

1951

# Uptown Appliance & Radio Company, Inc. v. Leland B. Flint et al : Brief of Appellants

Utah Supreme Court

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# IN THE SUPREME COURT of the STATE OF UTAH

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UPTOWN APPLIANCE & RADIO COMPANY, INC., a corporation,

*Plaintiff and Respondent,*

vs.

LELAND B. FLINT, FLINT DISTRIBUTING COMPANY, a corporation, REED BIGELOW, THE PARIS COMPANY, a corporation, E. M. ROYLE COMPANY, INCORPORATED, a corporation, and ROBERT NEVINS,

*Defendants and Appellants,*

ZION'S COOPERATIVE MERCANTILE INSTITUTION, a corporation, GRAYBAR ELECTRIC COMPANY, a corporation, ORVIL J. COON, dba DARTLING APPLIANCE DEPARTMENT, FRANK WARREN, doing business as WARREN RADIO COMPANY and SALT LAKE HARDWARE COMPANY, a corporation,

*Defendants.*

Civil No.  
7595

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## APPELLANTS' BRIEF

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This appeal is taken for the purpose of reversing an order of the trial court which set aside the verdict of a jury and granted a new trial as to these appellants.

Grounds upon which we seek reversal of the trial court's order are set forth in the petition upon which this appeal was granted.

The record of the trial below is now before the court. It includes, in addition to unusually voluminous pleadings, more than 100 exhibits and over 2,000 pages of trial proceedings. Because we believe, and now urge, inter alia, that the trial court should have granted our several motions to dismiss which were made after all parties had rested, the court is confronted by the gloomy prospect of examining the entire record. But we most earnestly press as valid a number of points which may be considered and disposed of upon much less than a full review of the entire record. For instance, we will contend herein that the order of the trial court setting aside the jury's verdict and granting a new trial as to these defendants shows upon its face that it is invalid—that it reflects a usurpation of power not vested in the trial court by the statutes or the applicable rules of civil procedure. It will be remembered that this case was tried in 1950, and its trial was governed by the new Utah Rules of Civil Procedure.

The case was tried before the Honorable Joseph G. Jeppson and a jury. Trial began on January 3, 1950, and proceeded from day to day thereafter until February 4, 1950, when the case was submitted to the jury. The verdict was unanimous in favor of all defendants. On February 15, 1950, plaintiff filed its motion for a new trial. On September 5, 1950, the Judge made his order denying the motion for new trial as to Graybar Electric Company, Z. C. M. I. and Salt Lake Hardware Company, and granting the motion as to Robert Nevins,

Reed C. Bigelow, Leland B. Flint, Flint Distributing Company, E. M. Royle Company and The Paris Company.

## STATEMENT OF FACTS

Plaintiff is Uptown Appliance and Radio Company, Inc. It was organized in 1947 to engage in the retail sale of electrical appliances in Salt Lake City. The business was conceived in the minds of Briant S. Badger, Ralph O. Bradley and Jean W. McDonough. The record does not show that any of them had ever had any substantial business experience. We mention this because the record will show that any business difficulties which overtook them were of their own making, and is in no sense chargeable to any of these appellants (Tr. 2129, 1675, 1676).

In the early fall of 1947, Bradley, Badger and McDonough agreed to enter upon the retail appliance business as co-partners (Tr. 680). In the formative stages of their business they recognized their own lack of experience and sensed the necessity of associating with themselves someone who could bring to the enterprise some knowledge of fiscal control and accounting. Accordingly, they invited Leland B. Tanner to participate with them. Tanner, like themselves, was without substantial business experience so far as the record shows. There is nothing to indicate that he ever had any experience in the operation of a retail business; but he had for sometime been employed by Wells, Baxter and

Miller, a firm of Certified Public Accountants (Tr. 1563). The partnership idea was discarded and the plaintiff corporation was organized in 1947 (Tr. 680) with Badger as President, Bradley as Vice President, and Tanner as Secretary and Treasurer. Bradley, Badger, Tanner and McDonough and their respective wives each subscribed \$2,000.00 to make up the firm's total capital of \$16,000.00. It is interesting and important to note that McDonough and Bradley never paid in quite the full amount of their subscriptions (Tr. 1431). Financial statements thereafter made by the plaintiff to its creditors concealed the fact that there was any deficiency in paid-in capital. The amount of unpaid capital subscriptions were included in "accounts receivable" (Exhibits 50 and 51; Tr. 1448, 1449).

At any rate, plaintiff began its corporate life with something less than \$16,000.00 (Tr. 680). It elected to transact business at 38 South Main Street in Salt Lake City. That space was held under lease by the operator of a shoe shine parlor. To induce the bootblack to vacate the premises and make room for plaintiff's appliance store, plaintiff was required to pay \$3,000.00 (Tr. 681, 682). Rehabilitation and decoration of the premises to make them suitable for the appliance business required the expenditure of approximately \$4,000.00 (Tr. 811). It will be seen, therefore, that approximately half of plaintiff's capital was spent before it acquired a stock of goods and opened its place for business. That fact is important as bearing upon the good faith of plaintiff's

case, and is significant when considered in connection with plaintiff's fantastic demands as reflected in its prayer for damages.

Before opening for business in November, 1947, plaintiff made connections with certain wholesalers other than those involved in this case, as the result of which it was able to stock its store with various electrical appliances. The store was opened for trade at the end of November, 1947 (Tr. 687 to 689).

During the year of 1948, plaintiff secured franchises or other authorization from various distributors for the sale of certain of their products at retail at its Main Street store. Plaintiff began the purchase of Easy Washers from Z. C. M. I., Bendix and Kelvinator appliances and Zenith radios from Flint Distributing Company, Hotpoint appliances from Graybar Electric Company, and RCA radios from Glenn Earl Distributing Company. Later in 1948 it began the purchase of phonograph records: Columbia records from Flint Distributing Company, RCA records from Glenn Earl Distributing Company, Decca records from Salt Lake Hardware Company, and other records from other distributors. It should be noted that when plaintiff made its connections with Z. C. M. I., Flint Distributing Company, Salt Lake Hardware and Graybar Electric Company, its only place of business was at 38 South Main Street. Sale of appliances by plaintiff at any other place was not then in the contemplation of the parties. No claim was made upon



the trial that any of those companies was under any agreement or obligation to continue for any length of time to furnish merchandise to plaintiff for resale. Plaintiff claimed that the wholesalers mentioned could not lawfully discontinue sale to it as the result of any concerted action or conspiracy.

We pause to describe briefly the competitive field upon which plaintiff launched its business. When plaintiff located at 38 South Main Street it found itself almost next door to the Warren Radio Company, which was and had been doing business at 28 South Main Street for many years. Plaintiff was directly across the street from Z. C. M. I. where a retail appliance business had been carried on for many years. The fact is that upon Main Street at that time there were not less than fifteen retail appliance stores (Tr. 2020, 2021). It is also a fact that at that time there were 323 retail appliance stores in Salt Lake City and vicinity (Tr. 1933, 1934).

Under-capitalized and over-manned as plaintiff was, it seemed to be going along in a normal way until it made its unfortunate association with Glenn Earl. Earl held the distributorship for Radio Corporation of America products in Utah, Idaho and a part of Oregon. He effected distribution of RCA products in that wide area through dealers whom he selected and licensed or otherwise authorized to distribute his products in the several communities in which they did business. He bought mer-

chandise directly from RCA, and resold it to dealers whom he had selected. The number of dealers authorized by him to sell RCA radios and records totalled 175 (Tr. 673).

In the spring of 1948 Earl discovered that he had critically over bought from the manufacturer and was facing financial disaster. He had in stock 300 to 350 high-priced console radios which were about to become obsolete. They were the 610-V1 model much talked about during the trial. To use his language upon the witness stand, Earl "could not eat" those old models. He "was stuck with them" and "had to shake them off" or face ruin (Tr. 622, 623).

Earl importuned all of his 175 dealers to take some of his outmoded merchandise. They all refused—all but plaintiff. Plaintiff was Earl's only "taker" and he worked off his entire stock upon plaintiff (Tr. 623). Plaintiff was thus victimized by Earl and was forced to business practices which degraded the trade name of RCA and other competing products purchased from other distributors by the plaintiff.

As fast as Earl passed on 610-V1 models to plaintiff, he passed to plaintiff the necessity of working off obsolete merchandise or being "stuck" with it. Accordingly, plaintiff began resorting to radio mystery tunes, guessing games and the promiscuous giving away of gift certificates to induce people to buy (Tr. 701 to 711). Meanwhile, Earl, in keeping with RCA policy, refused



to allow any other dealer in RCA radios to advertise RCA radios at any discount below retail prices suggested by him. Earl sold RCA radios to Nevins and Royle and other dealers not parties to this litigation. He required them to maintain "list prices" while plaintiff was resorting to all manner of discount schemes to work off the obsolete 610-V1 RCA radios upon the public (Tr. 630). Discounting RCA radios naturally brought on discount by plaintiff of the price of other radios, including Zenith. And, of course, discounting one model RCA radio made it difficult for any dealer to maintain list prices on other models.

During the summer and fall of 1948, dealers Nevins (Tr. 629) and Royle (Tr. 632) complained to Earl and told him that they must be permitted to advertise discounts as long as the practice persisted at plaintiff's store. Orvil Coon, another dealer (Tr. 634) dealing in RCA radios, informed Earl that he would be forced to advertise RCA radios at a discount if he was to move his stock of merchandise. Earl's answer was that dealers could not discount; that they had refused to buy the obsolete 610-V1 and would have to maintain list prices upon the RCA merchandise which they had purchased (Tr. 630).

In the early fall of 1948, plaintiff installed a record department and acquired the right from Earl to retail RCA records. In November 1948, Earl entered upon a "Fair Trade" agreement with Robert Nevins covering RCA records (Tr. 637, 1124, 1125, Exhibit OO).

The Fair Trade agreement was duly registered with the Trade Commission of the State of Utah on November 30, 1948 (Tr. 1125; Ex. PP), and thereupon it became unlawful for any retailer to sell RCA records at prices below those fixed in the trade agreement (Utah Code Annotated, 1943, Title 16A, Chapter 3).

In December plaintiff began the sale of Fair Traded RCA records at a twenty per cent discount. That was done to attract business and stimulate sale of other merchandise in plaintiff's store. Plaintiff's sale of RCA records at a discount was soon brought to the attention of other RCA dealers by their customers. Other dealers, including The Paris Company (Tr. 1076), Z. C. M. I. (Tr. 999), and Bigelow (Tr. 992) confirmed the sale by plaintiff of RCA records at a discount by causing purchases to be made at plaintiff's store. Naturally, dealers whose shelves were stocked with records which could not be discounted to compete with identical merchandise offered by plaintiff complained to Earl (Tr. 591) and insisted that something be done to eliminate the competitive advantage enjoyed by plaintiff through violation of the Fair Trade agreement. That is how and why The Paris Company and Bigelow became involved in controversy with Earl. They insisted that Earl stop violation of the Fair Trade agreement by plaintiff, or permit them to discount. They gave Earl the alternative of rebuying the stocks they had on hand (Tr. 591 to 606).

In November, 1948, plaintiff opened a store on State Street under the name of Radio City. Flint Distributing Company authorized plaintiff to sell Kelvinator and Bendix products and Zenith radios, and certain other products at that store (Tr. 1892). In December, 1948, plaintiff leased space on Pierpont Street, in the warehouse district of Salt Lake City, and there began the sale of all types of merchandise at heavy discount to certain large groups of industrial and commercial employees (Tr. 723 to 742).

On December 13, 1948 (Tr. 1839), Bradley, Badger, McDonough and Tanner met at the office of Flint Distributing Company with Leland B. Flint and his department heads and certain other employees. It is without dispute that the first part of that conference was devoted to a friendly discussion of Kelvinator products. Flint was urging plaintiff's representatives to purchase a large stock of Kelvinator ice boxes and other products (Tr. 1840, 755, 1015). There is a dispute in the record as to what was discussed following the references to Kelvinator. Plaintiff's representatives testified that Flint told them that their discounting practices were getting them in trouble, and that unless they changed their ways they would be destroyed (Tr. 756). They charge Flint with stating that at that very time a meeting was being held in Salt Lake City at which plaintiff's fate was to be settled (Tr. 757). According to them, Flint stated that the persons then convening to settle plaintiff's fate were the managers of Southeast Furni-

ture Company, The Paris Company, Z. C. M. I., and Gus P. Backman, Executive Secretary of Salt Lake City Chamber of Commerce (Tr. 757). Flint and all of his associates denied that Flint had ever referred to any such meeting, or that he had ever told plaintiff's representatives that plaintiff was about to be destroyed (Tr. 1846, 1847). That no meeting of persons representing Southeast Furniture Company (Tr. 1793), The Paris Company (Tr. 2111), Z. C. M. I. (Tr. 2119) and Gus P. Backman (Tr. 1787) was ever held was established without dispute by the testimony of each of the persons referred to.

On or about December 15, 1948, Leland B. Flint learned of the warehouse operations being carried on by the plaintiff on Pierpont Street (Tr. 1850). His representatives informed plaintiff that plaintiff would not be allowed to distribute Bendix (Tr. 1966, 1968) or Kelvinator (Tr. 1805) products through the Pierpont warehouse, but would be permitted to continue the sale of Zenith radios and Columbia records (Tr. 1154). Thereupon, plaintiff told Flint that it did not trust him and that if plaintiff could not sell as it pleased all of the lines distributed by Flint, plaintiff wanted none of his line (Tr. 770). Plaintiff arranged to return to Flint all merchandise then on hand and theretofore purchased from him, and to receive credit for such merchandise against the large balance owing Flint (Tr. 1807).



On December 17, 1948, Flint called upon Harold H. Bennett, Vice President and General Manager of Z. C. M. I., and spoke briefly about the type of operation carried on by plaintiff at the Pierpont warehouse. On that occasion Flint exhibited to Bennett one of the cards employed by plaintiff in advertising its warehouse operation on Pierpont Street. Early in January, after Flint's merchandise had been returned to him by plaintiff, and after Z. C. M. I. had discontinued the sale of Easy Washers to plaintiff, Flint was again in Bennett's office. That meeting was most brief. Flint said, "Mr. Bennett, I understand you are not getting along very well with Uptown Appliance. Is that right?" Bennett's reply was, "That is right." That was the extent of the conversation between Flint and Bennett (Tr. 1853, 1854). Those brief conversations between Flint and Bennett were seized upon by the plaintiff as the genesis of the alleged conspiracy. For sometime prior to the 17th of December, 1948, complaints had been reaching Mr. Bennett from his department heads to the effect that the trade practices of plaintiff, as they related to Easy Washers, were discrediting that commodity in the market (Tr. 980, 983). Bennett therefore decided to discontinue the sale of Easy Washers to plaintiff until plaintiff should adopt a method of advertising and sale of Easy Washers in harmony with Mr. Bennett's notions of sound merchandising (Tr. 986, 987).

By the first week in January, 1949, there was a general resentment among retailers of RCA records who were restrained by the Fair Trade law from competing

with plaintiff. On January 5, 1949, Jules S. Dreyfous, Vice President of The Paris Company, invited retailers of RCA records to meet at the Hotel Utah. Such a meeting was held and those present were E. M. Royle, Mr. Holland, a representative of Glen Brothers Music Company, two representatives of Daynes Music Company, a representative of Clark Radio Company, Reed C. Bigelow, Harold H. Bennett of Z. C. M. I., and two representatives of The Paris Company. The subject of discussion was the sale of phonograph records in violation of the Fair Trade laws. A. H. Nebeker, a member of the Bar, and attorney for The Paris Company and Z. C. M. I., was called in to advise those present. He told them that there was danger in concerted action, and that the state should police the Fair Trade law. The meeting thereupon broke up (Tr. 989 to 996). Dreyfous, of The Paris Company, took the matter up with the Trade Commission, and thereafter a letter was written by the Secretary of the Trade Commission to Plaintiff directing plaintiff to cease violation of the Fair Trade agreement (Tr. 1480 to 1482, Exhibit 44).

The method used by plaintiff in the sale of RCA records was to sell a book for \$20.00 which contained \$25.00 worth of coupons good for the purchase of phonograph records. It was shown that such coupons could be used for the purchase of Decca records and other records, as well as RCA records (Tr. 1000, 1354). When the manager of Salt Lake Hardware learned of the coupon method of price discounting, he concluded that



the value of his company's large inventory would be jeopardized by such long term discount, and refused to continue the sale to plaintiff of Decca records until the practice had been discontinued, and the effect of the coupon books had spent itself (Tr. 1919, 1929, 1959).

In February, 1949, Graybar Electric became concerned about the credit standing of plaintiff and suggested that it cooperate with plaintiff in an effort to have plaintiff's merchandise "floor planned" so as to relieve plaintiff's credit situation. Those efforts failed, and in February Graybar refused to sell Hotpoint merchandise to plaintiff (Tr. 2052 to 2056).

On January 15, 1949, Tanner resigned from plaintiff and resumed his employment with Wells, Baxter and Miller. In May, 1949, plaintiff turned over its lease at 38 South Main Street to Bradley and Badger. Those two continued at that place in the retail appliance business under the name of Bradley-Badger (Tr. 816, 817). They were so engaged at the time of the trial (Tr. 825).

In August, 1949, McDonough took employment with Glenn Earl as an appliance salesman (Tr. 1008, 1009).

On February 18, 1949, plaintiff brought this suit against Leland B. Flint; Flint Distributing Company, a corporation; Reed Bigelow, The Paris Company, a corporation; Graybar Electric Company, a corporation; Orvil J. Coon, doing business as Darling Appliance Department; Zion's Cooperative Mercantile Institution,

a corporation; E. M. Royle Company, Incorporated, a corporation; Frank Warren, doing business as Warren Radio Company; Salt Lake Hardware Company, a corporation; and Robert Nevins, claiming that they had conspired to fix and maintain prices in the Salt Lake territory on appliances, radio instruments and records, to limit the quantity and number of such articles to be sold, and to persuade, induce, entice and by threats to cut off the source of supply of merchandise to the plaintiff, and generally to cause the destruction of plaintiff's business (Tr. 1 to 15). Plaintiff, in its third amended complaint, upon which it went to trial, claimed actual damage in the sum of \$443,347.67, and prayed for treble damages in the sum of \$1,330,423.92 (Tr. 46 to 55). At the close of the trial, and after all the evidence was in, plaintiff amended its prayer to reduce its actual damage from \$443,347.67 to \$200,000.00, and its prayer for treble damages from \$1,330,423.92 to \$600,000.00 (Tr. 2190).

After plaintiff's original complaint was filed, numerous motions were lodged in good time against said complaint, as the result of which plaintiff was required to amend its complaint from time to time during 1949. After the third amended complaint had been filed, and motions addressed thereto had been argued and overruled defendants were required to answer. There followed an extended and protracted pretrial procedure (Tr. 88 to 96 and 98 to 100) and the case was set for trial on

December 12, 1949. Trial was thereafter continued first until December 27, 1949 (Tr. 94) and then again continued until January 3, 1950.

Plaintiff was represented in all pre-trial matters by W. C. Lamoreaux, and upon the trial by W. C. Lamoreaux and B. E. Roberts. Defendants were represented: Flint Distributing Company and Leland B. Flint by Harley W. Gustin and Harold R. Boyer; Salt Lake Hardware by Frank A. Johnson; Graybar Electric by W. W. Ray and Athol Rawlins; Z. C. M. I., The Paris Company and Reed Bigelow by Paul H. Ray, S. J. Quinney and Albert R. Bowen; E. M. Royle and Frank Warren by Delbert M. Draper; Robert Nevins by Gordon B. Christenson, and Orvil J. Coon by Marvin J. Bertoch.

Over the objection and affidavit of counsel for all defendants that the Honorable Joseph G. Jeppson was biased and prejudiced and therefore disqualified to hear and try the case, Judge Jeppson called the case for trial before himself and a jury on January 3, 1950 (Tr. 460). The affidavit denominated "AFFIDAVIT OF BIAS, CERTIFICATE OF COUNSEL, AND APPLICATION FOR DISQUALIFICATION OF JUDGE," signed and sworn to by counsel for all the defendants, omitting the caption and signatures, read as follows: (Tr. 101 to 104).

"The undersigned, attorneys of record or otherwise, for the various defendants in the above-entitled cause and action, after being duly sworn each for himself deposes and says:

“That he is of the belief that the Honorable Joseph G. Jeppson, the Judge before whom the above cause is set for trial, is prejudiced therein against the defendants above named and some, if not all, of their respective attorneys, and has a bias in favor of the plaintiff above named.

“That the said Judge has given the appearance of a personal desire to try said cause and affiants believe that he, the said Judge, for reasons personal to himself, has retained and is attempting to retain on his own trial calendar said cause for trial, although normally by reason of the rules and practices of the Judges of the Third Judicial Court in and for Salt Lake County, State of Utah, said cause would, as of this date, be assigned before an entirely different Judge, and that as of this date the said Honorable Joseph G. Jeppson would not have assigned to him, in regular course, the trial of controverted matters; that on the 29th day of November, 1949, at a pre-trial hearing of the above entitled cause and action, a motion by all of the defendants then present was made that the trial of the said cause be continued to the month of January because of the period prior to Christmas being an inconvenient time for the defendants involved in the action, the said trial having theretofore been set for the 12th day of December, 1949, which motion was on December 5, 1949, at a further pre-trial hearing of said cause denied by said Judge and the cause set for trial on December 27, 1949; that on the said 5th day of December, 1949, at a further pre-trial hearing the said Judge permitted the plaintiff to file a motion to amend its third amended complaint theretofore filed herein and set said motion, on three days notice, for hearing; that on a further pre-trial hearing of said cause held on December 9, 1949,

the said Judge granted plaintiff's motion to further amend its third amended complaint, denied to the defendants, Z. C. M. I. and Graybar Electric Company their asserted rights to file counter-claims herein, and at the request of the attorneys for the plaintiff shortened defendants' statutory time within which to answer the third amended complaint as further amended on said day, requiring said defendants to plead thereto before Friday, December 16, 1949; that on a further pre-trial hearing of said cause held on December 16, 1949, the said Judge, although said cause was not at issue, denied the motion of defendant, Graybar Electric Company that the cause be continued for trial to some date beyond December 27, 1949, ordered the hearing on the demurrers of the defendants, Leland B. Flint, Flint Distributing Company, Reed Bigelow, The Paris Company and Z. C. M. I., which demurrers were filed at the time of said pre-trial hearing, and forthwith and prefunctorily overruled the same, denying at said time a motion to strike likewise filed on said day by the said defendants, Leland B. Flint and Flint Distributing Company, and at said time denied the motion of the defendants Leland B. Flint and Flint Distributing Company that the cause be stricken from the trial calendar on the ground that the same was not at issue, and thereupon ordered all of the defendants not previously answering to the third amended complaint as further amended to do so on, and in some instances before, the 20th day of December, 1949; that the matters and things hereinabove set forth and the aforesaid actions of said Judge were all made and had over the objections of the defendants and exceptions duly taken thereto; that refer-



ence is hereby made to the record and files in the above entitled cause and by such reference the same are made a part hereof for all purposes.

“That the undersigned affiants, the said attorneys, verily believe that the prejudice and bias of the said Judge is shown by the capricious, arbitrary and pre-emptory conduct aforesaid and his bias in favor of the plaintiff is apparent, and affiants verily believe that the defendants represented by them respectively cannot have a fair and impartial trial on the merits of said action before said Judge.

“This affidavit is made pursuant to subdivision (b) of Rule 63 of the Utah Rules of Civil Procedure in effect on January 1, 1950, and in making this affidavit and as a part thereof the undersigned attorneys represent that the said affidavit and the application in connection therewith are made in good faith.

“Wherefore, all the defendants named in the above entitled cause by and through their undersigned attorneys pray that the said Judge, the Honorable Joseph G. Jeppson, shall be disqualified and shall proceed no further herein except to cause the said action to be heard and determined by another Judge within said District.”

The affidavit was refused and the Judge failed to disqualify himself for the reasons, so far as can be gathered from the record, (1) that the defendants made no showing that there was another judge available ready to handle the matter, (2) expense to the county, (3) nothing appeared in the affidavit that could not have been previously called to the court's attention, and (4)



that the application of rule 63 (b), under which the affidavit was made, would not be feasible and would work injustice under rule 1 (b) (Tr. 443 to 460.)

It is contended that the bias and prejudice asserted by the affidavit finds confirmation in the order granting the new trial as to these appellants, which bias and prejudice was evidenced throughout the trial.

Judge Jeppson having denied defendants' application for his disqualification, trial began before him and a jury on January 3, 1950, and was concluded on February 4, 1950. On and between these days twenty days were actually consumed in the trial of the issues. At the close of the evidence, and after both sides had rested, each of the defendants presented and argued a motion for directed verdict. Counsel for plaintiff confessed the motions of Warren and Coon. The court denied all other motions and sent the case to the jury. Before the case went to the jury the court received from all parties their requests for instructions. Thereafter extended discussions were had by the court and counsel for the consideration of requests and of the court's proposed instructions. It will likely be convenient for the court if we set down at this point certain portions of the instructions which are particularly germane to our argument. Such instructions were given for the purpose of applying the rule of law which requires that the existence of a conspiracy must be established, if at all, by clear and convincing evidence:

*“Instruction No. 3 (portions)*

“You are instructed that the existence of a conspiracy is never presumed. It may, however, be proved by circumstantial evidence. The plaintiff has the burden of proving that a conspiracy existed and not only by a preponderance of the evidence but by evidence that is clear and convincing . . . Therefore, unless you are satisfied by clear and convincing evidence that a conspiracy existed, you must find in favor of all of the defendants and against the plaintiff, no cause of action.

“Whether you consider the acts of the defendants to be lawful or unlawful would make no difference if there is no clear and convincing proof of a combination or understanding among some or all of the defendants to control prices or limit plaintiff’s supply of merchandise in restraint of trade, because in the absence of such proof the plaintiff cannot recover.

“You are further instructed that the burden is upon plaintiff to prove by clear and convincing evidence that each one of the defendants knowingly and intentionally joined in the conspiracy, if you should find there was a conspiracy, and if, as to any defendant, plaintiff has failed to prove by clear and convincing evidence that such defendant has so joined a conspiracy, then your verdict must be in favor of such defendant and against plaintiff, no cause of action.”

*“Instruction No. 8 N (Portions)*

“In order to prove a conspiracy by circumstantial evidence there must be substantial proof of circumstances from which it may be reasonably inferred that a conspiracy existed. It cannot be established by conjecture and speculation alone,

but the proof must be clear and convincing, and if the facts and circumstances relied upon are as consistent with a lawful purpose as with an unlawful undertaking they are not sufficient to establish a conspiracy."

*"Instruction No. 11*

"While it is necessary in order to establish the existence of a conspiracy to prove by clear and convincing evidence given in the cause, a combination of two or more persons by concert of action to accomplish the alleged wrongful purpose, yet it is not necessary to prove that the conspirators came together and entered into a formal agreement to effect that purpose. Such common designs and purposes may be proved by circumstantial evidence. Such common designs may be regarded as proved if you believe from clear and convincing evidence given in the cause that the parties to the conspiracy were actually pursuing in concert the common design or purpose, whether acting separately or together, by common or different means, if such common or different means all were leading to the same unlawful result.

"In this connection you are instructed that if you find from clear and convincing evidence that two or more of the defendants were actually pursuing in concert a common design to fix and regulate prices in Salt Lake City on merchandise, then such defendants so acting in concert would be conspiring and confederating for such purposes. For a conspiracy to exist there need be no formal meeting of the conspirators or any formal agreement, but it is sufficient if persons act in concert to accomplish the purposes herein specified."

*"Instruction No. 30 (Portions)*

“Unless you are satisfied by clear and convincing evidence, and by a preponderance of all of the evidence, that there was a conspiracy formed and carried out as alleged in plaintiff’s complaint, you will be required to find in favor of the defendants and against the plaintiff, no cause of action.”

Having heard the instructions of the court, the jury retired and thereafter returned with its unanimous verdict against the plaintiff and in favor of all defendants, including these appellants (Tr. 142, 143).

On the 15th day of February, 1950, plaintiff filed its motion for a new trial. On September 5, 1950, Judge Jeppson ruled upon the motion for new trial in this language:

“The above entitled case having been heretofore taken under advisement to this date, and the Court having considered and being fully advised in the premises, it is ordered that defendants’ motion to strike the affidavit of Bryant G. Badger is denied. It is further ordered that plaintiffs’ motion for a new trial against the defendants Graybar Electric Company, a corporation, Z. C. M. I., a corporation, and Salt Lake Hardware Company, a corporation, is denied. It is further ordered that plaintiffs’ motion for a new trial against the defendants: Leland B. Flint, The Flint Distributing Company, a corporation; Reed Bigelow, The Paris Company, a corporation; and Robert Nevins is hereby granted on the grounds that the verdict is against the weight of the evidence and that a new trial is required to prevent a miscarriage of justice.” (Tr. 161).

We are seeking to reverse that order and to reinstate the verdict of the jury.

## ARGUMENT

The points relied upon by appellants are specified on pages 8 and 9 of their petition for appeal. All of those points will be covered in this argument. The points will be presented here in an order different than that in which they are listed in the petition, and will be somewhat recast, regrouped and consolidated.

### I.

(a) The order appealed from shows upon its face that there is an invalid usurpation of power not vested in the trial Judge by statute or applicable rule of civil procedure.

(b) The record will show that there is no sufficient or any ground upon which the trial court could legally grant a new trial as against any of these appellants.

The trial court assigned as his reason for granting a new trial "that the verdict is against the weight of the evidence, and that a new trial is required to prevent the miscarriage of justice."

This is equivalent, in the light of the Rules of Civil Procedure to saying that the verdict is against the weight of the evidence, wherefore a new trial is necessary to prevent a miscarriage of justice.



The grounds upon which a new trial may be granted after verdict of the jury are limited to Rule 59 (a) and (d). They read as follows:

“(a) Grounds. Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial.

(2) Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by resort to a determination by chance or as a result of bribery, such misconduct may be proved by the affidavit of any one of the jurors.

(3) Accident or surprise, which ordinary prudence could not have guarded against.

(4) Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

(5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.



(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

(7) Error in law.

“(d) On Initiative of Court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial on motion of a party, and in the order shall specify the grounds therefor.”

The record will show that a verdict of the jury was received on February 4, 1950. The order granting a new trial was made seven months later, on September 5, 1950. It is plain, then, that Rule 59(d) is entirely inapplicable to this case. On September 5, 1950, the trial Judge was without jurisdiction to exercise any power under Rule 59(d).

The provisions of Rule 59 (a) (1), (2), (3), (4), (5) and (7) were clearly not invoked by the trial Judge in support of his order. This leaves for consideration only 59(a) (6), and only the first part of that subsection could be of any significance here because there is not even a hint in the Judge's order “that the verdict is against law.”

Our inquiry is therefore limited to that portion of 59(a) (6) which authorizes a new trial for “insufficiency of the evidence to justify the verdict.” The court did not set the verdict aside for insufficiency of the evidence to support it, but because he conceived that the verdict was against the weight of the evidence. Under the law in this particular case the order complained of is invalid

in this case for two reasons: (1) there is no authority in rule or statute for setting aside a verdict because the trial Judge thinks it is against the weight of the evidence; and (2) because these defendants were charged with fraudulent conspiracy, and their liability or not was not left to depend upon the weight or preponderance of the evidence, but could be established and found to exist only upon "clear and convincing evidence." This aspect of the case will be presented and argued in full detail in a subsequent section of this brief. Suffice it to say here that the Judge instructed the jury that they could find defendants guilty only upon proof that is clear and convincing. Having applied that rule as fixing the quality of proof necessary to support a verdict against the defendants, his order that the verdict in favor of defendants was against the weight of the evidence shows upon its face that it was lacking in the substance and vitality necessary in setting aside the verdict.

It will be remembered that plaintiff's motion for a new trial assigns all of the grounds authorized by the Rules of Civil Procedure, and some grounds not so authorized, but the order of the court shows that it was not based upon any ground specified in the rules. When viewed in the light of plaintiff's third amended complaint, as amended, the several answers of the defendants, and the instructions of the court, the order setting aside the verdict should fall of its own inherent weakness. Plaintiff charged a fraudulent conspiracy and demanded

treble damages therefor. The answers denied the existence of any conspiracy. The instructions directed the jury that a conspiracy could not be found to exist upon the simple weight or preponderance of the evidence, but only upon clear and convincing evidence. The jury found defendants not guilty, and the verdict was set aside as "against the weight of the evidence."

We are aware of the analysis made by this court in *King v. U. P. R. Co.*, 212 P. (2d) 692 to determine "the breadth of the trial court's discretion in granting a new trial," but that case and all the cases reviewed therein are clearly distinguishable from the instant case, as to the grounds upon which a new trial was granted. Beginning with the cases reviewed in the *King* case we find the following grounds stated as a basis for a new trial:

*James v. Robertson*, 39 U. 1068, 117 P. 1074, ground:

"The evidence did not justify the verdict in favor of the respondent."

Our new rule 59(a) is as follows: "Insufficiency of the evidence to justify the verdict."

If there is a difference in the two statements it is unimportant now.

*Valiotis v. Utah-Apex*, 55 U. 151, 184 P. 802. This court stated the grounds as follows:

"It will be perceived that counsel for appellant do not contend that there was no evidence to support the verdict, *but that the verdict is so palpably against the clear weight of the evidence* as to

indicate that the trial court abused its discretion in refusing to grant a new trial. *In other words, we are asked to review the weight of the evidence.*" (Italics ours)

In disposing of "weight of evidence" as a ground for a new trial, this court in the *Valiotis* case said:

"To set aside the verdict in such a case would be to invade the province of the jury, in whom is vested the power to decide all questions of fact and to whom all evidence thereon is to be addressed."

In this case a clear distinction is made between the unauthorized ground that the verdict is against the weight of the evidence and the ground that there is a legal insufficiency of the evidence to justify the verdict. Further in the *Valiotis* case there appears:

"This court has repeatedly held that the discretion of the trial court, exercised in granting or refusing to grant a motion for a new trial, *based on the insufficiency of the evidence to justify the verdict*, cannot be interfered with when, upon examination of the evidence as disclosed by the record, it is apparent that there is a substantial conflict of evidence as to material issues of fact in the case relative to which the insufficiency is alleged." (Italics ours)

In the above case, as in the case at bar, the ground relied upon was "that the verdict was against the weight of the evidence" and this court clearly held that such was not a proper ground upon which to base an order granting a new trial.

We are aware of no Utah case granting a new trial *on the sole ground that the verdict is against the weight of the evidence*, and under the new rules, the court acting on its own initiative is limited to the grounds available to the moving party in ordering a new trial. The grounds set forth in the new rules for granting a new trial are broad enough to cover every kind of injustice that may result from a verdict and the party against whom the order for a new trial runs, as well as the appellate court, is entitled to know from what unlawful act or thing the injustice arises.

It may be admitted that some confusion appears in judicial decisions attempting to clearly define the province of the court and the province of the jury, in a jury trial, but in the last analysis it must be held that statutory rules mean something or they mean nothing.

If a trial court can say and get away with it, "I order a new trial because my sense of justice is offended," or "that the jury misapprehended or ignored the weight of the evidence," then the rules mean nothing, because they are completely ignored, and the finding of a jury upon any issue in any case is simply advisory, to be accepted or rejected at will by the trial judge.

If it be thought that the court has power to grant new trials for reasons not stated in the statutes or rules, then again, the rules mean nothing, because if he cannot find a ground stated in the rules he may subvert them by resort to his sense of justice, which sometimes, though not always, is based upon a prejudiced view of the



situation. The statutes were passed and the rules were made with a view to providing grounds for the correction of all injustices, and all the court need do to insure justice is to base his order upon the appropriate statutory ground or grounds if such exist.

We submit that if injustice is involved in the verdict in the instant case, it could have been stated as some omission, misconduct, or other matters enumerated in rule 59. But since no statutory grounds have been stated it must be assumed that the court found no statutory ground upon which he could clearly base his order and, therefore, relied on the language of some courts to the effect that the "weight of the evidence" might be one of the elements considered in determining whether there is insufficiency of the evidence to justify the verdict, but as shown in the *Valiotis* case, supra, granting a new trial on the ground "that the verdict is so palpably against the clear weight of the evidence . . . would be to invade the province of the jury, in whom is vested the power to decide all questions of fact and to whom all evidence thereon is to be addressed."

But in no event can *King v. U. P. R. Co.*, 212 P. (2d) 692 sustain the order here complained of. There the issues were to be determined upon the simple weight or preponderance of the evidence while here Plaintiff could prevail only upon clear and convincing evidence.



## II.

(a) The record shows that plaintiff failed to prove by clear and convincing evidence that a conspiracy ever existed among the defendants, or any of them, and the record clearly shows that the jury was not convinced by plaintiff's evidence.

(b) The record shows that as a matter of law there was never any conspiracy among the defendants, or any of them.

(c) The record shows that the verdict of the jury in favor of the defendants does not constitute a miscarriage of justice.

(d) The record shows that a verdict finding the existence of a conspiracy would have been without substantial or probative support, and would have been a miscarriage of justice.

Points II (a), (b), (c) and (d) set forth above will be argued together.

The defendants in this case represent two groups: distributors who sold their merchandise at wholesale for resale by dealers, and dealers who purchased merchandise from distributors and resold it at retail to the consuming public. Defendants Graybar Electric Company, Flint Distributing Company, Z. C. M. I. and Salt Lake Hardware Company were distributors. Defendants Orvil C. Coon, Frank Warren, Robert Nevins, Reed Bigelow,

E. M. Royle Company, and The Paris Company were dealers. Defendant Leland B. Flint was president of Flint Distributing Co.

Each distributor denied that its business decisions with relation to plaintiff had been brought about, or in any manner influenced, by anything said, done or omitted by any other distributor, or by any dealer. Each dealer denied that he induced or attempted to induce any distributor to deal or not to deal with plaintiff. Each dealer complained to Glenn Earl about the violation of the Fair Trade laws by the plaintiff, and the defendant dealers, and other dealers in RCA records, met together to discuss their rights under the Fair Trade Laws.

The Court instructed the jury that each dealer had the right to so complain, and that, if the dealers believed there was a violation of the Fair Trade laws, they had a right to assemble for a discussion of such violation. Those instructions are correct statements of the law applicable to the issues, and the court in his order granting a new trial found no fault with them.

Each defendant specifically denied the existence of any conspiracy, and each denied participation in any concerted acts designed to injure plaintiff. Each defendant fully explained his conduct, and set forth logically and lawfully his reasons therefor. And the jury had the right to believe defendants' testimony.

As pointed out above, the court instructed the jury in Instruction No. 8 N that, "A conspiracy cannot be established by conjecture and speculation alone, but proof must be clear and convincing, and if the facts and circumstances relied upon are as consistent with the lawful as with the unlawful undertaking they are not sufficient to establish a conspiracy." Such being the law the jury was bound to find in favor of defendants, and a contrary finding would have been without substantial or probative evidence, and would have worked an injustice. In his ruling upon the motion for a new trial the court found no fault with the instructions given.

The case of the defendants was strong enough to absolve them from the charge of conspiracy as a matter of law. The burden of proof was upon the plaintiff, and we desire to demonstrate that plaintiff's case was entirely lacking in that quality necessary to make it clear and convincing to any unbiased mind. On the other hand, plaintiff's case was of such a shabby quality as to require rejection in the mind of any unbiased person.

The trial court ruled that the jury's verdict was "against the weight of the evidence" and therefore "a miscarriage of justice." "The weight of the evidence" is a standard clearly not applicable to this case. The court, in full accord with the law upon the subject, instructed the jury that defendants could be found guilty of conspiracy only upon "clear and convincing evidence," which is a different and higher standard than "weight of

the evidence." The court gave the jury the correct standard and then arrogated to himself the right to apply a different standard and by its application wipe out the jury's verdict.

Note again that in Instruction No. 3 this appears: "The plaintiff has the burden of proving that a conspiracy existed and not only by a preponderance of the evidence but by evidence that is clear and convincing." By that charge the court denied the jury the right to find conspiracy by "a preponderance of the evidence," but after the jury had found a verdict in accordance with his instructions he set the verdict aside by resort to the very standard he had forbidden the jury to employ.

The very nature of a conspiracy case calls for the application of the rule that proof must be by clear and convincing evidence. The penalties for civil conspiracy are far more severe than those in the ordinary civil damage cases. A finding of conspiracy not only fixes the basis for liability for all damages suffered, but subjects the defendants to treble damage. In addition to all this, a corporation is subject to the forfeiture of its corporate charter, which, as to any such corporation found guilty would be a death sentence.

Because of the penalties imposed it is altogether appropriate that the courts do and should require proof of the existence of a conspiracy by clear and convincing evidence.

*Abbott v. Miller et al*, 41 S.W. (2d) 899  
(Mo.).

“Before plaintiff was entitled to recover, it was necessary that she make out her case ‘by clear and convincing evidence.’ Walsh case, *supra*. This she failed to do, and the request of the Gregg Realty Company for a directed verdict should have been granted.”

*Burkholder et al., v. Westmoreland County Inst. Dist. et al.*, 68 Atl. (2) 436, (Pa.) decided in 1949.

“When conspiracy is alleged, it must be proven by full, clear and satisfactory evidence, and when plaintiff also relies upon subsequent acts to establish conspiracy, the acts must be such as clearly indicate prior collusive combination and fraudulent purpose, not slight circumstance of suspicion, and the subsequent acts must be such as to warrant belief and justify conclusion that subsequent acts were done in furtherance of the unlawful combination and in pursuance of scheme to wreck the business and cause the bankruptcy.”

*Quackenbush et al., v. Slate et al.*, 121 P. (2d) 331 (Wash.).

Suit for damages for conspiracy to defraud. Judgment dismissing complaint. Affirmed.

Headnote 1 reads:

“1. In an action for conspiracy to defraud plaintiffs of an interest in a mine, to establish the ‘conspiracy’ plaintiff must show by clear and convincing evidence that defendants combined, in furtherance of a pre-conceived plan, unlawfully to deprive plaintiffs of their interest in the mine, and that overt acts were done in accordance with the plan to their damage.”



Headnote 2 reads :

“2. In an action for conspiracy to defraud plaintiffs of an interest in a mine where plaintiffs’ evidence disclosed acts of the defendants which were as consistent with the lawful purpose of protecting defendants’ interests as they were with the unlawful purpose of conspiring to defraud plaintiffs’ evidence was not sufficient under requirement for clear and convincing proof of the elements of conspiracy.”

The court says, page 333:

“The main question for our consideration is, whether or not Vervaeke and Slate conspired to defraud and deprive appellants of their interest in the mine through the termination of the option contracts. Since this is a question of fact, we shall detail the evidence which each side proffered to sustain its contention. In weighing the facts, however, the following rules must be kept in mind. Appellant must prove that Vervaeke and Slate combined, in furtherance of a pre-conceived plan, to unlawfully deprive the company’s stockholders of their interest in the mine, and that overt acts were done in accordance with this plan to their damage. 15 C.J.S., Conspiracy, pp. 996-1000, Sec. 1 to Sec. 6; Eyak River Packing Co. v. Huglen, 143 Wash. 229, 225 P. 123, 257 P. 638, and Kietz v. Gold Point Mines, Inc., 5 Wash. 2d 224, 105 P. 2d 71. Furthermore, appellant must establish these elements by clear and convincing evidence. The evidence, moreover, will be insufficient if it discloses acts as consistent with a lawful purpose as an unlawful one. Dart v. McDonald, 107 Wash. 537, 182 P. 628.”

*Roberts v. Saukville Canning Co.*, 26 N.W.  
(2d) 145 (Wis.).

Suit to foreclose a mortgage, counterclaim for damages for conspiracy, judgment on counterclaim reversed.

Court says p. 147 :

“A claim of conspiracy is a challenging allegation, but in a civil action unless the conspiracy is established by clear and convincing evidence and some act pursuant to a formed conspiracy causing damage is proven, no cause of action exists. 11 Am. Jur. P. 577, Sec. 45.”

*Ziegler v. Hustisford Farmers Mut. Ins. Co.*,  
298 N.W. 610, (Wis.).

“In civil actions, where fraud, crime, criminal conduct or conspiracy is alleged, the burden rests upon him who so charges, to establish the proof of such allegations by clear and satisfactory evidence . . . or by the clear and satisfactory evidence to a reasonable certainty . . . or by clear, satisfactory and convincing evidence.”

That clear and convincing evidence is required to prove the existence of a conspiracy is clearly established by the rules announced in the preceding cases. While this court, as far as we are informed, has never decided a case involving proof of conspiracy, it has in a number of cases held that “clear and convincing proof,” or its equivalent, described the quality of evidence necessary to establish the liability of defendants in particular types of cases. We refer below to some of those cases to demonstrate that all civil cases are not adjudged or decided upon the simple weight or preponderance of the evidence.

And certainly there is as much reason why proof of conspiracy should require clear and convincing evidence as that clear and convincing evidence should be required to set aside a release, or to establish an oral trust.

*Burningham v. Burke et al.*, 67 Utah 90, 245 P. 977.

This was an action to rescind a subscription or purchase of capital stock and to recover back monies paid thereon.

“It is argued that the plaintiff was required to prove his case by clear and convincing evidence. That is true to entitle him to an adjudication in his favor on the merits, but not to overcome a motion for non-suit. Whether evidence is clear and convincing requires weighing, comparing, testing, and judging its worth when considered in connection with all the facts and circumstances in evidence.”

*Capps et al., v. Capps*, 110 Utah 468, 175 P. (2d) 470.

This was an action to impose a trust on proceeds of a war risk insurance policy.

“The substance of the rules announced in those cases is that where a party seeks to establish a trust by parol, the evidence must be clear, convincing and unequivocal. The evidence must be clear and unambiguous. It must be convincing and satisfy the trier of the facts that it is free from fabrication. It must be definite, so that no doubt is left as to the subject matter of the trust or trust res, or the rights and obligations of beneficiaries and trustee. Testimony which is designed to establish a trust must be carefully scrutinized,

to ascertain whether it is so attended with such circumstantial guarantees of trustworthiness that it is entitled to credence.”

*Rosenbraugh v. Branch*, 213 P. (2d) 333 (Utah).

Involved here was the reformation of a contract on the ground of mutual mistake.

“The substantial question confronting us is whether the evidence is ‘clear and convincing’ as to the terms of the agreement between the parties thereto, which terms were intended to be embodied in the writing subsequently executed, so as to overcome the presumption that the written instrument correctly evidences such agreement. As to the meaning of the phrase ‘clear and convincing,’ much has been written. We shall advert to a few typical statements as to the content of that expression.

“In the case of *Forrester v. Cook et al.*, 77 Utah 137, 292 P. 206, 209, it is said: ‘... A party seeking relief by reformation of a contract which is presumed to contain all the terms agreed upon must establish a mutual mistake by evidence that is clear, satisfactory, and convincing, and not by a mere or a bare preponderance of the evidence (*Cram v. Reynolds*, 55 Utah 384, 186 P. 100), unless a fair preponderance of the evidence clearly and satisfactorily convinces the court of the error....’

“In the recently decided case of *Greener v. Greener*, Utah, 212 P. 2d 194, 204, this court speaking through Mr. Justice Wolfe said: ‘That proof is convincing which carries with it, not only the power to persuade the mind as to the probable

truth or correctness of the fact it purports to prove, but has the element of clinching such truth or correctness. Clear and convincing proof clinches what might be otherwise only probable to the mind.' See also, *Nordfors v. Knight*, 90 Utah 114, 60 P. 2d 1115. With these criteria in mind, we examine the testimony hereinabove set forth."

*Jimenez v. O'Brien, et al.*, 213 P (2d) 337 (Utah).

Here we have a case applying the clear, unequivocal and convincing evidence rule to a release when it is contended that the releasing party did not have the mental capacity to contract.

"This requirement that a release can be avoided only if the evidence is clear, unequivocal and convincing that it is invalid, is well supported by the authorities.

"It is to be remembered that 'clear, unequivocal and convincing evidence,' is a higher degree of proof than a mere 'preponderance of the evidence,' and approaches that degree of proof required in a criminal case, viz., 'beyond reasonable doubt.'

"Proof that is convincing carries with it, not only the power to persuade the mind as to the truth or probable correctness of the fact it purports to prove, but has the element of clinching in the mind such truth or correctness. As a matter of law the plaintiff's evidence in this case falls short of that standard."

The jury, in the case at bar, found unanimously that there was no conspiracy, and rendered a verdict "no cause of action" as to all defendants.



The record will show that there was no evidence before the court and jury which squares with the standard of quality required in such cases. In ruling upon the motion of plaintiff for a new trial, the trial judge refused to be governed by the wholesome rule which he properly imposed upon the jury.

In view of the law of the case, the trial court's order might be construed as reflecting its conclusion that the jury was bound to accept plaintiff's case as "clear and convincing," but such a conclusion is not tenable because in ruling on the motion for a new trial the court ignored the "clear and convincing" test of the evidence, and seized upon a "weight" test, which is not a test under the Utah rules, and if it were it would amount to an abuse of discretion to say that the weight of the evidence in this case favors the plaintiff, and a downright perversion of the judicial function to ignore the "clear and convincing" test imposed upon the jury by the court itself and then conclude that the plaintiff made a "clear and convincing" case against any two or more of these defendants.

Before analyzing the testimony of plaintiff's important witnesses to demonstrate that the jury was not required to be and could not reasonably be expected to be convinced by plaintiff's case, it seems appropriate to illustrate the lack of quality in plaintiff's case by reference to some matters which affect the entire case and characterize the entire proceeding.

It will be remembered that the four owners and operators of plaintiff's business brought to the enterprise little, if any, business experience. Two had been appliance salesmen for a time, one an employee of an accounting firm, and the other a book seller. Plaintiff, in its corporate form, conducted business for only a little over one year. During that time an important part of its energies were devoted to the sale of Glenn Earl's obsolete radios which plaintiff alone, out of 175 dealers, was willing to handle. When plaintiff, in its corporate capacity, ceased business in the early part of 1949, Badger and Bradley took over the leasehold and fixtures and went right on in the retail appliance business at the corporation's old stand at 38 South Main Street. Tanner resumed his work in the accounting office, and McDonough again became an appliance salesman.

Yet, those four had the extreme hardihood to come into the trial court and ask an award from the jury of \$600,000.00. Such a demand could be calculated only to stultify plaintiff's entire case and make suspect the motives and good faith of all of plaintiff's officers who supported the demand by their testimony. The case went to trial upon plaintiff's third amended complaint, as amended. The prayer of that complaint demanded an award against the defendants, and each of them, in the sum of \$1,330,423.92. When one of counsel in his opening statement was about to mention that fantastic demand counsel for plaintiff objected, and the court sustained the objection (Tr. 530). By then even the

boundless avarice of plaintiff's officers did not blind them to the danger that such a demand might be offensive to the jury. By that time in the proceedings the demand of plaintiff's third amended complaint, as amended, was beginning to embarrass its officers and counsel. Accordingly, just before the case went to the jury the total prayed for was reduced to the sum of \$600,000.00 (Tr. 2190). The latter sum is as mythical, illogical and unjustified as the amount prayed for earlier. The amount of plaintiff's claim alone was sufficient to completely discredit plaintiff's case. And yet the trial court has ruled that until that claim has been satisfied justice will have miscarried.

Among the defendants against whom plaintiff sought to recover judgment for \$600,000.00 are Frank Warren and Orvil C. Coon. At the close of plaintiff's opening statement Warren and Coon moved the court for dismissal, which motions were denied. At the end of plaintiff's case they again moved for dismissal, and their motions were again denied (Tr. 1709 to 1712). After all the evidence was in and all parties had rested, Warren and Coon moved for directed verdicts. Plaintiff then confessed the motions (Tr. 2187). It thereby admitted that it did not have, and never did have, a case against either Coon or Warren, and yet insisted upon keeping both of those individuals in court for over a month at great expense and sacrifice.

The witnesses principally relied upon by plaintiff to prove conspiracy were its four officers, Bradley,

Badger, McDonough and Tanner, and Glenn Earl, the RCA man. The effect of the trial court's order is that the jury was bound to find the testimony of those men clear and convincing. True enough, the court had instructed the jury that they were the exclusive judges of the credibility of the witnesses, and that they could find a conspiracy to have existed only upon clear and convincing evidence, but he thereafter ruled in effect that after all the jury were not really the judges of the credibility of the witnesses, and after all it was not really the jury who must be clearly convinced, and that their verdict must be set aside as to some defendants—not as to others—because the verdict was “against the weight of the evidence.”

We will here present enough of the record to show that the jury was not only amply justified in rejecting the testimony of Bradley, Badger, McDonough, Tanner and Earl, but was in good conscience required to do so.

Briant S. Badger, President of the plaintiff, and one of its organizers, was the first of plaintiff's officers to take the witness stand. He sought upon direct examination, to leave the clear impression in the minds of court and jury that the retail business in which he had embarked had been destroyed and irrevocably lost because certain lines of merchandise had been withdrawn by Graybar Electric Company, Salt Lake Hardware Company, Z. C. M. I. and Flint Distributing Company. He centered his attack upon the Flint Distributing Com-

pany, and emphasized the crippling effect of the loss of the Bendix, Kelvinator and Zenith distributed by Flint. It was thereafter made clear beyond dispute by plaintiff's own witnesses that Flint Distributing Company did not suggest the withdrawal of Zenith products, but on the contrary urged plaintiff to continue their purchase and resale (Tr. 770, 771). It also was made to appear beyond dispute, and by plaintiff's own witnesses, that the business done by plaintiff in Zenith products far exceeded the total business done by plaintiff in all other Flint merchandise (Tr. 1198 to 1200, 1651, Ex. 53). It thereafter developed that Badger had not at all been forced out of the appliance business. On the contrary, he and Bradley were doing business at the old stand. He would have left the impression with the jury that the only sources of appliances were the four distributor defendants. It was later made to appear without dispute that there were fifteen or twenty other distributors in Salt Lake City who sold widely advertised and well recognized electrical appliances to retailers (Tr. 1940, 2082 to 2086).

At the time of the trial Badger and Bradley were conducting an appliance store in plaintiff's old stand and were and had been vigorously and persistently advertising their business (Ex. 7 to 23). Upon cross examination of Badger, questions were asked for the purpose of eliciting the admission that he and Bradley were still in the appliance business at 38 Main Street. A review of pages 923 and 924 of the record will show how lacking in candor and forthrightness was Mr. Badger.



Upon cross examination Badger was confronted with numerous newspaper advertisements published by him and Bradley and advertising their appliance business at 38 South Main Street during the years 1949 and 1950. It was even pointed out to Badger upon cross examination that he and Bradley were advertising for sale the very lines of merchandise which he claimed were lost by the withdrawal of lines by the four distributor defendants. He admitted causing such advertisements to be published, and was asked whether in fact he had in stock the merchandise he was advertising for sale. His answer to that question was "Did we have to have it?" (Tr. 827, Ex. 19).

The answer as above quoted shows a naive disregard by Mr. Badger for the Fair Trade Laws of the State of Utah.

Section 16A-4-8 of the Utah Code Annotated, 1943, provides: "It shall be unlawful for any person engaged in business within the State of Utah to advertise goods, wares or merchandise they are not prepared to supply."

As a part of plaintiff's abnormal cutrate advertising, it circulated thousands of cards through the mail addressed to names secured from an extensive mailing list and asked each recipient to send in to the plaintiff the model and age of his washing machine. This was requested with the promise that the person identifying his washing machine as the oldest washing machine of all to respond would be given a new Easy Washer (Tr. 895, 896). It is made to appear by the

testimony of the plaintiff that many hundreds of responses were received. When sufficient time had passed to bring this so-called contest to a close, numerous persons called plaintiff's store to inquire who had won the washer. Having received numerous such calls, and being unable to name for them the winner of the washing machine, Mrs. Thorpe, a lady employee of the plaintiff inquired of Mr. Bradley, "are you going to have a presentation of this washer?" To which Bradley replied, "Are you kidding." He laughed, and she said, "Have you given it?" And he said, "No, we can't afford it." (Tr. 1900, 1901). That Bradley made the statement just quoted stands in the record without dispute. The only fair inference from this incident is that plaintiff carried on a contest with never any intention of keeping its part of the arrangement. Badger, as President of the plaintiff, must have known of this shady bit of business.

In 1949 Badger filed a sworn statement with the assessor of Salt Lake County stating the plaintiff's inventory as of January 1, 1949, at a value of \$17,873.93 (Ex. 49). That sworn statement was intended to be the basis for tax liability of the plaintiff corporation. Plaintiff introduced as evidence in this case an exhibit prepared for the purpose of influencing the jury in its assessment of damages wherein its inventory as of December 31, 1948 was \$50,422.06 (Ex. AAA). The jury was justified in rejecting Badger as a convincing witness, but the court has now ruled that the jury was bound to accept his evidence as clear and convincing.

Bradley, like Badger, went right on with the retail appliance business at the plaintiff's old stand, 38 South Main Street, with scarcely an interruption, yet he joined Badger in seeking damages against the defendants in the sum of \$600,000.00. Bradley, like Badger, and in cooperation with Badger, publicly advertised the sale of merchandise which they did not have. Bradley testified that he did not have notice that RCA phonograph records were fair traded until January 6, 1949 (Tr. 1160). Plaintiff's own witness, Mrs. Thorpe, testified that formal notice was brought to Bradley and associates on December 28, 1948. At the time the notices were brought to the store Bradley was "kissing one of the girls under the mistletoe" (Tr. 1902, 1903. Ex. 32). Even such an entertaining diversion could not have blinded him to the fact that a man came into the store and left the notice on the counter within only a few feet of Bradley. Mrs. Thorpe testified that she knew of the fair trading of RCA records, and if she knew it certainly the jury was entitled to believe under all the circumstances that Bradley knew it.

For a long time Bradley had been directing the sale of RCA records in violation of the Fair Trade laws, and had been doing so by the sale of coupon books. When Bruce McKee, a record salesman for Salt Lake Hardware, asked Bradley about the sale of coupon books, Bradley denied that he or his associates were selling coupon books (Tr. 1949). That statement was clearly not true.

Bradley caused a registered letter to be sent to Harold H. Bennett on the 6th day of January, 1949 (Tr. 1673, Ex. 54) stating that Briant S. Badger had entirely severed his connection with the plaintiff. Shortly thereafter, and on the 22nd day of January, 1949, Bradley and Tanner called upon Mr. Bennett in an effort to reestablish dealings between plaintiff and Z. C. M. I. in Easy Washers (Tr. 1674, 2127 et seq.). On that day Bradley and Tanner knew that Badger had not left plaintiff, but was still its President. They thought Bennett might resume the sale of washers to Bradley if he thought Badger was no longer involved. Upon that assumption they induced Mr. Bennett to believe that Badger had retired from Uptown. They not only falsely and affirmatively represented that Badger had left the plaintiff's business, but concealed from Bennett the fact that Tanner had actually resigned his office with plaintiff and had arranged to resume employment with Wells, Baxter and Miller (Tr. 1675).

Bradley admitted that a major percentage of business done by plaintiff with Flint was in Zenith radios, and that Flint agreed plaintiff could continue to sell Zenith at all of plaintiff's outlets, and yet Bradley would have had the jury believe that Flint ruined plaintiff by refusing to sell merchandise to it.

Bradley and McDonough encouraged Mrs. Thorpe, manager of their record department, to secure employment as manager of Robert Nevins' record department.

Nevins is one of the defendants, and Bradley and McDonough urged Mrs. Thorpe to enter Nevins employ as "Mata Hari" and thereafter spy on Nevins and turn over to them confidential information from Nevins' files. They urged her "to load Nevins up with records and then quit him" (Tr. 1140).

Bradley admitted that after counsel had been employed to bring this action he and counsel had "reconstructed the conversations" (Tr. 1188 to 1192) upon which plaintiff relied at the trial for recovery. McDonough joined with Bradley in an effort to bribe Mrs. Thorpe to get the confidence of Robert Nevins, and then abuse it by turning over confidential information to them (Tr. 1139).

The fourth of plaintiff's four officers to testify was Tanner. He had been trained in the high ethics of his profession, but upon the witness stand he was indeed a sorry figure.

Tanner was invited into the enterprise because of his supposed skill and ability in the proper keeping of financial records. After this suit was filed Tanner began the preparation of financial exhibits to sustain the plaintiff's demands. In order to make the financial records which he had made in the regular course of business stand up as support for the complaint he found it necessary or convenient to make 99 changes in the records (Tr. 1390). He never kept a physical inventory which



is necessary in accordance with the standards of his profession if a correct financial history of the enterprise is to be maintained.

While on cross examination Tanner was confronted with a financial statement which he, as principal accounting officer and treasurer of the plaintiff, had given to a credit organization to reflect plaintiff's financial condition as of November 30, 1948. He admitted that the statement was given for the purpose of maintaining and securing credit (Tr. 1668). He admitted that the statement failed to disclose approximately \$30,708.68 of accounts payable (Tr. 1653). When asked if the omission of those accounts payable was in accordance with the standards and ethics of his profession, he stated if he had certified the statement as a Certified Public Accountant he would have been bound to include the accounts payable, but inasmuch as he was not certifying the statement he felt at liberty to omit the accounts payable (Tr. 1695). It will be remembered that the accounts payable which were omitted totalled in dollars almost double the amount of plaintiff's entire capital. The only permissible inference from Tanner's testimony was that according to his moral standards as long as he did not certify a statement to be true, he was free to be dishonest with his creditors and prospective creditors.

Early in the year 1949 Tanner prepared a statement for the County Assessor which was signed under oath by Badger, President of plaintiff corporation. The

statement was prepared and sworn to for the purpose of giving the County Assessor a basis for assessing taxes against the plaintiff corporation. The statement so prepared by Tanner (Ex. 49) and sworn to by Badger fixed the plaintiff's inventory as of January 1, 1949, at \$17,873.93. In an exhibit (AAA) prepared for the trial of this case by Mr. Jeffs from the books kept by Tanner, the inventory of plaintiff as of the same time was shown at more than \$50,000.00. That exhibit was submitted for the purpose of showing the value of plaintiff's business on January 1, 1949, as a basis for the measurement of damages by the jury. This conflict was submitted to Tanner shortly before the noon recess. His immediate reaction was reflected by his voluntary statement that it was "apparently an error" (Tr. 1622). When forced to answer whether he thought it was honest to give one sworn statement to the County Assessor for tax purposes and another entirely different sworn statement as to the firm's financial condition for the purpose of proving damages, he finally suggested that it would be all right to leave out the statement prepared for the trial (Tr. 1698).

In January of 1949, Tanner and Bradley, as officers of plaintiff, called upon Harold H. Bennett, as Manager of Z. C. M. I., in the hope of inducing Bennett to resume business relations with plaintiff. Although Tanner and Bradley did business just across the street from Bennett's office, they had recently, before calling upon Bennett, sent Bennett a registered letter (Ex. 54) to the

effect that Badger was no longer in any way connected with plaintiff. When they called upon Mr. Bennett they knew that the letter they had sent him was not true, but they intended to leave Bennett with the impression that Badger was no longer connected with plaintiff. Bennett had never met Badger, and he asked Bradley and Tanner why they had sent him the letter. Tanner replied that they all knew that their business difficulties had resulted from Badger's queer ideas of conducting a business, and they thought that if Bennett believed that Badger was no longer connected with them he would resume supplying merchandise (Tr. 2127 to 2129). And yet the trial court now rules that the jury was compelled to believe and be convinced by Tanner and Bradley.

The course of dealing between plaintiff and Glenn Earl has heretofore been summarized. Glenn Earl was thrust forward at the trial by plaintiff as its ace witness. It was plaintiff's hope that through Glenn Earl the jury could be convinced that Earl and other distributors had been induced to alter their relations with plaintiff because of concerted acts of the dealers. He was upon the witness stand for the better part of a week, and a review of his testimony in detail will demonstrate what a weak and unreliable support he was for plaintiff's case. It will be made plain that he was the genesis of plaintiff's business difficulties. He was caught with a stock of obsolete merchandise which he disposed of by imposition upon the plaintiff. He sought to and did

transfer the results of his improvident purchases upon the inexperienced officers of plaintiff. He would have had the jury believe that plaintiff's business difficulties arose from pressure exerted by retailers in Salt Lake City. On cross examination he admitted that as a distributor he was free to sell to retail outlets exclusively according to his own judgment and decision. He admitted that he was at liberty to appoint retail outlets and to cancell retail outlets as his business judgment dictated.

Among those authorized to sell his products at retail were the plaintiff, Frank Warren and the Summerhays Music Company. On direct examination he testified that he had cancelled the licenses of plaintiff, Frank Warren and Summerhays Music Company. He volunteered the statement upon the witness stand that he cancelled those licenses to demonstrate "that he could not be pushed around." He testified in effect that he ran his own business and wanted to make it clear that he would not be the victim of dealer pressure (Tr. 1333).

Subsequently he testified that he had cancelled the licenses of plaintiff, Frank Warren and Summerhays because of dealer pressure. Thus, his subsequent testimony was in direct conflict with his earlier testimony upon the same subject. His testimony on the two different occasions was in fact irreconcilable. He was pressed upon cross examination to reconcile the conflict. His answer was that he had changed his statement after counsel had called that testimony to his attention (Tr. 1332, 1333).

Earl made much upon direct examination of what he characterized as threats upon the part of E. M. Royle Company and The Paris Company to advertise RCA products at a discount as long as plaintiff was permitted to do so. He testified that it was his policy as a distributor, and the policy of Radio Corporation of America to forbid advertising of RCA products at a discount. It was then pointed out to him upon cross examination that plaintiff had been broadcasting over the facilities of a local broadcasting company that any listener who could guess the name of a well known tune could buy an RCA radio at a heavy discount. It was also pointed out to him that plaintiff had been resorting to various and devious means of bringing knowledge to the public that RCA radios could be purchased at plaintiff's store at a discount. He even admitted that he had been participating in the expense of plaintiff's promotion, and that the cost of the participation was charged upon his books as advertising. When probed as to why, in view of his announced policy forbidding advertising RCA products at a discount, he would permit plaintiff to indulge in the promotions we have described and at the same time forbid Royle and others from meeting the competition of plaintiff by advertising RCA instruments and records at a discount, his answer was that the sales promotions conducted by plaintiff were not advertising, but were "games of skill" (Tr. 1302).



Such hedging and weasling by the witness could be calculated only to discredit him before the jury, and yet the trial court has ruled that the jury was bound to accept him as a clear and convincing witness.

We invite the court's attention to the case of *Jackman v. Lawrence Drilling Co.*, 187 P. 258, wherein the Supreme Court of Kansas stated that the requirement that proof be clear and convincing means, "That the evidence should be clear, that it is not ambiguous, doubtful, equivocal or contradictory, and should be perspicuous and pointed to the issue under investigation; and satisfactory in the sense that the source from which it comes is of such a creditable nature that the court and jury as men of ordinary intelligence, discretion and caution may repose confidence in it. Absolute certainty is, of course, not required." The testimony of Badger, Bradley, McDonough, Tanner and Earl failed to square with any of the standards set forth by the Supreme Court of Kansas. And yet, the trial court has ruled that the jury was bound to be clearly convinced by the testimony of all of those witnesses, and that until plaintiff's demands for damages in the sum of \$600,000.00 is satisfied justice will have miscarried.

More needs to be said of the witness Mrs. Arva Thorpe, also called Toni Thorpe. She was the manager of plaintiff's phonograph record department from August, 1948, until January 22, 1949 (Tr. 1088). As such she was at the Main Street store during all business hours,

and in frequent contact each day with Badger, Bradley, McDonough and Tanner. Apparently she had made some contact with defendant Nevins (Tr. 1096) and with the defendant Bigelow (Tr. 1089 to 1091) while still employed by the plaintiff. The subject of employment was discussed between her and Nevins and with Bigelow. Apparently plaintiff construed those contacts as evidence that Nevins and Bigelow were trying to impair plaintiff's business by offering employment to Mrs. Thorpe. At any rate, that seems to be the purpose for which she was sworn and vouched for by plaintiff.

But upon cross examination Mrs. Thorpe gave evidence which characterized plaintiff's entire case in general, and plaintiff's witnesses Bradley and McDonough in particular, as being entirely unreliable and unconvincing. She testified that in the early part of January, while she was still an employee of plaintiff, Bradley and McDonough engaged her in conversation during which they informed her that they were contemplating a suit against Robert Nevins and others. They encouraged her to seek and accept employment with Mr. Nevins, and in this connection told her that if she would gain the confidence of Mr. Nevins and produce evidence to support their lawsuit it would be worth \$1,000.00 to her (Tr. 1139). She was urged to gain Nevins' confidence and then bring back confidential information to the plaintiff. As she put it, they suggested that she operate as a "Mata Hari" (Tr. 1140). She did accept employment with Mr. Nevins, but her conscience prevented her from operating as "Mata Hari."

She was about to relate an experience with Warwick C. Lamoreaux one of plaintiff's counsel. The trial Judge refused to let the jury hear her testimony in that connection, but in the absence of the jury she testified that after she had been in Nevins' employ for some weeks she received a telephone call from Mr. Lamoreaux inviting her to lunch. She was frightened about the matter, but with some misgivings, she accepted the invitation and took lunch with Mr. Lamoreaux at a down town cafe. Mr. Lamoreaux asked her if Mr. Nevins was a party to any conspiracy and she stated, "To the best of my knowledge he was not." (Tr. 1100). He urged her to gain additional information from Nevins and she replied that she was frightened and wasn't interested in getting additional information. She did, however, promise that she would see him again.

While they were together she missed one of her gloves. While looking for it she observed that Lamoreaux held it in his hand. He tossed it back on the table. When she endeavored to place it upon her hand she discovered a ten-dollar bill folded within it. When Lamoreaux returned the glove he stated, "There will be more of this, and we will take care of you, but we can't meet in public from now on." (Tr. 1101).

There is real flavor to that episode. While the jury was not permitted to hear it, the jury did hear enough from the lips of Mrs. Thorpe to clearly indicate the lack of good faith in plaintiff's entire case. The trial Judge heard that statement and yet he ruled in effect that plain-

tiff's case was bound to be accepted by the jury as clear and convincing, and that until plaintiff prevails there will be a miscarriage of justice.

Plaintiff offered other witnesses whose testimony related to isolated incidents and is of little or no significance, except for the testimony of Rulon Jeffs, an accountant who was employed by plaintiff to audit its books. He came up with some interesting sidelights. First, he had to reconstruct the accounting which had been kept by Mr. Tanner and reach his conclusions by reference to work sheets which Tanner had made from the books. One small incident revealed by Tanner would be really humorous if it did not disclose such a complete lack of good faith on the part of plaintiff. Plaintiff detailed upon exhibits the items of loss which it alleged it had sustained by the unlawful conduct of defendants. Among the items going to make up the \$200,000.00 damage was one for \$10.00 paid for the rental upon a casket. After this suit had been brought plaintiff sought to inflame the public against the defendants by garish and dramatic display in its show windows. It posted parts of its complaint in the show windows, and exhibited a casket with dry skull and magpie as supporting scenery. This was accompanied by funeral music played over their loud speaker, and by remarks made for the purpose of gaining sympathy for themselves and hostility for the defendants. For the use of that casket as a show window exhibit plaintiff paid a rental of \$10.00. It sought in this lawsuit to recover from the defendants the cost of that

morbid exhibit. Any \$10.00 item as such would be of small consequence, but this \$10.00 item was a tip off to the shady character of plaintiff's entire lawsuit (Tr. 1511, 1512).

The fabric of plaintiff's claim of conspiracy was woven around certain conversations alleged to have taken place with and concerning plaintiff and its officers. Chief reliance was rested upon two conversations between Leland B. Flint, of Flint Distributing Company, and Harold H. Bennett, Manager of Z. C. M. I. It was claimed that Flint, having withdrawn certain merchandise from plaintiff called upon Bennett and that Z. C. M. I. shortly thereafter withdrew Easy Washers from resale by the plaintiff. Plaintiff was then permitted to offer evidence of numerous conversations alleged to have been had at various times and places with salesmen of Z. C. M. I. All such conversations were offered and received to support the charge of conspiracy between Flint and Z. C. M. I. to which it was alleged other defendants had attached themselves.

The jury found there was no conspiracy. The court, by its order, acquiesced in the jury's finding that Z. C. M. I. was no part of any conspiracy. It now having been adjudicated that Z. C. M. I. was no part of any conspiracy, all hearsay received in evidence to connect Z. C. M. I. with the alleged conspiracy would, upon another trial, be incompetent and inadmissible against any of the remaining defendants. It is most earnestly submitted that a review of the entire record will show that



if Z. C. M. I. was not a conspirator, then Flint was not a conspirator. And if Flint was not a conspirator there was no conspiracy among any distributors because it is now finally adjudicated by order of the court that Graybar Electric and Salt Lake Hardware, like Z. C. M. I. are not conspirators.

Reams of hearsay testimony relating to statements made by salesmen and representatives of Graybar Electric Company and Salt Lake Hardware Company were received in evidence in support of plaintiff's theory that the three companies just mentioned were engaged in a conspiracy. It having been judicially settled that they were not so engaged, most of that testimony would be entirely incompetent upon another trial.

Plaintiff's claim for damages is based upon the theory that its business was ruined because merchandise distributed by Graybar Electric, Z. C. M. I., Salt Lake Hardware, and Flint was withdrawn. It is now determined that Graybar, Z. C. M. I., and Salt Lake Hardware lawfully withdrew their merchandise, and in all the vast record made below there is nothing to indicate that any withdrawal of merchandise by Flint ruined, or could have ruined, plaintiff's business. The record shows quite the contrary.

After Flint and the plaintiff ceased to do business with each other, plaintiff informed Harold H. Bennett that if plaintiff got the Easy Washers back it could make

a success of its business (Tr. 1166). The record also shows that Flint did not withdraw his merchandise from plaintiff (Tr. 1968, 770).

Flint refused to permit the sale of certain of his lines through the Pierpont warehouse, but he agreed to the continued sale of Zenith radios at all of plaintiff's outlets, and agreed to the continued sale of Bendix and Kelvinator products at the Main Street and State Street stores of plaintiff, respectively. Plaintiff rejected all of the Flint lines upon the ground that they no longer trusted Flint. Zenith radios were the dominating Flint merchandise in plaintiff's operation, and Flint urged plaintiff to keep them and to continue to sell them (Tr. 768, 1020, 1154). It is now adjudicated that whatever was done by Graybar Electric, Z. C. M. I. and Salt Lake Hardware was done for lawful reasons of their own, and was not done in furtherance of any conspiracy among themselves, or with Flint, or with anyone else.

Note certain of the court's instructions on this aspect of the case:

*Instruction No. 8.*

A. Plaintiff did not have the right to require the defendants, or any of them, to sell to it merchandise for resale at the Pierpont Street warehouse, or at any trade area not of the choosing of such defendant or in a location not provided for by agreement.

B. You are also instructed that a person or corporation in private enterprise has no right to refuse to sell to another person if such refusal

is made for the purpose of furthering a conspiracy or combination to fix or maintain prices or a conspiracy to cut off a person's supplies for the purpose of lessening competition.

C. The defendant distributors were at liberty (if they were not intending to aid in a combination in restraint of trade), to cancel any sales agreement and stop selling any merchandise to plaintiff whenever the sales practices of plaintiff became embarrassing to them in the operation and conduct of their respective businesses, or for any other reason personal to the defendants acting individually. Such defendant distributors had the right to determine for themselves whether further sales of merchandise of any kind to plaintiff would be to their best interests. Such a decision to stop selling to the plaintiff by such defendants, if acting independently therein, would be lawful.

D. If any defendant distributor felt that the trade practices of the plaintiff were injurious to the business of the said defendant or for any reason or for no reason at all, acting solely by itself and upon its own initiative, the said distributor could refuse to sell to the plaintiff, that is, as long as its refusal was not a part of a combination with others to act together in restraint of trade.

In his ruling upon plaintiff's motion for a new trial the court found no fault with the above instruction. When Flint authorized the sale by plaintiff of his merchandise plaintiff had no operation on Pierpont Street. When Flint discovered that his merchandise was being sold through the warehouse on Pierpont he had the right to determine for himself whether he would permit the sale

of all or any of his lines through that outlet. He determined that he could not permit his Bendix and Kelvinator lines to be so sold. At the same time he concluded that he would permit the sale of Zenith radios at the warehouse. The record is clear beyond any substantial dispute that Flint's decision in that particular did not and could not unlawfully affect plaintiff's business. It is equally clear that Flint's decision was not based upon anything done or omitted by any dealer.

An effort was made by plaintiff to prove that Flint's decision with respect to plaintiff was forced by The Paris Company which sold Flint's Kelvinator and Zenith products at retail. What occurred between Flint and The Paris Company is wholly without dispute in the record. It was the testimony of the Vice President of The Paris Company that it was the historical policy of his store to find out at all times what his competition was, and then to meet it. He was told that plaintiff was selling Zenith radios at a discount. To confirm that information he caused one of his employees to "shop" plaintiff in accordance with the established practice of retail merchants. As a result a Zenith radio was purchased from the plaintiff by The Paris Company at a substantial discount. The Paris Company did not then complain either to Flint or to the plaintiff. On the contrary, and in accordance with its usual custom, The Paris Company published an advertisement in a Salt Lake paper offering to sell Zenith radios at a discount sufficient to meet plaintiff's competition. After the advertise-

ment appeared Flint called upon The Paris Company and stated that the plaintiff did not like The Paris Company's price cutting on Zenith. The reply was that The Paris Company was simply meeting plaintiff's competition, and Flint was handed the sales ticket covering the purchase of the radio from the plaintiff. That is all there was to that conversation between Flint and The Paris Company respecting the plaintiff (Tr. 1070 to 1075).

On another occasion Mr. Dreyfous of The Paris Company, inquired of Flint whether Kelvinator products were being sold by the plaintiff through the Pierpont warehouse. Flint's reply was "No," and that was the extent of that conversation (Tr. 1068, 1069). When asked why he inquired of Flint whether Kelvinator was being sold through plaintiff's warehouse, Dreyfous replied, "I wanted to know where our competition was." (Tr. 1069).

The foregoing reflects all the record with respect to any contacts between Flint and The Paris Company, relating to the plaintiff, and yet the trial court has ruled that the jury was bound to be clearly convinced that a conspiracy existed between Flint and The Paris Company. *There never was any clear and convincing evidence of the existence of any conspiracy.* With three of the four distributors definitely and permanently out of the case, all hearsay testimony tending to tie those distributors to any conspiracy would be incompetent upon an-



other trial. It would indeed be a miscarriage of justice to subject these appellants to the expense of another trial.

### III.

(a) The record of the trial below will show that the granting of a new trial as to these appellants and each of them, was arbitrary, capricious and an abuse of discretion.

(b) The record will show that the granting of a new trial did not result from the exercise of sound judicial discretion, but rather from prejudice and bias in favor of plaintiff, or plaintiff's counsel, or against defendants, or their counsel, which prejudice and bias was shown prior to and during the trial of the case.

All of counsel for all of the defendants were of the opinion that Judge Jeppson was so far biased as to justify an application for his disqualification as trial Judge.

January 3, 1950, the day upon which the trial began, was the first day upon which rule 63(b) of the Utah Rules of Civil Procedure became applicable, and upon that day all attorneys for all defendants joined in an Affidavit of Bias, Certificate of Counsel, and Application for Disqualification of Judge (Supra. Page 24, Tr. 101-104).

The bias of the trial Judge up to and including the trial was overcome by the verdict of the jury in favor of all of these appellants, but we urge that bias persisted

after the trial, and that bias rather than sound judicial discretion resulted in the granting of a new trial as to these appellants.

Because we take this position we feel bound to assume the unpleasant duty of pointing out wherein the record supports the charge of bias upon the part of the trial Judge.

It will be remembered that plaintiff filed its complaint in February, 1949. The parties were finally at issue upon plaintiff's third amended complaint, and counsel were noticed to appear before Judge Jeppson on November 9, 1949, for a setting of the case for trial. On that day Judge Jeppson had the case before him and announced to counsel that he would have to dispose of the case promptly because he would not be trying contested cases after January 1, 1950 (Tr. 267). There was no apparent reason why he should have felt under any special duty to try this particular case. His determination to hold onto the case and try it without regard to the convenience of the parties became clearer from day to day as he had counsel before him upon pre-trial matters.

Having announced on November 9, 1949, that he would not be trying contested cases after January 1, 1950, he set the case for trial on December 12, 1949, and called a pre-trial for November 28th (Tr. 306, 307).

On November 28th, counsel for defendants moved for postponement of the trial until after January 1, 1950, and urged that December was the busiest month of

the year for merchants, and that a trial in December would impose a heavy hardship upon defendants. At that point Judge Jeppson again called attention to the change in trial judge personnel which would become effective after January 1, 1950 (Tr. 309) and indicated his determination to hold onto the case and try it before rotation in judicial personnel took him away from the trial of contested matters.

On November 28, 1949, plaintiff was permitted to make certain formal amendments to its third amended complaint and suggested its intention to make further substantial amendments. Defendants objected to the allowance of any further amendments. At that point defendants renewed their request for a continuance until after January 1st. Such request was again overruled (Tr. 308 to 330). A further pre-trial hearing was called before Judge Jeppson for December 5, 1949. On that day plaintiff proposed substantial amendments to its third amended complaint as amended. Defendants objected to the allowance of such amendments. The Judge then ordered plaintiff to serve its proposed amendments upon defendants and shortened the time to object to the amendments to three days. At that time the Judge moved the trial date from December 12, up to December 27 (Tr. 94). Again defendants urged a postponement of the case until after the first of the year, and again the motion was denied.

On December 9, 1949, Judge Jeppson, over the objection of the defendants, allowed further and substan-

tial amendments to plaintiff's third amended complaint as amended. At the same time he denied the motion of Graybar Electric Company and Z. C. M. I. to be allowed to counterclaim against the plaintiff (Tr. 97). Having, on December 9th, allowed substantial amendments to plaintiff's third amended complaint, as amended, Judge Jeppson, upon his own motion, and without any showing whatsoever, made his order requiring all defendants to plead to plaintiff's third amended complaint, as amended, before December 16th, 1949 (Tr. 393). This was a shortening of the time allowed by law without any showing whatever of any urgency, except the Judge's determination to try the case.

On the afternoon of the last day of the shortened time, Z. C. M. I., The Paris Company and Reed Bigelow filed their several demurrers to plaintiff's third amended complaint as amended. After the court had permitted the plaintiff to make the amendments to its third amended complaint at the pre-trial hearing on December 16, 1949, Harold R. Boyer, counsel for Leland B. Flint and Flint Distributing Company, two of the defendants in the case, made a motion that the case be stricken from the trial calendar upon the ground that the same was not then at issue. This motion was joined in by the other defendants and was summarily denied by the Court (Tr. 404, 405). Paul H. Ray, one of counsel for defendants, was engaged before a state commission on the day those demurrers were filed. He appeared in Judge Jeppson's court just before 5:00 o'clock P.M., the

usual time for evening recess. Court was then in session. At twenty minutes to six Judge Jeppson called up for argument the demurrers which had just that afternoon been filed. Ray stated to the court that he was entitled to the statutory notice calling up matters for argument. The court then announced that the demurrers would be argued then and there or would be forthwith overruled without argument. The following excerpt from the record illustrates the bias of the court:

“MR. PAUL RAY: I was not able to get here until late. I was at a hearing at the Capitol till four o’clock. I did not hear the order your Honor made which brings these demurrers on for hearing at this time, without notice.

“THE COURT: I entered an order that they be heard at this time, because the time before the trial is so short it would almost necessitate a continuance of the case to get them heard.

“The only objection I have heard is that counsel has not had time to prepare the arguments.

“MR. PAUL RAY: Well, I want to make the record as clear as I can. I don’t think that counsel has to give any reasons why he is entitled to stand upon his statutory rights; and before we make any presentation of this demurrer I want to be understood that it is done upon the order of the court; that if it is not done now, there would be no other time to do it.

“THE COURT: The order of the court is that the demurrer be argued at this time, and the court will be prepared to rule on it when you complete your argument.



“MR. PAUL RAY: The defendants, Paris Company, Z. C. M. I. and Bigelow take exception to the order of the court.

“So that my record may be quite complete, I call your Honor’s attention to the fact that the statutory time has not been given us to plead, and there is no evidence or no showing of any notice from plaintiff’s counsel.

“The statute gives us ten days to plead. Your Honor shortened that, over our objection. It is now twenty minutes to six in the afternoon, which is forty minutes beyond the customary time to hold court.

“No showing has been made that there is any emergency in this case; no showing made in this case that anybody will suffer if the case is not tried on the 27th of December. There is nothing in this record which indicates that the defendants’ rights should be sacrificed for the convenience of plaintiffs.

“I will present what we have to say, in connection with this demurrer, under duress of the court’s order which deprives me of my time to plead, or the statutory notice to which I am entitled.

“THE COURT: You may proceed. I think that is clear.

“MR. PAUL RAY: I did not hear what your Honor said.

“THE COURT: You may proceed. I think that is clear.

“MR. PAUL RAY: I am particularly interested, if the court please, in their allegations that

except for a conspiracy, this firm would have done a volume of business, four years from now—

(Argument on demurrer.)

“THE COURT: The demurrers are overruled.” (Tr. 434, 435).

All pending motions were on that day overruled and denied, and all defendants again joined in a motion for continuance upon the ground that the case was not then at issue. Motion for continuance was denied, and again Judge Jeppson, upon his own motion, shortened the time within which defendants might answer plaintiff's third amended complaint, as amended. Instead of allowing the statutory ten-day period, he reduced the time to answer to three days and in some cases four days from the time the plaintiff's amendments were filed (Tr. 99).

Thereafter counsel for plaintiff and defendants stipulated for a postponement of the trial from December 27, 1949, to January 3, 1950 (Tr. 448).

When court opened on January 3, 1950, all of counsel for defendants presented their affidavit for disqualification in accordance with Rule 63(b) of the Utah Rules of Civil Procedure. The court criticized (Tr. 456) counsel for not filing the affidavit earlier, although he well knew that that was the first day upon which Rule 63(b) was available and applicable.

The court then referred to that portion of the affidavit in which it is stated that “normally, by reason of the rules and practices of the Judges of the Third Judi-

cial District Court in and for Salt Lake County, State of Utah, certain cases would, as of this date, be assigned before an entirely different Judge, and that as of this date the said Honorable Joseph G. Jeppson would not have assigned to him in regular course the trial of controverted matters," and having referred to such statement the Judge characterized it as not true (Tr. 450). He made that charge of falsehood against all the defendants' counsel, notwithstanding he had stated from the bench on November 9th, and again on November 28th, that after January 1st he would not be available for the trial of contested matters (Tr. 267, 309). Judge Jeppson then ignored the provisions of Rule 63(b), and instead of certifying a copy of the affidavit to another judge to determine its legal sufficiency, as required by the rule, he reviewed the affidavit himself and held it insufficient because (1) it did not show the availability of another judge to handle the matter (2) because of expense to the County (3) and because nothing appeared in the affidavit which could not have previously been called to the Court's attention, and (4) because the application of Rule 63(b) would not be feasible and would work injustices under Rule 1(b). Whereupon the motion for disqualification of judge was denied (Tr. 460). The right to disqualify the judge is not subject to any such limitations as those applied by Judge Jeppson.

The prejudice of the court appeared again from time to time during the trial. During the opening statements of counsel for defendants, counsel was summarizing what

the evidence would show and was about to mention the amount of plaintiff's prayer for damages when the court not only stopped counsel and refused to permit him to mention the amount of plaintiff's prayer, but criticized counsel in the presence of the jury for attempting to mention the amount prayed for (Tr. 530).

Further incidents during the trial indicated the prejudice of the court. Mr. Flint had been testifying to various conversations, to which no objection had been made. At a point in his testimony Mr. Roberts made an objection and the court made the following comment:

“The motion is granted. As given, his testimony in most cases has not been in the line of conversation. It has been mostly in the way of conclusions. There has not been objection heretofore, but now that objections have started you better caution the witness to be sure his testimony is different to what it has been.”

Mr. Gustin who was examining the witness replied:

“I appreciate your Honor's suggestion and your Honor's assistance.” (Tr. 1852, 1853).

At another place in Mr. Flint's testimony, upon objection of Plaintiff's counsel the court said:

“The motion is granted. Mr. Flint, the court does not want to caution you again to confine that to conversation.” (Tr. 1855).

During the trial of the case it developed that one of the jurors was not a qualified juror. Following that discovery the defendants moved the court for an order of mistrial. While the Judge was considering his ruling

upon that motion he asked counsel for defendants if they would renew their motion to disqualify him if a mistrial were granted and a new trial ordered. Counsel for defendants informed the Judge that such motion would be renewed in the event of a new trial. Judge Jeppson then denied the motion for mistrial (Tr. 1248, 1249, 1257).

### CONCLUSION

Plaintiff's case was without merit. It was not established by clear and convincing evidence and the order setting aside the verdict as to these appellants was an abuse of discretion and beyond the power of the trial court.

WHEREFORE, it is respectfully submitted that the order complained of be reversed, and the verdict of the jury be reinstated.

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