the Fox Movietone News for the sum of $88.74 (fol. 287; Deft's. Ex. K). The respondent's film editor "got an idea to make a golf picture" (fol. 365), and went around to the various motion picture libraries and selected about 2,000 feet of golfing material, assembled it and cut it down to about 800 feet and entitled the film "Golfing Rhythm" (fol. 365). Pictures of the appellant taken by the Fox Movietone News were included in such material and were used by the respondent in its film "Golfing Rhythm" (fol. 365). In the due course of its business the respondent released the film "Golfing Rhythm" to its various exchanges which, in turn, sold and distributed the picture to theatres all over the country. Altogether the picture "Golfing Rhythm," containing the ap-

pellant's exhibition, was shown in 1,343 theatres in the United States, of which 117 theatres were in the State of New York (fols. 196-214).

Some time in June, 1936, the appellant discovered that he was one of the features of the respondent's picture "Golfing Rhythm" (fol. 65). The respondent concedes that on *July 13, 1936,* it received a written notice from the appellant that it was using his pictures and name in "Golfing Rhythm" without his consent (fols. 397-401).

But in *September, 1936,* the appellant attended a showing of the respondent's motion picture "Golfing Rhythm" at the Translux Theatre in the City of New York, at which time he saw the film of his exhibition on the screen, as well as his name on billboards outside of the theatre (fols. 70-77). This was the first time that the appellant's name appeared on placards outside of theatres without his receiving compensation for such use (fol. 175).

The respondent conceded that the dialogue used in the motion picture "Golfing Rhythm" was not that of the appellant, nor was it the same dialogue used by the Fox Movietone News (fol. 77; Plff's. Exs. 1, 6, 6A).

The respondent published and distributed a publication known as the "Columbia Mirror" which advertised the respondent's picture "Golfing Rhythm" (fol. 235; Plff's. Ex. 2), one of its purposes being to stimulate trade among the exhibitors (fol. 236). This publication was sent to 1,406 theatres in the State of New York and to 150 field agents of the respondent in the State of New York (fol. 238). During the months of April, May and June, 1936, the total number of copies of the publication sent all over the country was 12,920 (fol. 251). The publication described the appellant's ex-

hibition in the picture "Golfing Rhythm" (fol. 245) in the following language:

> "Jack Redmond, the magician of the course, shows us some trick stuff, such as driving golf balls off a young lady's foot; shooting a golf ball right through a wooden box; then through a Bronx telephone book" (Plff's. Ex. 2, fol. 549).

The appellant received a copy of the "Columbia Mirror" through the mails while he was in Chicago (fol. 87). He denies that he ever shot a golf ball "right through a wooden box" and states that "he never even tried" to hit a ball through a Bronx or any other telephone book (fols. 88, 89).

The respondent also publishes a house organ known as the "Columbia Beacon" for the use of its organization (fols. 239-242; Plff's. Ex. 5 for Iden.; Deft's. Ex. F). This publication was printed by the respondent and sent to 1,100 people, 113 of whom were in the State of New York (fols. 242, 251), and described the appellant's exhibition in the picture "Golfing Rhythm" in the same language as that used in the "Columbia Mirror" (fol. 246).

The appellant never gave his consent, written or otherwise, to the respondent for its use of his pictures and name (fol. 91).

The respondent's film "Golfing Rhythm" portrayed the identical scenes posed for by the appellant for the Fox Movietone News (fols. 164-167). When the appellant posed for the Fox Movietone News, it was as a news event only, as distinguished from a "short" (fol. 167). Through the appellant and the respondent's witnesses, a news reel was described as a series of current news flashes which are shown in theatres all over the country, usually for a period of no more than three or four days (fols. 168-170, 308-312). It is unusual for one

theatre to show the same news reel for a full week (fol. 311). A "short," such as the respondent's film "Golfing Rhythm" was conceded to be, was described as a motion picture designed for entertainment which is leased and sold to theatres all over the country for a period of many years (fols. 168, 322-323).

Appellant is recognized as an outstanding golf authority all over the world. He has written many articles on the subject of golf, such as "The Metropolitan Golfer" (Deft's. Ex. E, fol. 180), "Golf Training" (Plff's. Ex. 3, fol. 190), and "Path to Par" (Plff's. Ex. 4, fol. 191). The appellant has also been employed to endorse golf products, such as balls, clubs and other equipment, for which he has always been paid (fol. 191). In fact, the Fox Movietone News cameraman who filmed appellant's exhibition, which was subsequently used by the respondent in "Golfing Rhythm," testified that his brother, a promoter, had the appellant hit golf balls off a series of whiskey bottles in that exhibition with the intention of selling them to a distributor of the whiskey as an advertising medium (fols. 230-233).

Although by the respondent's concession, it received a written notice from the appellant on *July 13, 1936,* that it was portraying his pictures and name in the film "Golfing Rhythm" without his consent (fols. 397-400), the manager of the respondent's print department testified that he did not receive any instructions from the respondent's legal department or any other department to delete the appellant's pictures in the film "Golfing Rhythm" until *October 7, 1936* (fol. 271). He further testified that it takes only seven days to delete portions of a film (fol. 275). The record is barren of any explanation by the respondent of its failure

to delete the appellant's pictures from the film "Golfing Rhythm" until after *October 7, 1936*—three months after having received notice to do so.

Could the reason have been that the months of July, August and September constitute the golfing season? (fol. 482).

The Statute Involved.

The appellant was granted a judgment by the Court below on the ground that the respondent violated Sections 50 and 51 of the Civil Rights Law, which read as follows:

> "§50. RIGHT OF PRIVACY.—A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor, of his or her parent or guardian, is guilty of a misdemeanor.
>
> §51. ACTION FOR INJUNCTION AND FOR DAMAGES.—Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by the last section, the jury, in its discretion, may award exemplary damages. But nothing contained in this act shall be so construed as to prevent any person,

firm or corporation, practicing the profession of photography, from exhibiting in or about his or its establishment specimens of the work of such establishment, unless the same is continued by such person, firm or corporation after written notice objecting thereto has been given by the person portrayed; and nothing contained in this act shall be so construed as to prevent any person, firm or corporation from using the name, portrait or picture of any manufacturer or dealer in connection with the goods, wares and merchandise manufactured, produced or dealt in by him which he has sold or disposed of with such name, portrait or picture used in connection therewith; or from using the name, portrait or picture of any author, composer or artist in connection with his literary, musical or artistic productions which he has sold or disposed of with such name, portrait or picture used in connection therewith."

The Case of *Franklin* v. *Columbia Pictures Corp.*

Columbia Pictures Corporation is a repeated offender of the Civil Rights Law. It has been declared an offender in *Franklin* v. *Columbia Pictures Corp.*, decided in this Court on *December 27, 1935* (246 App. Div. 35), aff'd in 271 N. Y. 554, on *May 1, 1936.* (It released the appellant's pictures within a month thereafter.)

The Court below was requested to take judicial notice of *Franklin* v. *Columbia Pictures Corp.*, because the *Franklin* case involves an identical violation of the Civil Rights Law by the same corporation.

We respectfully invite this Court to reread its decision in the *Franklin* case. The behavior of the respondent was almost identical and shows its utter disregard for the Court's warning as well as the rights of others.

POINT I.

The Court, having found that the appellant was entitled to a judgment, erred in granting only nominal damages.

A. The Court below found that the appellant's proof sustained both of his causes of action under the Civil Rights Law.

The proof presented by the appellant and *corroborated in every respect by the respondent,* led the Court below, immediately upon the conclusion of the trial, to state:

> "The Court: There is no question that under the law, the law upon which this action is concededly based, Sections 50 and 51 of the Civil Rights Law, plaintiff is entitled to a judgment, in my opinion" (fol. 434).

Not only did the proof clearly indicate that the respondent had wrongfully used the appellant's pictures and name in connection with its business, but it pointed indisputably to the fact that such acts were done knowingly and with a wilful disregard of the appellant's civil rights. Nowhere did the respondent explain or justify its misconduct in any way.

B. The refusal of the Court below to grant the appellant substantial damages constituted error.

The Court below refused to grant the appellant compensatory damages on the ground that there was no evidence of any actual damages sustained by the plaintiff (fol. 527). Indeed, the Court indicated that the appellant was somehow indebted to

respondent for the publicity he received through the wide distribution of the film (fols. 528-531). The Court failed to see how appellant was thereby deprived of a means of livelihood.

The appellant makes his living by exhibiting trick golf shots (fol. 98). They are so difficult to execute that only two or three persons in the world can duplicate his feats (fols. 118-120). Like a writer's book, like a painter's picture, or like a draftsman's drawings—so the appellant's stock in trade were these extraordinary trick golf shots. This is what he had to sell. Whether he sold it on a golf course or on the stage in Earl Carroll's Vanities, or in exhibiting it as part of a motion picture, that was appellant's "merchandise," upon the sale of which his livelihood depended. When the respondent appropriated to itself appellant's pictures and name, it appropriated the appellant's stock in trade.

The attitude of the respondent was that it was purged of guilt because of the publicity gained by the appellant in posing for news reels and otherwise seeking publicity during his professional career. In that, however, he was not unlike actors, professional athletes and other performers, whether on the stage, in motion pictures, or in other fields of endeavor, who habitually and repeatedly pose for pictures or news reels, not only without compensation but by their invitation and instigation. But never was such voluntary conduct construed as a general license to the whole world to exploit and sell such publicity without the consent of the performer, nor was it ever asserted as a lessening of the performer's worth.

Here, too, the appellant welcomed publicity in order to make his name and feats known to the general public, but when he reached the point of

negotiating for the sale of his exhibition of trick shots through the medium of motion pictures, he found that this respondent had deprived him of that opportunity, by wrongfully making and distributing his performance for its own gain (fols. 94-98). It is unimportant that the appellant had not yet consummated an actual contract with any motion picture company. It is important that he was deprived of such an opportunity. Certainly to that extent, the appellant has been actually damaged (fols. 450-452).

The appellant having sustained actual damages, the fact that the amount might be difficult of ascertainment should not deprive the appellant of a substantial recovery.

In *Drucker* v. *Manhattan Railway Co.*, 106 N. Y. 157, the Court of Appeals, in sustaining the award of damages to the plaintiffs, said:

> "It is often the case that damages cannot be estimated with precision and the basis of accurate calculation is wanting and inadequate. That is notably true in many cases of personal injuries. Such evidence as can be given should be given, and facts naturally tending to elucidate the extent of loss should not be withheld. But when all the proof which, in the nature of the case is fairly possible has been given, the good sense of a jury must provide the answer, and it is no defense that such judgment involves more or less of estimate and opinion having very little to guide it. That criticism has no force in the mouth of a wrongdoer when all reasonable data has been furnished for consideration" (at p. 164).

Clark, Briscoe Baldwin, *New York Law of Damages*, Vol. 1, pp. 139, 140;

Wakeman v. *Wheeler & Wilson Mfg. Co.*, 101 N. Y. 205.

Although the Court below conceded that "where the damages are in their nature not liquidated, not capable of being ascertained, there is an element of speculation that enters into any determination involving an award of compensatory damages" (fol. 469), it refused to allow the appellant any compensatory damages, evidently on the ground that the appellant had failed to prove his injury in terms of dollars and cents. We respectfully submit that were the appellant able to prove such damages as the loss of specific contracts, that would be proof of special damages. His failure to prove special damages should not preclude him from the recovery of actual damages which he sustained by reason of respondent's conversion of his stock in trade.

POINT II.

The Court below abused its discretion in failing to grant punitive damages.

Although Section 51 of the Civil Rights Law specifically provides that in a proper case exemplary damages may be awarded, the Court below questioned appellant's right to such damages.

> "If you can find authority to support the proposition that in a case where the law by statutory rule gives a plaintiff a right to exemplary or punitive damages, that such damages may be awarded in a case where the evidence shows the plaintiff sustained no actual damage, *I will be very glad to give heed to your plea for an award of punitive damages in this case*" (fol. 485). (Italics ours.)

This was on May 12, 1937. On May 14, 1937, at 2 o'clock in the afternoon, the Court had read the

memorandum of law submitted by the appellant and found that:

> "* * * there is ample authority in this State to support the proposition that in a case where exemplary or punitive damages are sanctioned by the law, such an award may be made to the plaintiff even though the plaintiff may not have sustained any actual or special damage" (fols. 490-491).

Thereafter, at folio 494, we find:

> "The Court: I feel persuaded that not only upon the authority of the cases that you have cited but also upon reason and principle, punitive damages may be awarded in a case where the law sanctions an award of punitive damages even though the plaintiff may not have sustained an actual or special damage from the acts complained of" (fol. 494).

Thus bolstered by the memorandum of law submitted by the appellant and by its own reasoning on "sound principle," the Court left the case in the position of the classic, "where the operation was successful, but the patient died," for it awarded no punitive damages.

A. Punitive damages where no actual damages.

The right to award punitive damages in a case where no compensatory damages are allowed is firm in this State.

As early as 1896, in the case of *Prince* v. *Brooklyn Daily Eagle,* 16 Misc. 186, a plaintiff who had been damaged only nominally recovered punitive damages. The Court said:

> "It is contended that, as the jury found that the plaintiff was damaged only nomi-

> nally, it was not a case for punitive damages. It is said that it would not have been error to have charged the jury that, if they found that the plaintiff was damaged only nominally, they should not give punitive damages. There is authority for this (Stacy v. Publishing Co., 68 Me. 279); but I do not think it is the law of this state. A person may be of such high character that the grossest libel would damage him none; but that would be no reason for withdrawing his case from the wholesome, if not necessary, rule in respect of punitive damages. It is in such cases that the rule illustrates its chief value and necessity."

In *Buteau* v. *Naeyeli,* 124 Misc. 470, this question was again ruled upon. In that case, an action for alienation of affections of the plaintiff's wife, the jury returned a verdict for the plaintiff in the sum of $1 for alienation of affections, and $5,000 for "smart money." The Court, by CHURCHILL, J., in approving the *Prince* case, said:

> "That case was decided by a very learned judge, and in view of the evenly balanced state of the decisions in other jurisdictions, I am of the opinion that orderly practice requires that I should follow the single decision already made in this jurisdiction, rather than make an individual choice between the two widely prevailing views established elsewhere. I am further persuaded to that course by the fact that the United States Circuit Court of Appeals for this Circuit has taken a similar view of the law on the point at issue. Press Pub. Co. v. Monroe, 73 F. 196, 19 C. C. A. 429, 51 L. R. A. 353. I am not disposed to disturb the verdict on the theory that it is contrary to or against the weight of the evidence."

This Court, in the *Buteau* case, modified the judgment of the lower Court as to the amount of damages, and as so modified, affirmed the judgment (216 App. Div. 833).

The United States Circuit Court of Appeals for this Circuit has ruled similarly on the point at issue in the case of *Press Pub. Co.* v. *Monroe,* 73 Fed. 196, appeal dismissed 164 U. S. 105. In that case, copies of plaintiff's poem of approximately 400 lines were given to a literary committee to determine whether the poem was suitable for certain purposes. The plaintiff was paid $1,000 for the use of the poem by the literary committee. A newspaper published what purported to be an interview with the plaintiff and printed the poem in full. The plaintiff sued for damages for the use of the poem by the newspaper without her permission. The Circuit Court of Appeals for the Southern District of New York sustained a judgment for the plaintiff for exemplary damages, although the plaintiff was damaged only nominally. The Court said:

> "* * * they" (referring to cases of other jurisdictions) "are, however, plainly at variance with the theory upon which exemplary damages were awarded in the Federal Courts, namely, as something additional to, and in no wise dependent upon, actual pecuniary loss of the plaintiff, being frequently given in actions 'where the wrong done to the plaintiff is incapable of being measured by a money standard.' Day v. Woodworth, supra: Wilson v. Vaughan, 23 Fed. 229. There is no room for argument against the allowance of exemplary damages at all as anomalous and illogical. Some courts have held that it is unfair to allow the plaintiff to recover not only all the loss he has actually sustained, but also the fine which society imposes upon the offender to protect its pe-

> culiar interests. But if it be once conceded that such additional damages may be assessed against the wrongdoer, and when assessed, may be taken by the plaintiff,—and such is the settled law of the Federal courts,—there is neither sense nor reason in the proposition that such additional damages may be recovered by a plaintiff who is able to show that he has lost $10, and may not be recovered by some other plaintiff who has sustained, it may be, far greater injury, but is unable to prove that he is poorer in pocket by the wrongdoing of the defendant."

In *Wardman-Justice Motors* v. *Petrie,* 39 F. (2d) 512, the Court said:

> "Punitive damages being given by way of punishment, there is no reason to hold that there must be actual damages and something more than nominal damages to justify their imposition. *Punitive damages depend not upon the amount of actual damages but upon the intent with which the wrong was done."* (Italics ours.)

In two recent cases the Court of Appeals has had occasion to rule that exemplary damages may be awarded "that express indignation at the defendant's wrong, rather than a value set on plaintiff's loss." *Grawunder* v. *Beth Israel Hospital Association,* 266 N. Y. 605, aff'g 242 App. Div. 56 (an autopsy performed upon a dead person without the authorization of his family); *Gostkowski* v. *Roman Catholic Church of Sacred Hearts,* 262 N. Y. 320, aff'g 237 App. Div. 640, 910 (removal of a body from one grave to another without the authorization of the deceased's family).

B. The Court's discretion in awarding punitive damages.

Section 50 of the Civil Rights Law makes its violation a misdemeanor. Section 51 of the Civil Rights Law provides that in the event of a violation of Section 50, "the jury in its discretion may award exemplary damages."

The finding of a trial court sitting without a jury is treated as a verdict of a jury. *McBean* v. *McCallum,* 89 Hun 95.

Although Section 51 provides that exemplary damages "may" be awarded in the discretion of the jury, this discretion may not be exercised out of a whim or caprice but upon sound judicial principles.

> "Almost every form of relief has been time out of mind labeled 'discretionary.' In judicial opinions, the word is one of repeated occurrence. The idea which it is designed to express is real, if perhaps vague. Discretion is not the judge's sense of moral right; neither is it his sense of what is just. He is not clothed with a dispensing power or privileged to exercise his individual notions of abstract justice. With him there is no scope for judicial caprice. Principles of law are to be ascertained and followed. Justice is administered in the courts on settled and fixed principles. It does not vary 'like the Chancellor's foot.' The rights of litigants do not rest in the discretion or grace of the judge. In all cases that come under his consideration a judge must act with discretion and discrimination and give weight to every circumstance bearing on the question to be adjudicated. He is not at liberty in determining personal or property rights to act at his own discretion unrestrained by the legal and equitable rules governing those rights." *In re Bond's Guardianship,* 297 N. Y. S. 493.

In *Coleman* v. *Pepper,* 159 Ala. 310, a case involving trespass to lands, the Court held that the imposition of punitive damages

> "is discretionary with the jury" (citing cases). "And this discretion is not an unbridled or arbitrary one, but a legal, sound and honest discretion; * * * they should act with due regard to the enormity or not of the wrong, and to the necessity of preventing similar wrongs, and that, if such damages are imposed, they should be in such an amount (much or little) as, under all the circumstances attending the commission of the wrong, the exigencies of the case, in the sound judgment and discretion of the jury, may demand, in no event to exceed the amount claimed in the complaint."

Also see: *Cox* v. *B. R. L. & P. Co.,* 163 Ala. 170; *Southern Express Co.* v. *Malone,* 16 Ala. App. 414, cert. den. 201 Ala. 700.

Perhaps the Court below exercised its "discretion" out of a failure to distinguish between the nature of compensatory damages and punitive damages. The Court was obsessed with the fear that the appellant had not proved actual damages. Repeatedly it asked, what damages did the appellant suffer? Instead, under the law, the inquiry should have been: What wrong did the respondent commit? How grave is that commission? When else did this respondent commit a similar wrong? Did it commit that wrong knowingly? Had it any prior warning that its acts constituted a wrong? And if it did, wasn't the respondent guilty of legal malice in addition to its guilt of a violation of a specific provision of law? *Grawunder* v. *Beth Israel Hospital Ass'n,* 266 N. Y. 605, aff'g 242 App. Div. 56; *Gostkowski* v. *Roman Catholic Church of Sacred Hearts,* 262 N. Y. 320, aff'g 237 App. Div.

640, 910; *Rhodes* v. *Sperry & Hutchinson Co.*, 193 N. Y. 223, aff'g 120 App. Div. 467; *Greene* v. *Keithley*, 86 F. (2d) 238; *Scott* v. *Donald*, 165 U. S. 58; *Punitive Damages in Tort Cases*, Clarence Morris, 44 Harvard Law Review, 1173.

If the Court had pointed its queries in the direction of the respondent's wrongdoing, it would have found:

Respondent, an Acknowledged Second Offender.

This respondent had been found guilty of the same offense and that it had repeated it against the appellant knowingly, maliciously and necessarily in violation, not only of the Civil Rights Statute, but of the judgment of this Court and the Court of Appeals only recently rendered against it.

This respondent had purchased some film of one Sidney Franklin from the Fox Movietone News, reset it, embellished it with dialogue, and created therefrom a short subject photoplay, one of a series of motion pictures produced by the respondent, and known as "A News World of Sport"; and then sold and distributed that film in theatres throughout the country for a price. The Supreme Court, this Court and the Court of Appeals adjudged the respondent guilty of a violation of Sections 50 and 51 of the Civil Rights Law and assessed against it damages for its wrongdoing. *Franklin* v. *Columbia Pictures Corp.*, 246 App. Div. 35, aff'd without opinion 271 N. Y. 554.

Within a month of the last admonition given by the Court of Appeals in the *Franklin* case, the respondent repeated the violation of the law; and in doing so, pursued the identical methods which the courts condemned. Here, again, this respondent purchased some film from the Fox Movietone News, reset it, embellished it with dialogue and created

another short subject photoplay in the same series, "A News World of Sport"; and sold and distributed the photoplay in theatres throughout the country for a price.

Although this Court had once before punished the same respondent for a similar wrongdoing, and assessed against it substantial punitive damages, the Court below, in the case at bar, permitted the respondent to go free. A clearer case of a second offender turned loose can hardly be found.

In the *Franklin* case the plaintiff set forth three causes of action, one for the violation by the respondent under Sections 50 and 51, one founded in libel, and one founded in slander. The Supreme Court, this Court and the Court of Appeals sustained the granting of damages as to each of the three causes of action, and this Court, in addition, said:

> "It is undoubtedly true that respondent could have obtained all the damages he suffered in a cause of action based solely on a violation of his civil rights." 246 App. Div. 35, at p. 36.

The Court below analyzed the *Franklin* case as an award made chiefly on account of the libel (fol. 448).

The only element of libel found in the *Franklin* case was that the plaintiff was a bull fighter and was referred to by the respondent as a "bull thrower." It was then argued that the expression "bull thrower" connotated a "liar" or "exaggerator." In the case at bar there was also an element of mockery. Here the appellant was advertised by the respondent as a person who could drive a golf ball through a wooden box and a Bronx telephone directory. The appellant has never claimed such ability and has never attempted such an exhibition.

Likewise, in the *Franklin* case, the record fails to reveal that the plaintiff sustained any greater damage than the appellant here, yet the Court allowed the plaintiff a substantial recovery (fols. 440-447).

Respondent, a Wilfull Violator.

The Court below, in exercising its discretion upon "sound principles," should have taken into consideration the respondent's disregard of the demand made by the appellant on *July 13, 1936,* to desist from using his pictures and name in the film "Golfing Rhythm."

The respondent failed to explain why no orders were given to its print department to delete the appellant's pictures from the film until *October 7, 1936.* It did not matter to the respondent that during the three-month period after notice every showing of its film was a violation of the appellant's civil rights. It was only concerned with exploiting to the fullest degree a golf picture during July, August and September, the height of the golfing season. Such wilful action on the part of an offender under the Civil Rights Law should always be taken into consideration when a court or jury exercises its "discretion" in awarding exemplary damages.

In *Rhodes* v. *Sperry & Hutchinson Co.,* 120 App. Div. 467, aff'd 193 N. Y. 223, the plaintiff sued the defendant under the Civil Rights Law. The plaintiff had posed for her photograph for a third party and had purchased some of these pictures for her own use. The third party then made a contract with the defendant, a stamp trader. Under this contract the defendant purchased several of the photographs of the plaintiff for use in its business.

The plaintiff had never consented in writing or otherwise to such use. The jury awarded the plaintiff $1,000 damages. The defendant's acts in no way reflected upon the character or reputation of the plaintiff, nor did it personally humiliate her in the presence of others. The plaintiff admitted that neither her reputation nor social standing had been affected in the slightest degree. In sustaining the award of damages to the plaintiff, the Appellate Division, Second Department, said:

> "* * * So that really the main offending which called for the imposition of exemplary damages was *in the continuance of the display after the husband of the plaintiff remonstrated with it* * * *. The object of exemplary damages is not to compensate the plaintiff, but rather to punish the defendant and to deter him and others from like acts. Hamilton v. Third Avenue R. R. Co., 53 N. Y. 25." (Italics ours.)

The Court below recognized this principal, for it said:

> "The Court: Where an act is done by one to the injury of another under circumstances which enable the recovery of exemplary or punitive damages, the degree of wilfulness with which such act is done certainly should always be considered" (fol. 480).

Then, why didn't the Court impose such damages?

Respondent, a Violator of a "Penal" Statute.

The Court below, in exercising its discretion, should have taken into consideration the punitive nature of Section 50 of the Civil Rights Law (fols. 506-508). The penal nature of Section 50, considered in conjunction with the express authorization for the award of exemplary damages as set

forth in Section 51, makes it clear that the primary reason for this legislation was to punish and make an example of an offender.

> "The statute" (Civil Rights Law) "is in part at least penal, and should be construed accordingly." *Binns* v. *Vitagraph,* 210 N. Y. 51, at p. 55.

Any benefit resulting to the appellant is unimportant when the Court addresses itself, properly, to the wrong of the violator. *Rice* v. *Glens Falls Publishing Co.,* 86 Misc. 503.

The question of punitive damages in connection with a violation of a "penal" statute was considered by the Supreme Court of Iowa in *Fox* v. *Wunderlich,* 64 Iowa 187. The plaintiff sued the defendant for damages for selling her husband intoxicating liquors in violation of a statute. Speaking of exemplary damages, the Court said:

> "It is true that damages of this character are ordinarily assessed against wrong-doers by way of punishment for the negligent or evil d i s p o s i t i o n or motive which has prompted or characterized their conduct. In this class of cases, however, the assessment of damages is authorized by express statutory enactment (Code #1557). This section occurs in the chapter of the Code which prohibits the sale as a beverage of all intoxicating liquors except beer and wine. *The statute is penal and it was undoubtedly the intention of the legislature* when it enacted the provisions making the violators of the law liable in damages to those who suffered injury in consequence of their unlawful acts and authorizing the assessment of exemplary as well as actual damages in such cases, *that such damages should be assessed by way of punishment for the criminal misconduct of which they are guilty* and,

> whatever may be the ground on which such damages are ordinarily assessed, we think it clear that under this provision they may be assessed in every case where there has been a wilful violation of the statute which has occasioned an injury for which a right of action is given by the statute" (at pp. 190-191). (Italics ours.)

In *Binns* v. *Vitagraph Co.*, 147 App. Div. 783, aff'd 210 N. Y. 51, this Court demarcated the principles for the award of exemplary damages under Section 51 of the Civil Rights Law.

> "This is a new statute designed to protect important personal rights of privacy, and *both as a punishment* to defendant and in order to deter others from violating the law and invading such rights, it is necessary that the jury in a proper case *liberally award exemplary damages.*" (Italics ours.)

Binns was a telegraph operator on board a ship and he was instrumental in the rescue of another ship by his timely message. The defendant, a corporation engaged in the business of leasing and distributing motion pictures for use in theatres, proceeded to make a series of pictures entitled: "C. Q. D. or Saved by Wireless; a true story of the Wreck of the Republic." The picture of the plaintiff appeared in the series five times and his name was used in the subtitles six or more times, all of which was without his consent. He sued to enjoin the use of his picture and name and to recover damages for the injuries sustained. This Court and the Court of Appeals reinstated a verdict rendered by a jury in the sum of $12,500 after the Trial Court had reduced the same to $2,500.

The Court of Appeals said:

> "It is asserted that the defendant, by the way it used the plaintiff's name, in practice held him up to public ridicule and contempt. *In determining whether this action can be maintained, it is immaterial whether the defendant's use of the plaintiff's name, in practice, held him up to public ridicule and contempt because the action is not brought for a libel.*" (Italics ours.)

Similarly, in our case, the picture films were distributed all over the country, and "were with others described at length in circulars and pamphlets, and such circulars and pamphlets were sent throughout this and other states to those engaged in the business of exhibiting pictures to the public" (fols. 235-251). (See *Binns* case, p. 57.) "The plaintiff's name was prominent in the advertisements put out by the defendant * * * and the purpose of the advertisements was to extend the defendant's business and add to its profits by increasing the demand for such picture, and thus multiply the number of leases or other agreements by which the picture and films were put upon the market" (fol. 236). (See *Binns* case, p. 57.) "The defendant used the plaintiff's alleged picture to amuse those who paid to be entertained" (fol. 369). (See *Binns* case, p. 58.)

From the undisputed facts, the respondent wilfully used the appellant's pictures and name without his consent in its business, knowingly continued to do so after notice by the appellant to it, and deliberately disregarded a specific reprimand by this Court and the Court of Appeals that these acts were a violation of a statute. The Court below had no alternative. It was bound by all sound judicial principles and the law of this State to exercise its

"discretion" by awarding substantial punitive damages against such an acknowledged offender as the respondent.

POINT III.

This Court has the power to correct the error of the Court below and make its own award of damages to the appellant.

Section 584 of the Civil Practice Act specifically gives this Court the power to grant the judgment which the Court below ought to have granted. That section reads as follows:

> "§584. Judgment or order on appeal. 1. Upon an appeal from a judgment or an order, any appellate court to which the appeal is taken, which is authorized to review such judgment or order, may reverse or affirm, wholly or in part, or may modify, the judgment or order appealed from, and each interlocutory judgment or intermediate or other order which it is authorized to review, and as to any or all of the parties. It shall thereupon render judgment of affirmance, judgment of reversal and final judgment upon the right of any or all of the parties, or judgment of modification thereon, according to law; except where it may be necessary or proper to grant a new trial or hearing, when it may grant a new trial or hearing.
>
> 2. On an appeal from a judgment rendered in an action tried by the court without a jury, the appellate court, unless it shall affirm the judgment, shall so far as practicable, grant the motion for judgment which the court below ought to have granted. (Am'd L. 1926, ch. 215, in effect April 2; L. 1936, ch. 915, in effect Sept. 1, subdividing section and adding subd. 2.)"

Lamport v. *Smedly*, 213 N. Y. 82;
York Mortgage Corp. v. *Clotar Const. Corp.*, 254 N. Y. 128.

POINT IV.

Judgment should be granted to the appellant for substantial compensatory damages as well as for substantial punitive damages.

Respectfully submitted,

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To be argued by
LOUIS D. FROHLICH.

Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT.

JACK REDMOND,
Plaintiff-Appellant,

against

COLUMBIA PICTURES CORPORATION,
Defendant-Respondent.

RESPONDENT'S BRIEF.

Statement of Facts.*

Plaintiff appeals from a judgment rendered by Mr. Justice FERDINAND PECORA sitting at Trial Term without a jury, awarding plaintiff nominal damages of six cents (fol. 46).

The Pleadings.

The complaint alleged a violation of Sections 50 and 51 of the Civil Rights Law in two causes of action. In the first cause of action appellant alleged that he gave a private exhibition of trick shots at a country club in Eatontown, New Jersey, for the Fox Movietone News (fol. 12), which issued

*Italics ours throughout.

the picture as a news event, for which appellant received no compensation (fol. 13); thereafter, respondent used this identical picture of appellant in a picture made by it called "Golfing Rhythm" and distributed the same to motion picture theatres for exhibition (fols. 14-15), all without the written or oral consent of appellant.

During the release of respondent's picture appellant was negotiating for a contract with other concerns for a golfing picture, which concerns have since refused to enter into a contract with him, all to his damage in the sum of $25,000 (fols. 18, 19, 20).

The second cause of action alleged that in two of respondent's publications, "Columbia Mirror" and "Columbia Beacon," it made use of appellant's name and portrait, all without his oral or written consent, to his damage in the sum of $25,000 (fols. 22-26).

The amended answer set up one complete defense and a partial defense in mitigation of damages.

The complete defense was that defendant, in publishing its picture "Golfing Rhythm" was publishing truthfully an actual sport event as it took place (fol. 32).

The partial defense in mitigation of damages alleged that appellant had posed for his picture for the Fox Movietone News; had orally consented to its release; had consented that Fox Movietone News make unlimited use of his picture and exhibit it and license others to do so as a sport event; and that Fox Movietone News thereafter licensed respondent to exhibit the picture, and that the use of appellant's picture in the manner complained of was with his consent and acquiescence (fols. 33-34).

In the original answer, the defense now pleaded as a partial defense had been pleaded as a complete defense. On motion made before Mr. Justice McGoldrick, at Special Term, he held that it was bad as a complete defense, but good as a partial defense, and he said, in part (N. Y. L. J., Oct. 26, 1936):

> "* * * The second defense is struck out, with leave to plead over. It seems to me that a defense in this type of suit must rely wholly on writings. Defendant must allege that the consent to Fox was in writing, and unless that consent specifically waived a transfer in writing, that the subsequent consent to defendant was in writing. The damages in this type of case are ordinarily punitive; here wholly so. *The oral consent, it seems to me, should when used defensively, be pleaded in mitigation as a partial defense.*"

No appeal was taken from Mr. Justice McGoldrick's order. The answer was amended accordingly and the case went to trial on the pleadings as they appear in the record.

The Evidence.

Appellant is a professional trick golfer who specializes in difficult and unusual shots which he has described in great detail at folios 55 to 61 of the record.

He had been a trick golfer for fourteen years continuously prior to the trial (fol. 98). Previously to that, he had been a professional golf player employed at various golf clubs throughout the United States (fol. 98), and had also played during that period in various tournaments (fol.

100), and his name had been mentioned in connection therewith in the press (fol. 101).

At the country clubs where he was a professional, appellant practiced for many years perfecting his trick shots (fol. 102) and in 1924 or 1925, he appeared on the vaudeville stage exhibiting such shots (fol. 102). He was a performer on the vaudeville stage for about five or six years (fol. 103) during which period he covered practically the entire territory of the United States and appeared on various vaudeville circuits, including the Keith houses and the R.K.O. houses and the Interstate Circuits, as well as many independent houses around Chicago, New York City and all through New York State (fols. 103-4). During that period he was billed as an "attraction" (fol. 104) and his portrait was featured in the lobbies of the theatres in which he appeared (fol. 105) and he received a lot of publicity which helped him in his business (fol. 107). Because of this publicity appellant was able to get a better salary from time to time (fols. 107-8).

Appellant kept scrapbooks in which, from time to time, he pasted articles and pictures which referred to him and showed him performing in his profession as a trick golfer and actor. He has about thirty-two of these scrapbooks (fol. 110), three of which he brought to the courtroom. These were put in evidence as Defendant's Exhibits "B", "C" and "D". Pursuant to stipulation, they were not printed, but their contents have been summarized as follows (fols. 629-30):

> "DEFENDANT'S EXHIBITS 'B', 'C' and 'D': These exhibits are three scrap books kept by the plaintiff-appellant covering the years 1923 to date. These books contain about

> 75 pages each, are approximately 3 feet by 2½ feet in size, and consist of thousands of news items and pictures relating to the career of the plaintiff-appellant. These news items report the meetings of the plaintiff-appellant with famous people all over the world, and describe his exhibitions of trick shots in golfing all over the world. The pictures show the plaintiff-appellant in various poses as he executed trick shots in golf. In most of these news items the name of the plaintiff-appellant appears in large type. Most of these news items and pictures originally appeared in the sport sections of the leading publications in the various states of the United States and countries of the world."

Exhibit "B" covers a period of approximately four or five years prior to the trial (fols. 113-15); Exhibit "C" covers a period of seven years, from 1925 to 1932 (fol. 116); Exhibit "D" is a collection of various magazine articles which he had written (fol. 117), and also contains many letters in praise of his skill and ability (fol. 119).

Appellant used these letters to help him obtain engagements for exhibitions at various country clubs, for which he was paid moneys (fol. 122).

As illustrative of the type of publicity that appellant received in the golfing magazines, there is in evidence the April, 1928 issue of "The Metropolitan Golfer," which contains an interesting article on appellant's ability as a trick shot golfer (Deft's Ex. E, p. 190), and carries an illustration of appellant in the act of making a difficult trick shot.

There is also in evidence a booklet called "Path to Par" by Jack Redmond (Pltff's Ex. 4, p. 184),

omitted pursuant to stipulation, which is described as follows (fols. 628-29):

> "PLAINTIFF'S EXHIBIT '4': A booklet approximately 3 inches by 5 inches, consisting of 32 pages, entitled 'Path to Par' by Jack Redmond. The cover indicates that it was given with the compliments of the Chicago Meadows Public Golf Course. The foreword is by the plaintiff and is dedicated to helping the golfing public. The booklet demonstrates how to play golf correctly."

It is at once manifest that the more publicity appellant received, the more dates or engagements he could obtain.

Appellant was shrewd enough to realize the value of this publicity for engagement purposes. Not content with newspaper and magazine publicity, appellant eagerly sought out the motion picture field to exploit his ability in order to secure profitable engagements.

From time to time he employed publicity men (fol. 138), and both appellant and his publicity men on his behalf solicited news reels, such as Pathe, Hearst, Fox and Universal, to make news reel shots of his specialty (fol. 139).

As far back as 1925, appellant posed in Los Angeles, California for the Pathe News reel at the Rancho Country Club (fol. 123), and that news reel then and there took a picture of appellant making some difficult trick shots (fol. 124). That was in the days of silent motion pictures and there was no commentator (fol. 124). After the picture was made, appellant saw it in a theatre (fol. 126).

In 1929 or 1930 appellant posed for the Hearst International News Reel at Van Cortlandt Park in New York in the open golf links (fols. 156-7).

He admitted that he also might have posed in 1932 for the Pathe News reel (fol. 127), and he testified as to the total number of times that he posed for motion picture news reels (fols. 127-28):

> "Q. Do you remember posing for the Pathe newsreel some time in 1932? A. I might have, I don't know. I have had so many of them.
>
> "Q. How many of them? A. Over a period of time?
>
> "Q. Yes. A. Offhand I do not know. Maybe eight or nine or ten, maybe fifteen, maybe twenty.
>
> "Q. Is it your testimony that you may have posed as much as twenty times for the various newsreels throughout the United States over the years? A. I would not pin it down to twenty; it may be less than that and it may be more than that.
>
> "Q. It may be fifteen and it may be twenty; is that right? A. That is right."

[To the same effect see appellant's testimony at folios 144 and 151.]

In 1935 appellant again posed for the Pathe News reel (fol. 142) and also for the Universal News reel in Boston, Massachusetts (fols. 153-4). Appellant testified (fols. 142-5):

> "Q. And you wanted to have your picture making these trick shots widely distributed throughout the United States in June, 1935, did you not? A. In a newsreel, yes.
>
> "Q. And you were very glad to have these pictures appear in theatres in these newsreels? A. I don't know how to answer that. I must be pretty good copy or they would not take them.

"Q. You wanted it, did you not? A. I believe so, I believe I did.

"Q. And you wanted it because it was going to help you in your profession as a trick golfer; is not that right? A. It gets me dates by country clubs.

"Q. And engagements for which you receive compensation and earn your living? A. That is right.

"Q. So the more publicity you get the better chance you had of getting employment; is that right? A. Of that type publicity.

"Q. Now, you have testified this morning that in all the years that you were a trick golfer you had had probably fifteen to twenty newsreels at one time or other take your picture making these trick shots; is not that right? A. Yes, I believe so.

"Q. And this form of publicity that you received helped you to get employment during all these years, did it not? A. It got me in contact with managers and committees of country clubs."

At folio 151:

"Q. But the immediate purpose was to have your picture appear on the screen in motion picture theatres in the United States in those newsreels, was it not? A. To build me up for future dates."

At folio 158:

"Q. And you felt that if they showed your picture on the newsreel it would help you in your profession, did you not? A. Just like any performer.

"Q. And it would give you a certain amount of publicity? A. It would get me a certain amount of dates I would get paid for."

At folio 164:

"Q. And the better picture it is the better your prestige and publicity; is not that so? A. The more chance I will have of selling myself where I will get paid.

"Q. You have been doing that for a good many years? A. During the course of my career as a golfer I would do it, yes."

Appellant knew that these news reels enjoyed a wide distribution in theatres throughout the United States (fols. 142, 149, 154).

These trick shots, in which appellant posed for news reels, were invariably displayed on golf courses connected with large country clubs (fols. 155, 157). Appellant never objected to the taking of these pictures (fol. 153) of his various trick shots (fols. 170-1). The news reel companies never paid appellant any compensation for such shots (fols. 175-6) and he never asked them for any (fol. 175), nor did he expect any compensation directly from these news reel companies (fol. 177).

On Sunday, June 23, 1935 (fols. 159-60, 221), appellant, who was visiting in Long Branch, New Jersey, went by pre-arrangement (fol. 223) to the grounds of the Monmouth Golf Club nearby, at Eatontown, New Jersey, for the purpose of making some trick shots for the Fox Movietone News. To assist him appellant brought with him a young lady who was employed in a night club in Long

Branch (fol. 161), and two men who were friends of his. Accompanying the party was the crew of the Fox Movietone News which consisted of Mr. Lee Hammond the cameraman, Hammond's brother and his brother's wife, the sound man and a number of caddies (fols. 225-6). There was a golf tournament going on on the links of the club at that time (fol. 226), and in addition to the persons mentioned and the caddies about a dozen other people came up and watched the shots (fols. 227-8).

Appellant claims that the shots there made by him on a Sunday morning in June, on links where a tournament was being played, and where about twenty people were around watching him, was a *strictly private* affair.

The number of people present at the exhibition is wholly immaterial, because the performance was given for the purpose of exhibition throughout the theatres in the United States—a performance intended to be witnessed by many thousands.

It can hardly be contended that appellant intended that photographs of this exhibition, in the form of motion pictures, should be protected under a statute which was intended solely for the purpose of protecting the right of privacy, where individuals choose to keep out of the public eye.

These trick shots were summarized by Hammond in his library index card (Deft's Ex. L, p. 200) as follows (fols. 602-4):

"1. Redmond being crowned as trick shot king by a stooge an exchange of patter between the two leading up to 'driving balls off bottles sequence.'

"2. Closeup shot of Redmond and stooge with comment leading from bottle sequence to

sequence of Redmond driving ball of stooge's mouth. Long shots, medium shots, and close-ups of latter sequence.

"3. Caddy doing backflip after Redmond hits ball off his toe.

"4. Redmond driving balls off liquor bottles.

"5. Redmond driving 3 golf balls off girls toe and also hitting two balls at same time with a niblick so that top ball flies into girls hat.

"6. Redmond smashing liquor bottle with full drive shot from a fifty foot distance.

"7. Two key shots of Redmond driving ball off top of crown."

Appellant had previously described to Hammond the kind of shots that he had done and could do (fols. 223-4), and had told Hammond that three days previously he had made such shots for the Pathe News Reel (fol. 224).

Appellant executed the shots, Hammond did the photographing (fols. 166, 228), and then they left the links.

Although appellant maintained that he was posing for Hammond only for a news reel (fols. 168-9), there was nothing especially said between appellant and Hammond regarding the distribution of the news reel, nor was there anything said about any limitation upon the right of the Fox Movietone News people to exploit the picture as they saw fit (fol. 167); and no writing of any kind passed between appellant and Hammond or the Fox Newsreel Company (fol. 167).

Fox Movietone News made up a newsreel which consisted of six items, as follows (fols. 553-5; Pltff's Ex. 6, p. 185):

"1. BALLET CORPS STAGES A DANCE ON LINER'S DECK (Described by Louise Vance);

"2. SCIENCE—ENGINEERS CREATE BOLTS OF LIGHTNING (Prepared by Russell Muth) (Announced by Lowell Thomas);

"3. NEWSETTERS—ROM-TOM LEHR SAYS BOO TO THE ZULUS (Announced by Lew Lehr);

"4. AVIATION—AIR QUEEN SOARS OVER SEA QUEEN (Prepared by Ben Miggins) (Announced by Lowell Thomas);

"5. SPORT FLASHES (Supervised by Tom Cummiskey) (Announced by Ed Thorgersen);

"(LOCAL) 6. BLACK HELEN WINS AMERICAN DERBY AT CHICAGO (Reported by Ed Thorgersen)."

Item numbered 5 represented the trick shots made by appellant. The commentator, Ed Thorgersen, made the following comments as the picture was exhibited (fols. 556-7):

> "Professor Redmond who knows his form presents the neatest trick of the week on the turf of New Jersey's Monmouth County Country Club. Now keep your eye on the ball—gentlemen. Having completed the first lesson in form, the professor is now getting himself all tied up—so the subject naturally will be 'How to acquire a body swing'—this is very important men—on that 19th hole.
>
> "The Professor will next sample the glassware so stand by for a crash. The subject for homework will be "When to use a useless caddy in playing the ball out of a trap—Watch the ball men—sometimes the trap is quicker than the eye—Wise guy."

Fox Movietone Company released the newsreel. Norman B. Steinberg, its assistant-secretary, testifying from the office records of the Company, stated that this newsreel was exhibited in 2,728 theatres throughout the United States (fols. 305-6); since it was leased for three days a week (fol. 310), this particular newsreel was exhibited at least 8,184 times. This was with the wholehearted approval of appellant (fol. 153).

Harry Foster, respondent's film editor, got an idea for putting together shots of various well-known golfers, to make a short golfing picture (fol. 365). He went around to the motion picture and newsreel libraries, selected about 2,000 feet of golfing material, and in the course of three or four weeks assembled it, cutting it down to 800 feet (fol. 365). From the Pathe News he purchased shots taken by them at various times of Gene Sarazen, Lawson Little and others (fol. 365).

On April 17, 1936, respondent purchased from Fox Movietone News for the sum of $88.74 the negative of the shots which the latter had taken of appellant at Eatontown, in June, 1935 (see Bill of Sale, Deft. Ex. K, p. 199). These shots were added to the other shots acquired by respondent from Pathe, and this collocation of golfing shots was called "Golfing Rhythm".

A sound track was made with commentation appropriate to the shots, and the patter that accompanied appellant's shots on the film was as follows (fols. 583-4):

> "Jack Redmond, a magician of the links, continues the trick stuff by driving 3 balls off this young lady's foot. Either she has

confidence in him or she needs a chiropodist and doesn't mind having a divot taken out of her shapely tootsie.

"You win Jack. Her foot is still there. What? Bottles for tees? Come now, Mr. Redmond. If you break them you'll have to play out of a hazard full of 8-year old rye. And wouldn't that be tough? Ah but he never misses. If we duffers could drive as well under normal conditions as Jack does off a bottle or a lady's toe, we'd be as happy as a tiger lunching on an explorer. Hitting a target is a hard trick, but socko—there it goes. Now don't worry sir, Mr. Redmond is a gentle soul, and careful—ah very, very careful, and if anything goes wrong he can always get a new set of clubs. Oh well."

Respondent distributed prints of the picture to its local exchanges, which in turn licensed exhibitors to show it on the screen.

Respondent publishes a magazine called "Columbia Mirror" which it does not sell but distributes gratis to theatres and members of its field organization (fols. 235-6). It contains references to respondent's forthcoming pictures. In April, May and June, 1936, respondent sent out 1,283 of these publications to theatres in the State of New York, and 150 to its field representatives in the State (fol. 238). That paper contained a reference to "Golfing Rhythm" and appellant.

Respondent also publishes a house organ which it calls "Columbia Beacon" distributed gratis by it exclusively to its employees (fol. 239); in May, 1936, it distributed 113 copies of this paper in this State (fol. 242).

"Golfing Rhythm" was released on or about May 15, 1936 (fol. 279).

Two months later, on July 13, 1936, appellant notified the respondent that he objected to the use of his picture in "Golfing Rhythm" (fols. 399-400).

Respondent immediately took steps to delete from "Golfing Rhythm" the shots of appellant. There were about seventy prints of the picture in circulation, throughout the country, in the hands of local exchange managers (fol. 282). These had to be called in from various local exchanges. By October 7, 1936, respondent had completed deleting appellant's shots from the picture (fol. 271).

Appellant thereupon brought this suit.

While the suit was pending appellant again invited Fox Movietone News to take a picture of him executing difficult golf shots in Miami, Florida, in February, 1937 (fol. 341).

William J. Storz the cameraman, testified that appellant, by prearrangement with the Miami Biltmore Publicity Department (fols. 344-9), posed for him at that time at the Miami Biltmore Country Club executing trick shots; in the picture posing with him was a famous woman athlete Miss Babe Didrickson (fol. 343), who executed most of the shots that appellant did (fol. 344). This picture added to other scenes was again used by Fox Movietone Company in a newsreel, and was exhibited by it in 3,431 theatres throughout the United States (fol. 340); and on the same computation made previously for a three-day run on each picture that would mean that the picture was exhibited at least 10,293 times.

Manifestly appellant did not suffer any damage by reason of what respondent had done when he was perfectly willing to have his picture executing trick shots taken over again and exhibited in thousands of theatres throughout the country.

Appellant's good faith is open to question when he urges in one breath an invasion of his right of privacy and in the next breath consents to a repetition of the acts.

Respondent no more invaded appellant's rights than Fox Movietone News did. As a matter of fact all that respondent did was to reproduce exactly in "Golfing Rhythm" the scenes which had been taken by the Fox Movietone News, as appellant himself admitted (fol. 165).

Just as Fox Movietone News had included appellant's shots in a group of shots making up the usual newsreel, so respondent had included shots of appellant in a group of shots made by famous golfers.

How can it be urged that the exhibition of these trick shots through the medium of Fox Movietone News was a *benefit,* but the exhibition of the same shots through the medium of "Golfing Rhythm" was an *injury?*

Appellant's conduct is eloquent proof that he considered the exhibition of *all* these pictures of distinct benefit to him.

Respondent coupled appellant with other great golfers, such as Gene Sarazen and Lawson Little, men of the highest standing and repute in their profession. This was complimentary to appellant and not derogatory of him.

Moreover, after appellant notified respondent that he objected to the use of these shots, it deleted the shots from this picture.

This shows that there was no malice and no wilful and deliberate injury, but, on the contrary, the acts of respondent were in good faith, under a firm belief that it had a right to exhibit the picture it had purchased.

The charge was made on the trial that respondent had been unduly enriched by its acts and that appellant should therefore be compensated. The uncontradicted proof, however, was that the negative cost of the picture was $2,802.57; the cost of positive prints was $1,068.04; other costs amounted to $500; the cost of distribution was $2,115.68; making a total expense of $6,486.29; and that the gross income of the picture was $5,600.

There was a *net loss* to respondent of **$886.**

The Trial Court was unable to find the slightest basis for actual damage for there is no proof of damage in the record.

The Court repeatedly asked appellant's counsel whether there was such proof (fols. 431-33-34), at folio 435:

> "What evidence is there of any actual damage sustained by the plaintiff?"

Appellant's counsel replied (fol. 435):

> "I say to your Honor, frankly, that there need not be any proof of damages."

Then appellant's counsel asked the Court "to speculate as to what the compensatory damages should be" (fol. 436), and the Court refused to do this in the absence of proof as a basis for such an award (fol. 437).

The Court summarized its conclusions in the following statement (fols. 457-60):

> "The plaintiff gave testimony substantially to the effect that he has been specializing in the making of these trick shots in golf for about fourteen years, that he has given exhibitions of these trick shots all over the world. So far as his exhibitions in this country are concerned, I think he said that he had given them in every state. He testified that these exhibitions are given by him for hire, that is, he is paid for them. He testified that he employs press agents and publicity agents to help him get engagements for the giving of these exhibitions by him for hire. He testified that on probably as many as twenty different occasions, either more or less, he had posed for moving pictures showing him in the making of these trick shots. He testified that he had done so voluntarily in every instance, and his testimony further was, as I recall it, that he himself or through his press agents, publicity men or other representatives, had solicited many of these private exhibitions at which these moving pictures were taken of him; and that he had done so because he regarded the exhibition of those moving pictures of him executing these trick shots *as an aid to his obtaining the engagement for hire,* the giving of these exhibitions. The testimony, and this part of it does not come from the plaintiff, but there is further testimony that as recently as February of this year, after the institution of this very action and while it was awaiting trial, the plaintiff, by arrangement, posed down in Florida for

> the Pathe News film people and made another exhibition of his trick shots. So that apparently the plaintiff's own estimation as evidenced by his own testimony with regard to his course of conduct in the last fourteen years, has looked upon the exhibition of these moving pictures posed for by him in the execution of these trick shots, *as a valuable adjunct to his business or profession,* call it what you please, of giving public exhibitions for hire of the execution of his trick shots."

Appellant's counsel had taken the position that punitive damages might be awarded even though only nominal damages were suffered by the plaintiff. **The Court below agreed with that position** (fols. 490-1, 494-5) but held that an award of punitive damages was discretionary.

Appellant's counsel, who now argues in his brief that the Court below was *absolutely bound* to render punitive damages, made this statement to the Court (fol. 493):

> "Mr. Weisman: I think it is fair to state that in every case *where punitive damages are permitted, it is always a 'may' clause."*

The Court's oral opinion pointed out that appellant made no claim that he had been held up to scorn, ridicule or contempt (fol. 530); and that the dialogue which accompanied the picture was not made the basis of any complaint (fol. 531); and the Court held (fols. 534-5):

> "I have already said that in my opinion the plaintiff is entitled to a judgment, but on the question of quantum of damages, I

feel from all the evidence in this case that the plaintiff is not entitled to recover more than nominal damages, which are awarded him in the sum of six cents; * * *

"The Court: I do not think this is a case where punitive damages should be allowed. I think the plaintiff here has sustained, if he sustained any damages at all, purely nominal damages, for which he is awarded a judgment of six cents. * * *

"The Court: I have upheld your contention despite the fact that the question is still clouded in doubt, that in a case where the Statute allows an award of punitive damages in addition to compensatory damages, punitive damages may be allowed even though no compensatory damages are granted, **but I do not think in the exercise of my discretion and exercising it in a manner that is influenced entirely by the evidence in this case, that this is a proper case for the allowance of punitive damages to the plaintiff."**

The Court thereby sustained the partial defense which had been pleaded in mitigation of damages (fols. 33-5).

POINT I.

The appellant suffered not the slightest injury.

There is no dispute here on the facts. From the lips of the appellant himself, it was established that he had not been injured.

In spite of this appellant first urged the Court below to find compensatory damage; when the Court pointed out that there was no basis for compensatory damage, but that since appellant was entitled to a judgment, the most that he could recover would be nominal damage, appellant then urged that punitive or exemplary damage be awarded.

Appellant argued that smart money could be awarded, even though nominal damages only were found. **The Court below agreed with appellant's contention.**

Appellant devotes pages 15 to 18 of his brief to the proposition that punitive damages may be awarded where plaintiff was only nominally damaged.

Although the right to award punitive damages in such a case has recently been challenged (*Prince* v. *Brooklyn Daily Eagle,* 16 Misc. 186, GAYNOR, J.; *Buteau* v. *Naigele,* 120 Misc. 470, CHURCHILL, J.), discussion of that subject becomes unnecessary since the Court recognized its power to award punitive damages, but refused to do so in the exercise of sound judicial discretion.

This discretion is recognized by Section 51 of the Civil Rights Law in the following language:

> *"* * * and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have*

> *knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by the last section, the jury,* ***in its discretion, may*** *award exemplary damages.* * * *"

It is not the first time that courts have limited recovery to nominal damages in these civil rights suits.

In *Harris* v. *Gossard Co., Inc.,* 194 App. Div. 688, an actress, sued to recover damages for a violation of her rights under the Civil Rights Law. The principal contested question of fact was whether the plaintiff had given her consent to the publication of her name and portrait. She received a verdict of six cents, which was set aside by the Trial Court. The Appellate Division reversed and reinstated the verdict. Mr. Justice PAGE said (p. 690):

> "The jury, therefore, accepted the testimony of defendants' witness that the plaintiff had given her oral consent to this use of her name and portrait by the defendant, The H. W. Gossard Company, Inc.
>
> "The plaintiff was a well-known actress, whose name and portrait had frequently been published, and no objection had ever been raised by her on account of these publications; in fact, she admitted that they helped her in her profession and that she was not averse to the publicity which these publications brought, provided it was in connection with her profession. * * *"

And at page 692:

> *"* * * if the jury believed that the plaintiff had orally consented to the use of her*

> *name and photograph by the Gossard Company, under the charge of the court, a verdict for six cents was proper. * * *"*

In *Schellberg* v. *Empringham,* 36 F. (2d) 991, Judge KNOX refused to grant any damage under a civil rights cause of action, because the plaintiff had not proved that he had suffered any damage.

He said at page 996:

> *"No proof of damages as a result of such publication is shown, and I shall award none. * * *"*

Appellant argues that the Court was bound, against its own conscience, to award punitive damages, because of the case of *Franklin* v. *Columbia,* 246 App. Div. 35 (affirmed, 271 N. Y. 554), and he refers to respondent in his brief (p. 21) as "a second offender."

It is strange doctrine that because a litigant has been unsuccessful in one case, he must be mulcted in damages in every case that comes along thereafter.

Appellants would have the Courts treat respondent as an outlaw, to be forever subject to the payment of tribute, because it had erred in the *Franklin* case. It is submitted that if this respondent sinned in the *Franklin* case, it has expiated its sins and has paid its judgment in full.

POINT II.

The judgment should be affirmed, because, in any event, appellant had no cause of action and he was not prejudiced by the award of nominal damage in his favor.

There are several elements in this case which would have justified the Court below in dismissing the complaint.

1. For example, the proof was that appellant, a famous golfer, a vaudeville actor and a golf writer, was a public figure and had received a great deal of publicity in connection with these activities, sufficient to permit him to accumulate about thirty large-sized scrapbooks. Since the picture complained of portrayed appellant in a public role in which he voluntarily engaged, he surrendered his right of privacy *pro tanto.*

> *Colyer* v. *Fox Pub. Co.,* 162 App. Div. 297;
> *Corliss* v. *E. W. Walker Co.* (C. C. Mass., 1894), 64 Fed. 280, 282;
> *Melvin* v. *Reid* (Calif., 1931), 297 Pac. 91, 93;
> *Jeffries* v. *N. Y. Evening Journal Pub. Co.* (1910), 67 Misc. 570.

See article by Warren and Brandeis on the right of privacy, 4 Harvard Law Review, 193, page 216:

> "The general object in view is to protect the privacy of private life, and to whatever degree and in whatever connection a man's

life has ceased to be private, before the publication under consideration has been made, to that extent the protection is to be withdrawn."

2. There was the principle of estoppel. Appellant had posed for the Fox Movietone News for the express purpose of having his trick shots exhibited in theatres. It is true there was no written consent, but the courts have always been impressed by an oral consent.

That was done in *Harris* v. *Gossard Co., Inc.*, 194 App. Div. 688, 692, and in *Wendell* v. *Conduit Machine Co.*, 74 Misc. 201.

It was considered by this Court in *Ruth* v. *Educational Films, Inc.* (GUY, J.), unreported (1920), affirmed, 195 App. Div. 893. There, the court below pointed out that Babe Ruth orally consented to some of the films complained of, and it vacated a temporary injunction.

Appellant now claims that the exhibition of the trick shots in question was a private performance, and that he has a right to insist upon the right of privacy which Section 51 gives to persons engaged in private callings.

The fact is, however, that this exhibition was expressly for the purpose of being reproduced before thousands of people in theatre audiences throughout the United States.

This attempt on the part of appellant to claim that his performance was private is similar to that in *Davies* v. *Bowes*, 209 Fed. 53 (aff'd. 219 Fed. 178), where a newspaper reporter, after presenting a fictitious article in his newspaper as a report of an actual occurrence, thereafter attempted to prevent the dramatization of this story on the ground that the story was a work of his imagina-

tion. The court held that he was estopped from making any such claim since the story had originally been presented to the public as news.

In *Sweenek* v. *Pathe News, Inc.* (1936), 16 Fed. Supp. 746, Judge MOSCOWITZ, dismissing a complaint based upon a newsreel, pointed out:

> "* * * *It is conceded by counsel for the defendant that the written consent required by the statute was not given. Oral consent, however, was apparently given, In Wendall* v. *Conduit Mach. Co.,* 74 Misc. 201 *this was held to be enough to ground denial of an injunction pendente lite. On the question of waiver see also White* v. *White,* 160 App. Div. 709. *While the court is not prepared to say that the express moods and requirement of the statute may always be regarded as waived by oral consent, yet, such consent having been given, the whole action leaves the impression of being an afterthought on the part of the plaintiff."*

In *Thayer* v. *Worcester Post Co.,* 187 N. E. 292 (Mass., 1933), the plaintiff sued a daily newspaper for publishing a picture of herself, her husband and her chauffeur, with a caption indicating the customary triangle. One of the counts was in libel; one a violation of the right of privacy.

Demurrer to the libel was overruled, but demurrer to the right of privacy was sustained.

The Court stated that it assumed for the purpose of this case that there was such a right. However, it said:

> "* * * The defendant's allegations show that the picture of which she (plaintiff) complains, was not taken surreptitiously or

> without her knowledge and consent. *On the contrary, she voluntarily posed for it as one of a party of five. The picture was taken at an airport which is presumably a public place. * * * One who under the conditions disclosed in these counts poses for a photograph, has no right to prevent its publication.*"

Obviously, the airport was no more private than were the golf links at Eatontown that Sunday morning in June, 1935. See also: Hammond v. Crowell Pub. Co. McLaughlin, J. - N.Y.L.J. Oct. 27, 1937.

3. The appellant's picture was not used for trade or advertising purposes.

Since respondent had the right to exhibit the motion pictures in question, portraying the appellant, it also had the right to notify exhibitors of motion pictures as to the content of such pictures, as respondent did in its publication, "Columbia Mirror."

> *Humiston* v. *Universal Film Mfg. Co.*, 189 App. Div. 467.

In *Sweenek* v. *Pathe News, supra,* it was said:

> "Publication of matters of public interest in newspaper and newsreels is not a trade purpose within the meaning and purview of this statute."

In *Lahiri* v. *Daily Mirror, Inc.,* 162 Misc. 776, Mr. Justice SHIENTAG, dismissing a complaint under the Civil Rights Law, classified the publication of photographs and newspapers into four groups. He said at page 782:

> "The rules applicable to unauthorized publication of photographs in a single issue

of a newspaper may be summarized generally as follows:

"1. Recovery may be had under the statute if the photograph is published in or as part of an advertisement, or for advertising purposes.

"2. The statute is violated if the photograph is used in connection with an article of fiction in any part of the newspaper.

"3. There may be no recovery under the statute for publication of a photograph in connection with an article of current news or immediate public interest.

"4. Newspapers publish articles which are neither strictly news items nor strictly fictional in character. They are not the responses to an event of peculiarly immediate interest but, though based on fact, are used to satisfy an ever-present educational need. Such articles include, among others, travel stories, stories of distant places, tales of historic personages and events, the reproduction of items of past news, and surveys of social conditions. These are articles educational and informative in character. As a general rule, such cases are not within the purview of the statute."

Elsewhere in that opinion, the Court pointed out the distinction between the *Lahiri* case and *Binns* v. *Vitagraph,* 210 N. Y. 51, and *Blumenthal* v. *Picture Classics, Inc.,* 235 App. Div. 570, where (p. 781):

"* * * a feature of current interest was fictitionalized in a film. * * * The emphasis in the two former cases was placed on dramatization rather than information."

In *Rhodes* v. *Sperry & Hutchinson Co.*, 120 App. Div. 467 (affirmed, 193 N. Y. 223), cited by appellant, the defendant had made outright advertising use of the plaintiff's picture in its stamp business. We have no such situation here.

Since appellant was not entitled to prevail, in any event, the failure of the Court to award punitive damages may not be deemed a fatal error.

Wood v. *Wyeth*, 106 App. Div. 21, 24.

POINT III.

The Court below exercised a proper discretion.

Section 51 of the Civil Rights Law provides that "the jury in its discretion may award exemplary damages."

The ruling of the Court below that it had the right to award exemplary damages on top of nominal damages was equivalent to a charge to the jury to that effect.

Suppose we had a jury below which had been charged in that manner, and it had refused to find exemplary damages. Could appellant then urge that the verdict would have to be set aside? Appellant is at great pains to point out that the Trial Court was exercising the function of a jury (App. Brief, p. 19). Assuredly, the Trial Court had as much right to exercise its discretion as a jury would have had.

There is no provision in law that makes it *mandatory* upon courts and juries to find exemplary

damages. We think the broad rule is that that is always a matter of sound discretion.

> *Voltz* v. *Blackmar,* 64 N. Y. 440;
> *Bergman* v. *Jones,* 94 N. Y. 62;
> *Chellis* v. *Chapman,* 125 N. Y. 222;
> *Eupes* v. *Nephue,* 120 App. Div. 621, 622.

In the *Eupes* case, the court, citing from *12 American and English Encyclopaedia of Law* (2d ed. p. 51) said:

> "The rule that the question of exemplary damages is one for the jury in the exercise of their discretion has been held to apply, though it was established in point of fact that elements existed which would, according to the general rule of exemplary damages, warrant such an assessment. It has been held, therefore, to be erroneous to instruct the jury that in any state of facts it is their duty to award exemplary damages, or that they should, will, ought to, or must do so; or that if they find a given state of facts the plaintiff is entitled to recover such damages. And so carefully is the discretion of the jury guarded in this particular, it has been declared, that an instruction several times repeated which seemed to invite the jury to give punitive damages was erroneous."

There is not the slightest evidence in this case that the Court below abused its discretion. On the contrary the Court was at great pains to summarize the proof in the case, to weigh it and analyze it, to even determine that it had the right, if it so desired, to give exemplary damages, but in its wise discretion to deny that relief.

Appellant's counsel, who, in the argument before the Court below conceded that the Court was *not* obligated, at all events, to find punitive damage, has now taken an opposite position, and urges that the Court below was bound, at all events, regardless of the evidence, regardless of every element of fairness and justice in this case, to grant exemplary damage.

CONCLUSION.

The judgment below was a just one and should be affirmed.

Respectfully submitted,

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