

1951

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

Utah Supreme Court

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## Recommended Citation

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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 BIGE-  
LOW; THE PARIS COMPANY, a corpo-  
ration; E. M. ROYLE COMPANY,  
INCORPORATED, a corporation, and  
ROBERT NEVINS,

*Defendants and Appellants.*

Civil No. 7595

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INTERMEDIATE APPEAL FROM THE DISTRICT COURT OF THE  
THIRD JUDICIAL DISTRICT, IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH

---

**FILED** RESPONDENT'S BRIEF

JUL 27 1951

WARWICK C. LAMOREAUX,  
Clerk, Supreme Court, Utah

RAWLINGS, WALLACE, BLACK, ROBERTS AND BLACK,  
*Attorneys for Respondent*

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**RESPONDENT'S BRIEF**

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WARWICK C. LAMOREAUX,

RAWLINGS, WALLACE, BLACK, ROBERTS AND BLACK,

*Attorneys for Respondent*

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## PRELIMINARY STATEMENT OF FACTS

The jury below returned a verdict against respondent of no cause of action. On motion made by plaintiff below, the trial court granted a new trial as against the several appellants, the latter appealing the order granting the motion. This appeal is to test the right of the trial court in granting the new trial.

Appellants statement of the facts is extremely one-sided. On a question arising in an appellate court as to the jurisdiction and use of discretion by a trial court as to the latter's disposition of a motion for a new trial, the sole inquiry of the appellate court is whether there was any competent evidence which would support a verdict in favor of the moving party.

*Stack v. Kearnes*, 221 P2d 594.

*King v. Union Pacific Ry.*, 212 P2d 692.

The facts as hereinafter stated are set forth to meet the test of the Stack, and the King cases. An elaborate review of all of the lengthy facts is thus not required.

## STATEMENT OF FACTS

Respondent Uptown Appliance and Radio Company, Inc. was formed in November 1947 to do an appliance business and was operated by four men, three of whom had had business experience. (R. 681) The fourth was a certified public accountant. (R. 1412)

They opened what the distributor for several western states of RCA products called a beautiful store at 32 South Main Street in Salt Lake (R. 535) and commenced business with several lines of appliance goods. (R. 686, 689, 695, 696, 711, 720) Their business grew rapidly and by midsummer of 1948 it was the largest RCA account in the territory. (R. 539) The defendant Flint stated to the witness Earl it was one of his best accounts. Respondent did a gross business during 6 months of 1948 of almost \$225,000.00. (Exhibit AAA) Until the conspiracy got under way in December 1948 the company always paid its bills. (R. 541)

In November 1948 respondent opened a store on State Street called Radio City (R. 714) and also a warehouse outlet on Pierpont Street. (R. 722) From early summer until December of 1948 some dealers, including the defendant dealers herein, became concerned about respondent and its prices. (R. 748, 750, 981, 986, 1066, 1068, 1070) Respondent sold goods at reduced prices. Its warehouse price-discount operation was particularly odious to defendant Royle, (R. 1999) Mr. Bennett of ZCMI, (R. 985) and of concern to defendants Graybar and the Paris Co. (R. 772, 1068) Defendant Flint had conversations with Mr. Bennett and Mr. Dreyfous of Paris Co. in December, at the time of respondent's difficulties, in which both Bennett and Dreyfous expressed concern or dissatisfaction about price policies of respondent. (R. 1069, 935)) Defendant Nev-



ins, operating the leased appliance departments of ZCMI and Keith O'Brien Co. complained many times to Bennett and others about the prices and policies of respondents "across the street" (R. 982)

The Pierpont warehouse was an inexpensive outlet located in relatively unimproved quarters in the warehouse district (R. 729) of Salt Lake City, and merchandise was sold at cost plus a mark up reflecting sales expense plus a margin for profit, passing the savings on to the consumer. (R. 733, 743) Arrangements were made with large groups of consumers through their leaders to purchase. Contacts were made by respondent with Geneva Steel employees association (R. 730), Utah Oil, and Wasatch Oil employees (R. 731), Safeway employees, Navy Base and Hill Field employees, the Teamsters Union, and the Utah Federation of Credit Unions. (R. 735) For a period of seven weeks prior to the working out of the conspiracy, the Pierpont store flourished. (R. 744)

Ed Moreau, a department head of Flint, warned respondent in November 1948 the latter were to be "shopped," (R. 750) and on November 8th or 9th the Paris Co. made from Uptown a purchase of a Zenith radio at a discount. (R. 1149, 2149, Ex. CCC) The sales slip of the "Rammelmeyer purchase" was given by Dreyfous of the Paris Co. to Flint. (R. 1876, 1075) Flint's man Moreau immediately confronted respondent with the sales slip stating Flint was in difficulty



with the Paris Co., that a meeting was required by Flint who supplied respondent with considerable of its merchandise. (R. 1012) Two days later, December 12, at the meeting held at Flint's, defendant Flint admonished respondent about its policy of cutting prices below those generally followed, stating that if it didn't quit, it would be destroyed in 90 days, its lines taken away, its credit connections destroyed, that dealers were even then meeting to decide the fate of respondent. (R. 1015, 756)

On December 15th representatives of defendants Flint and Graybar at different times called on respondent and dicussed the objectionable price methods of respondent's merchandising. (R. 760, 762)

On December 16th Flint's represtenatives called, advising of the cancellation of all Flint lines of merchandise supply except two, and by Christmas virtually all of Flint's merchandise had been returned. (R. 768, 1872, 984) When Flint had shown his hostility to appellant, threatening its downfall and cancelling Bendix washers, Kelvinator refrigerators, and Fowler water heaters, respondent had no confidence to continue with its Zenith and Columbia lines. (R. 930)

On December 17th defendants Flint and Nevin went to Bennett of ZCMI and told him of the Pierpont store, and its methods of discounting prices. Flint said Bennett, as head of a retail store, should know what was

really going on. (R. 985) Flint testified he told Bennett he had terminated his sale of merchandise to respondent; said he: "I am not going to sell to them." (R. 1872, 985)

Within a few days Bennett caused a cancellation of business relations with respondent, who had sold a very large volume of Easy washers supplied theretofore by ZCMI. (R. 773, 986) The representatives of ZCMI, in relating the circumstances of the cessation of business, stated that Flint was the source of the trouble. (R. 733) All ZCMI merchandise had been returned by January 8th 1949, (R. 779)

On December 20th a representative of defendant Graybar, Mr. Searle, told respondent that all his dealers were complaining about them, and that the Pierpont store must be closed or there could be no more supplying of Hotpoint merchandise. (R. 772)

On December 22 or 23, Graybar's man advised respondent Nevins had called the manager asking if he intended to continue to sell Uptown (R. 774, 2080) reporting further that Standard Supply had made the same current inquiry, the latter selling Uptown radio instruments and records.

During this time respondent employed a coupon book for the sale of phonograph records whereby a purchaser paying \$20 cash for a book received \$25 worth of records. (R. 993, 780 A) During this time defendants

Royle, Bigelow, the Paris Co., and Nevins all complained to the RCA Victor distributor about the practice, and later had a meeting in the Hotel Utah which included that subject for discussion. (R. 991, 591, 593, 595, 597) All these dealers put pressure on the RCA distributor to either discontinue selling records to Uptown or he would have to buy back their record inventory which entail about \$80,000.00. (R. 557, 559, 561, 595, 1025) As an alternative, the dealers would advertise Victor records at great discount, the Paris discount being possibly 40%. (R. 596) The Victor distributor was told this would break him. (R. 595)

Concurrently Uptown bought Decca records from defendant Salt Lake Hardware; and defendant Royle telephoned McKee, the representative of Salt Lake Hardware, asking if the company was aware that Uptown was also using the coupon book to sell Decca records at a discount. (R. 944 A) Defendant Nevin's man Crowton called McKee also. Because of dealer pressure, the RCA distributor induced Uptown to cease to use the coupon book. (R. 592)

On January 4th the department head of Graybar called on Uptown, stating he had been that day at one of the largest Hotpoint dealers in town; that the only way he could leave Hotpoint in Uptown was for Uptown to conform to retail prices, and that respondent could sell no merchandise below the suggested retail price. (R. 1159) The Pierpont store had been closed because of

the prior demand of the Hotpoint representative (Graybar) and its inducement to quit the warehouse operation, (R. 772).

On January 4, 1949, Jules Dreyfous decided to call a meeting of the dealers to discuss Uptown's price policies. (R. 1077) He made arrangements for the meeting at Hotel Utah, and called defendant Bigelow requesting the latter to invite certain other dealers (R. 1078) which the latter did. Dreyfous personally invited Bennett of ZCMI, who attended to represent ZCMI and defendant Nevins. (R. 989) On January 5th the meeting was held. Ten persons were present including all of the dealer defendants. (R. 991) Dreyfous opened the meeting explaining that Uptown was selling records at a discount, and was price cutting. (R. 992) Radio instruments were discussed, and Mr. Bennett explained that he ceased to sell Easy washers to Uptown; (R. 992) there was talk about respondent violating a fair trade agreement on Victor records. Lawyer Nebeker was called in by Dreyfous who explained the fair trade law, observing that the dealers as a group should do nothing about the matter as it would have the appearance of a "*conspiracy*." (R. 997) Someone was delegated to call on the RCA distributor Earl. (R. 997)

Dreyfous called on the RCA distributor immediately after stating to him that Uptown was selling records and Zenith radio instruments at a discount and that he was going to do something about it. (R. 598) He stated

that “other dealers feel the same way about it.” “You have my ultimatum; you either *take the Uptown Appliance Company out of business*, or I am going to discount and sell the RCA Victor records that I own” and the discount would not be any 25%. (R. 597, 598) Defendant Bigelow testified Dreyfous was ready to run an ad discounting the records 40%. (R. 563)

Immediately after the meeting, Bennett sent a shopper to Uptown who purchased records at a discount, (R. 999) sending them and the evidence to defendant Nevin’s department for keeping. (R. 1000) After the shopping girl told Bennett she could also purchase Decca records at a discount, Mr. Bennett immediately telephoned Mr. Wheeler, President of the defendant Salt Lake Hardware advising him of the discount facts. (R. 1001), further stating Uptown’s practice was “*disrupting*.” (R. 1910) Mr. Wheeler testified respondent’s price cutting “upset the market.” (R. 1914) Decca records were not fair-traded (R. 1914); Victor were. Soon thereafter Salt Lake Hardware acted in double fashion. (Since the trial the U. S. Supreme Court has thrown out as unlawful the type of fair trading practice involved in this case. *Schwegmann Brothers v. Calvert Distillers*, 340 U.S. 925, 71 S. Ct. 491

At this time, Mr. Ellis Wheeler treasurer of Salt Lake Hardware, telephoned Mr. Van Winkle, office manager of Strevell-Paterson Finance, with whom Uptown had done over \$100,000.00 of finance business, and asked

Van Winkle if he knew "that to promote their sales that Uptown Appliance was cutting prices." He then further stated that "it was his opinion that in view of the fact that appliance merchandise was still critical during that particular time, that it was unwise from a merchandising standpoint, to cut prices." (R. 964)

On January 10th, defendant Bigelow, operating the leased appliance department of Auerbach's telephoned the RCA distributor three times importuning him to cease to sell Uptown, stating that the dealers had all been together to force him not to sell Uptown. (R. 1023) He stated that the process to be followed by the dealers would put Earl the distributor out of business. (R. 1025)

On January 11th Bennett of ZCMI was called upon by defendant Flint who stated he had heard the ZCMI had taken Easy washers out of Uptown; Flint wanted to know if it was true and when it was done. (R. 998) Bennett related to Flint the facts, stating he had deprived Uptown of Easy washers a few day prior. (R. 1880)

On January 12th, Salt Lake Hardware advised Uptown that they would be sold no more Decca records, (R. 780) and the existing stock was immediately taken back. (R. 783) Just prior thereto Mr. McKee of Salt Lake Hardware had had a conversation with Nevin's department head in ZCMI about respondent's price cutting, and McKee had assured that department head "we will work the matter out to the best of everyone's feel-



ings.” (R. 956) On another occasion at about this same time Nevins phoned Mr. Price, salesmanager of Salt Lake Hardware and objected to Uptown having Decca records to sell. (R. 783)

On the same January 12th Mr. Earl and the factory representative from RCA Victor, Mr. Bullock, visited all the record dealers in Salt Lake to discuss Uptown price cutting. Mr. Dreyfous of Paris Co. stated to them that “he would absolutely not talk to us on any kind of compromise basis; that either we *take out the Uptown Appliance Company* or we could buy back his stock.” (R. 557) Defendant Royle stated that as long as Earl sold to Uptown, he wanted no dealing with Earl, and that Earl could buy back his stock. (R. 559) Defendant Nevins stated: “As long as those guys across the street are in business I am not interested in doing business with you on RCA Victor records.” (R. 561) Defendant Bigelow of Auerbach’s stated he knew the Paris Co. was to run a 40% discount add on Victor records and this would hurt Earl’s business. (R. 563) Just two days before Bigelow had importuned Earl by phone to cancel Uptown’s buying privileges, (R. 1023) stating the dealers had all been together.

On January 13th the RCA Victor distributor determined to cease selling records to Uptown and advised all the defendants dealers to that effect, each of whom expressed approval for his action, (R. 601, 605, 606) notwithstanding the account to be cancelled



was the best account in the whole territory. (R. 539)

On January 20th the supplier of Capitol, Mercury and London records and Stromberg-Carlson radios refused to sell Uptown any more merchandise.

On February 7th Graybar announced their unwillingness to sell respondent more merchandise, even for cash (R. 788, 790, 793). Graybar knew of the loss by plaintiff of all the other sources for merchandise, and had been told the loss of Hotpoint would mean the end of respondent's business. (R. 790, 2075) Defendant Graybar stated as the only reason for the decision, the financial condition of Uptown, with the reply from the latter that their credit position was much sounder than when Graybar had started to sell to them initially. (R. 792) When Hotpoint was removed, Uptown had no more appliance merchandise and started to liquidate (R. 795), and dispose of its fixtures, lease, trucks, etc.

In the last six-month period before the conspiracy began to reflect its effect, respondent did a business of almost a quarter of a million dollars. (Ex. AAA)

Each distributor-defendant put evidence in the record that Uptown had a perfect right to sell at whatever prices it chose: Uptown "could sell at any price they saw fit." (R. 1915) Flint testified he had no reason to disapprove the merchandising policies of Uptown, (R. 1873) yet he later stated he was opposed

to the Pierpont store, (R. 1883) repeating it to Bennett. (R. 985)

## STATEMENT OF POINTS

1. The trial court had jurisdiction to grant a new trial to respondent.

2. A conspiracy between the defendants was fully proven at the trial.

3. The granting of a new trial was neither arbitrary, capricious, nor an abuse of discretion but was based on a sound exercise of legal authority.

## ARGUMENT

### I.

#### THE TRIAL COURT HAD JURISDICTION TO GRANT A NEW TRIAL TO RESPONDENT.

The principal argument of appellants brief beginning at page 24 is that the trial court, by an invalid usurpation of power, granted a new trial to respondent. Their argument is bottomed on the proposition that the trial court did not ascribe reasons within the precise words of the new rules, and the reasons given are beyond the pale and without power to effect the new trial. This argument is wholly without merit.

It is also submitted that the last and most authoritative decision of this court is based on a record where the court below granted a motion for a new trial without giving *any* reason therefor.

*Stack v. Kearnes*, 221 P2d 594.

In the King case, post, the appellant quarrelled about the grounds upon which the lower court had granted the motion for a new trial, but the court paid no heed to such an argument.

In a line of cases hereinafter treated, the doctrine is aptly stated that the motion for a new trial will not be disturbed if it could have been properly granted upon any of the grounds asked for by the maker of the motion.

We will take the position here that the words used by the trial court below are of no consequence; and that the trial court in granting the motion used appropriate words within the meaning and import of the new rules.

Respondent, in moving for a new trial, cited 22 reasons therefor including those required by the rules and those stated by the trial court. (R. 146, 161)

#### QUESTION DECIDED BY UTAH SUPREME COURT

The Utah rules of Civil Procedure (Rule 59) set forth the essential terms and conditions under which a new trial may be given. Said rules follow substan-

tially the code which has been in effect in Utah for many years, and which were taken almost bodily from the California Code of Civil Procedure.

*King v. Union Pacific Ry.*, 212 P2 692.

This court in the *King* case and later in *Stack v. Kearnes*, 221 P2 594 reviewed the law on the "breadth of the trial court's discretion in granting a new trial" and found it had a wide discretion.

To review exhaustively these recent cases would be a needless expense here. They constitute a profound utterance clearly announcing principles found to exist in Utah and California law, as well as the roots of the Common Law for centuries. The *King* case reviews the Utah decisions and calls attention to cardinal rules to be here followed:

In one of its earliest cases this court announced that where the testimony is conflicting, the granting or refusing of a new trial rests peculiarly within the discretion of the trial court.

*Newton v. Brown*, 2 Utah 126.

Where there is a substantial conflict of evidence on a material issue we will not review the discretion exercised by the trial court in granting a new trial.

*Davis v. Utah Southern Ry. Co.*, 3 Utah 218.  
2 P. 521.

Again in *Utah State National Bank v. Livingston*, 69 Utah 284, 254 P. 281, this court ap-

plied the same rule and upheld a trial court which had granted a new trial where the evidence was conflicting upon an essential issue of the case.

*Thompson v. Bown Live Stock*, 74 Utah 1, 276 P. 651.

This court then reviewed in the King case the California decisions which are carried automatically into our law with the enactment of the California civil code. This court said in that analysis:

From an examination of the California decisions, it is apparent that the trial courts of that state possess a wide latitude in granting motions for new trials . . . .

In California it is not an abuse of discretion for a trial court to grant a new trial upon the grounds of insufficient evidence to justify the verdict:

(1) Where there is a conflict in the evidence or where there is substantial evidence which would support a judgment in favor of the party asking for a new trial,

(2) unless a decision in favor of the moving party would have no legal support in the evidence,

(3) when the evidence is conflicting upon the issues to be decided since the trial court is "at liberty to find either way" on the motion; also when the evidence is not conflicting, and all the proof seems to be favorable to one or the other of the parties litigant, since the trial court must determine the question as to the

“probative force or evidentiary value of the testimony”,

(4) even where there is sufficient evidence to support the judgment on appeal had the new trial been denied. (Note: the following are the cases cited in the King decision for the above doctrines:

*Union Oil v. Hane*, 34 Cal. App. 2d 689, 94 P2d 387

*Roma Wine v. Hardware Mutual Ins.*, 31 Cal. App. 2d 455, 88 P2d 260

*Erickson v. Grady*, 119 Cal. App. 596, 6 P2d 1002

*Laverne v. Dold*, 17 Cal. App. 2d 180, 61 P2d 497

*Kehlor v. Satterlee*, 37 Cal. App. 2d 116, 98 P2d 759

*Glascock v. Watters*, 136 Cal. App. 713, 29 P2d 434

The *Rose v. Carter* case, 29 Cal. App. 2d 191, 84 P2d 174, cited with approval in the King case, is an example of the treatment needed in the case at bar, where defendant got a verdict. The appellate court observed the evidence against said defendant was but slight. The court further stated that the defendant's appeal was by no means unjustified or without merit, stating that there was

“a generous abundance of evidence in support of the jury's verdict. Indeed, in the light of the record, any other verdict could scarcely have been expected. Nevertheless the law is well settled that insufficiency of the evidence to justify a verdict is a ground for a new trial which is

peculiarly within the discretion of the trial court and its order either granting or denying a new trial will not be disturbed on appeal, unless it appears there was a manifest abuse of discretion.”

With but “slight evidence” against the defendant he was required to undergo a new trial. In the case at bar, the court will be impressed, to say the least, with respondent’s evidence that there was prima facie evidence of a conspiracy, whether the jury believed it or not.

*Prout v. Perkins*, 69 P2d 194.

The most recent declaration of this court on the question of the discretion of the trial court to act on a motion for a new trial is *Stack v. Kearnes*, 221 P2d 594; there the trial court goes one step further than in the King case and grants the motion without giving any reason for so doing, a practice evidently unanimously approved by this court. The opinion observed, as to the holding in the King case:

We held that where there appears in the record competent evidence which would support a verdict in favor of the party moving for a new trial, there is no abuse of discretion on the part of the trial court in granting a new trial upon that ground.

Many cases have held that where there is substantial competent evidence, the trial court is fully authorized, and indeed it is its duty to grant the



motion, if in its judgment justice has not been done by the verdict.

But here we have our own Utah court going further in 1950 and approving the action of the trial court in the absence of any reasons given by the trial court in granting the motion, and when there is but "competent evidence," to say nothing of the standard of substantial, or uncontradicted evidence. Certainly the trial court had jurisdiction.

In the well-reasoned case of *Campanella v. Campanella*, 269 P. 433, 1928, the supreme court of California lays down the important rule respecting the "general" language used by the trial court in the case at bar, as distinguished from specific words contended for:

It is the well established rule of this court that when the order of the trial court in granting a new trial is general in its terms, it will be affirmed if it could properly have been granted upon any of the grounds upon which the motion for it was predicated. (Cases.) It is an equally well-settled and long-established rule of this court that an order granting a new trial will not be disturbed upon appeal, except upon a showing of clear and manifest abuse of discretion on the part of the trial court in respect to granting the same.

*Scott v. Times-Mirror Co.*, 174 P. 312

*Weiseer v. S. P. Co.*, 83 P. 439, 148 Cal. 426

*Morgan v. J. W. Robinson Co.* 107 P. 695

In the *Morgan v. J. W. Robinson* case, *supra*, the trial court was unanimously affirmed by the California supreme court where the lower court had used the general language that the new trial “is ordered to be and the same is hereby granted;” thus no reason was given, as in the *Stack* case. Note also in the *Weiseer* case, *supra*, the supreme court of California stated:

It is the duty of the trial court to grant a new trial on such ground (insufficiency of evidence) whenever the judge is convinced that the verdict is clearly *against the weight of the evidence* . . . (Italics added.)

In the *Scott* case, *supra*, the motion was made as in the case at bar on the grounds stated in the statute, but the motion was granted by the trial court in general terms: The Supreme Court of California stated:

It is the well-settled rule of this court that when the order of the trial court in granting a new trial is general in its terms it will be affirmed if it could properly have been granted on *any* grounds upon which the motion for it was predicated. (Cased cited.)

The specious nature of appellants argument of lack of jurisdiction of the trial court to grant a new trial is well illustrated by reference to the practice in Idaho where the same statutory reasons for giving a new trial are in effect as in Utah and California. 1 *Idaho Code Annotated* 1932, 485, and 2 *Idaho Code* 656.

The Idaho Supreme Court in *MacDonald v. Ogan*,

104 P2d 1106 took occasion to state, in a case where the reason for the trial court granting a new trial were not elucidated:

This appeal illustrates the great importance of trial courts specifying the grounds on which a new trial is granted. We have frequently pointed out the desirability of such a practice and recommended its adoption by the courts.

Where a motion for a new trial has been made on several grounds and the trial court grants the same without designating the ground upon which the order is made, the order will not be disturbed on appeal if it could have been granted properly on any ground mentioned in the motion.

*Gray v. Pierson*, 64 P. 33, 7 Idaho 540

*Penninger Lateral Co. v. Clark*, 117 P. 764, 20 Idaho 166

Respondent here asked the trial court for a new trial stating twenty-two grounds therefor, including the grounds of the rule of "insufficiency of the evidence" and the verdict is against the weight of the evidence; (R. 146) thus the decision of the trial court is supported by the best of authority.

#### TRIAL COURT'S LANGUAGE ADEQUATE

It is submitted that there is great and undisputed authority for the proposition that the language used by the trial court was substantially within the meaning

and powers set forth in the new rules. The trial court stated that the "verdict is against the weight of evidence." The new rules, 59-(6), state a new trial may be had based on "insufficiency of the evidence." It is further submitted that the two expressions mean one and the same thing.

The terms "insufficiency of the evidence" require an analysis by the trial court of the evidence, and the weight to be given it. Such an inquiry forces consideration of the weight of the evidence. The terms are reciprocal. Indeed, the United States Supreme Court said in a foundation decision many years ago, since widely followed, of the words "against the weight" as being within the terms "insufficient evidence."

*Metropolitan Railroad v. Moore*, 121 U.S. 558.

The court in the same case further stated, in construing the meaning of the words, and the powers of trial courts in applying them to the problem of granting new trials:

In many cases it might be the duty of the court to withdraw the case from the jury, or to direct a verdict in a particular way; and yet in others, where it would be proper to submit the case to the jury, it might become its duty to set aside the verdict and grant a new trial. That obligation, however, is the result of a conclusion of fact, and in such cases the ground of the ruling is, that the verdict is not supported by sufficient evidence, because it is against the weight of the evidence . . . . it is admitted, also,

that by the construction placed upon the language contained in § 804 by the courts of New York, it includes motions to set aside a verdict against the *weight of evidence*, as within the phrase 'for insufficient evidence'. This was the very point determined in the case just referred to of *Angeo v. Dunca*, 39 N.Y. 313.

In *Angeo v. Dunca*, supra, decided by the New York Supreme Court in 1888 that court lays down the solid and well-followed rule that there is no want of power in the judge presiding at the trial to set aside a verdict rendered by a jury, when it is palpably against law, or wholly and clearly *unwarranted* by the evidence. The appellate court held that a code provision of that state granting a new trial for insufficient evidence, among other reasons, did not by any implication limit or abridge the power which would exist had the code provision not been enacted. In other words the old New York decision is the basis for the generalization used by many modern texts to the effect that:

Power or authority to order a new trial is in its inception a common-law right, and is inherent in all courts of general common-law jurisdiction. . . . A statute which purports to limit this power, being in derogation of the common law, should be strictly construed. Nor will a statute governing new trials be construed to restrict the authority of the court unless the intention of the legislature so to do is plainly manifested. 39 Am. Jur. 34

*Inland and Seaboard Coasting Co. v. Hall*, 124  
U.S. 121

The California Supreme Court has several times held that insufficiency of the evidence means want of evidence as well as contrary to the weight of the evidence.

*Campanella v. Campanella*, 269 P. 433

*In re Bainbridges Estate*, 146 P. 427

*Southern Pac. Land Co. v. Dickerson*, 204 P. 576

*In re Caspar's Estate*, 155 P. 631.

In the *Bainbridge Estate* case, supra, the supreme court of California clearly construed as similar the meaning of the terms here under review:

In the determination of a motion for a new trial, the verdict should be set aside if, in the opinion of the trial court, it is not supported by sufficient evidence; and this is equally true whether there be an absence of evidence or that the evidence received, in the individual judgment of the trial judge, is lacking in probative force to establish the proposition of fact to which it is addressed. This is the meaning of the terms "insufficiency of evidence" and "contrary to evidence."

The narrow construction argued by the defendants to the effect that the trial court must find for a new trial specifically within the words of the new rules is further made ridiculous by the following quotation appearing in the same *Bainbridges Estate*, supra, where



the same court quotes from an earlier California decision by the same court as follows:

While it is the exclusive province of the jury to find the facts, it is nevertheless one of the most important requirements of the trial judge to see to it that this function of the jury is intelligently and justly exercised. In this respect, while he cannot competently interfere with or control the jury in passing upon the evidence, he nevertheless exercises a very salutary supervisory power over their verdict. In the exercise of that power he should always satisfy himself that the evidence as a whole is sufficient to sustain the verdict found, and, if in his sound judgment it is not, he should unhesitatingly say so, and set the verdict aside.

In the case at bar, the trial court was not at all satisfied by the verdict as rendered. In no uncertain words it has so stated. To the court who viewed the witnesses, heard and saw the entire panorama of this most interesting and significant trial, his feelings were so strong as to compel him to state that “a new trial is *required* to prevent a miscarriage of justice.” Such strong language is certainly not to be lightly looked upon. The evidence was full. It was contested. On the question of the existence of a conspiracy, it is evident that the court felt there was strong evidence upon which a jury could well find for the plaintiff’s even under the high standard of evidence required under its instructions. He was not satisfied that the jury had properly understood and acted upon the evi-



dence. It was clearly within his sound discretion and duty to grant a new trial under the timely motion made by respondent.

In *Weiseer v. Southern Pac. Ry.*, 83 P. 439, the California Supreme Court, in upholding the granting of a new trial against a verdict for plaintiff awarding substantial damages, observed not only the trial court had used but general language in granting the new trial but specifically used the very words used by the trial case in the case at bar as follows:

It is established by numerous decisions of this court that, although there may be some conflict in the testimony, it is the duty of the trial court to grant a new trial on such ground, whenever the judge is convinced that the verdict is clearly against the weight of the evidence, and his action in that regard will not be disturbed unless it is apparent that there has been an abuse of discretion.

Attention is called to the statutory authority in California during all of the times the above cited cases were being decided, almost exactly similar to those provisions stated in the new Utah Rules. Yet the California court has used the expression "weight of the evidence" almost interchangeably with "insufficiency of the evidence." Clearly the trial court in the case at bar had the same reasoning in mind and that with good and sufficient legal authority.

In *Southern Pac. Land Co. v. Dickerson*, supra, the court held:

. . . the code of Civil Procedure authorizes a new trial upon the ground of "insufficiency of the evidence to justify the verdict" which has been interpreted as applying not only to cases where the verdict is contrary to the weight of the evidence, but where there is no evidence to support the verdict. (Citing *Estate of Bainbridge*, supra, and *Estate of Caspar*, 172 Cal. 147. 155 Pac. 631.

In *Re Caspar's Estate*, supra, notwithstanding there was in existence the same civil rules governing the granting of new trials, the Supreme Court of California found in 1916 as follows:

In this state, though the evidence pro and con upon the issues be substantial and conflicting, it is the duty of the trial judge to set aside a verdict at least once if his conviction is that that verdict is *contrary to the weight of the evidence*. *Emmons v. Sheldon*, 26 Wis. 648

Appellants' brief at page 27 states "there is no authority for setting aside a verdict because the trial judge thinks it is against the weight of the evidence." Nothing could be further from the truth.

This court's opinion in the King case gives with approval a long analysis of *Nelson v. Angelus Hospital Assn.*, 23 Cal. App. 2d 71, 72 P2d 169 quoting at length. Both expressions used by the trial court in the case at bar appear profusely in the King case in the cases

quoted therein. The Utah court quoted the California court as follows:

To the contrary, notwithstanding any such conflict, or even though the apparent *weight of the evidence* should be in support of the verdict or decision, since it is the personal duty of the trial judge to weigh and consider the evidence and to reach a just conclusion thereon, if he be satisfied that the verdict or decision in question is not in fact supported by the evidence, or that it is *contrary to the weight* of the evidence, he is not only authorized, but it is his bounden duty to grant the motion for new trial. 30 Cal. Jur. 117. . . . all that is required to sustain it is the fact that the record discloses *substantial* evidence in support of the conclusion that has been reached by the trial court in that respect.

The same King opinion quotes with approval the following language from *Garrison v. U.S.*, 62 F2d 41, using both the expressions appearing in Judge Jeppson's order granting a new trial:

Where there is substantial evidence in support of the plaintiff's case, the judge may not direct a verdict against him even though he may not believe his evidence or think that the weight of the evidence is on the other side; for under the constitutional guarantee of trial by jury, it is for the jury to weigh the evidence and pass upon its credibility. He may, however set aside a verdict supported by substantial evidence where in his opinion it is contrary to the *clear weight of the evidence* or is based upon evidence which is false; for even though the

evidence be sufficient to preclude the direction of a verdict, it is still his duty to exercise his power over the proceedings before him to *prevent a miscarriage of justice*.

The words “weight of the evidence is against the decision” used in connection with the granting of a new trial are quoted again in the King case with approval from *Whitfield v. Debrincat*, 96 P2d 156. Indeed the King case uses the expression almost itself at page 698 of the decision *supra* as follows:

If what the defendant contends for were the law, the trial judge would have no authority to *weigh the evidence* and decide a question of fact.

The decision in the King case further and finally stated in approaching the constitutional issues involved, in quoting the United States Supreme Court in *Wilkinson v. McCarthy*, 336 U. S. 53:

All that resulted from the granting of a new trial was that the determination of the issues upon which liability was dependent was taken away from one jury and given to another jury. There was no usurpation by the trial court of the juries’ function. As was observed by Lord Mansfield in *Bright v. Eynon*, 1 Burrows 390, the effect of a new trial is “no more than having the cause more deliberately considered by another jury, when there is reasonable doubt or perhaps a certainty that justice has not been done.

Indeed, in an annotation on the subject referred to in the King case as 20 Cal Jur. at page 12 appears the interesting statement that the plaintiff is entitled to *two decisions*, one by the jury and another by the court on the motion for a new trial.

Appellant would possibly undertake to mislead this court in its reference to the holding in *Valiotis v. Utah Apex*, 184 P. 802 at page 29 of its brief. That case does not help appellant at all. It is an authority squarely in favor of the action of the trial court below in weighing the evidence. In that case the jury had returned a verdict for an injured plaintiff, and the trial court refused to grant defendant a new trial. This court then refused to upset the verdict and the ruling as to a new trial on jurisdictional grounds, and a finding there was no abuse of discretion.

Appellants take the position that the trial court in passing on a motion for a new trial cannot weigh the evidence. This court will have to do a great deal of overruling if that is to be the law. Note the language of the Valiotis case at page 806:

It will be perceived that counsel for appellant does 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.

It is undoubtedly true, as counsel for appellant content that the trial judge may and should set aside a verdict for insufficiency of the evidence and grant a new trial whenever in his judgment the verdict is clearly and palpably against the weight of the evidence. Not to do so would be an abuse of his discretion.

Of course the appellate court was precluded from weighing the evidence but it clearly stated the trial court must. It made no point as to a nice distinction between weight of evidence and insufficiency. It treated one as the reciprocal of the other exactly as the U. S. Supreme Court had done years before in the cases of *Metropolitan Railroad v. Moore*, 121 U.S. 558, and *Inland and Seaboard Coasting Co. v. Hall*, 124 U.S. 121.

Appellants cite not a single case in or out of Utah to show that a trial court is without jurisdiction to grant a new trial on the grounds asked for by respondent and given by the trial court. The only cases cited by appellant are those where the appellate court refused on any grounds to interfere with the discretion exercised by the trial court in not allowing a new trial. The James and Valiotis cases cited on pages 28 of appellants brief are no authority on the contention of appellants but support entirely the position of respondent. In fact, appellants cite no case in its entire brief to support its position that the trial court was without jurisdiction, or exceeded the propriety of the occasion in granting a new trial. All

they have given the court is an unconvincing argument without citation of any pertinent law. They have said the King case is not in point and there left the matter for specious argument, and reference to irrelevant matters in the record, not going to the question of whether some, or substantial evidence was shown of a conspiracy.

Appellants make a great deal in their brief of the point that the court set a standard of evidence for the jury of "clear and convincing," yet in granting a new trial, the court speaks of the "weight" of the evidence. We do not find that appellants have presented a single authority on the pertinent subject of inquiry for this court. The issue before this court is not the quantum of proof required for a finding for plaintiff by the jury below. It is simply the question of the right of the trial court under proper motion, to grant a new trial for any lawful reason. The cases we have presented are unanimous on the subject, and the quantum of proof required for the jury to make a finding has no relevance to the question at bar.

The trial court had the discretion and wisely used it.

## II.

### A CONSPIRACY BETWEEN THE DEFENDANTS WAS FULLY PROVEN AT THE TRIAL.

Defendants in the second section of their brief



state that "Plaintiff failed to prove that a conspiracy ever existed among the defendants or any of them." The trial court believed a conspiracy was proven at the conclusion of respondent's case and denied a motion for non-suit. (R. 1708, 1712) There can be no question but what a conspiracy was proven.

The court properly instructed the jury that "under the statutes of the State of Utah it is declared that any combination by persons having for its object or effect the controlling of prices of any article of manufacture or commerce is prohibited and declared unlawful," and that any person who becomes a member of any combination, federation or understanding with any other person or persons to regulate or fix the price of any article shall be deemed guilty of a conspiracy to defraud, and shall be answerable in damages. (R. 107) This suit was bottomed on the law as stated in Title 73, chapter 1, UCA 1943, reflecting the mandate of Article XII section 20 of the Utah Constitution. The whole body of law enforcing the Sherman Act of the United States Government serves as a backdrop for the nefarious drama enacted secretly by the defendant conspirators.

The evils of price fixing are well stated in *Denver Jobbers v. People*, 122 Pac. 404, as follows:

    Pools, trusts, and conspiracies to fix and maintain the prices of the necessities of life strike at the foundations of government; instill a destructive poison into the life of the body

politic; wither the energies of competitors; blight individual investments in legitimate business; drive small and honest dealers out of business for themselves and make them mere hewers of wood and drawers of water for the trust; raise the cost of living and lower the price of wages; take from the Average free man the ability to supply his family with necessities and wholesome food. . . . The wisdom and experience of all ages and all peoples have demonstrated the necessity for laws against such combinations and for the rigid enforcement of them.

*U.S. v. Trenton Potteries*, 273 U.S. 392, 50 ALR 989

*Johnson v. Yost*, 117 F2 53

*Bigelow v. RKO Radio Pictures*, 327 U.S. 251

*Eastman Co. v. Southern Photo*, 273 U.S. 359

*Eastern States Lumber v. U.S.*, 234 U.S. 600

*Ball v. Paramount Pictures*, 169 F2 317.

*U.S. v. Paramount Pictures*, 68 S. Ct. 915, 334 U.S. 131

*American Tobacco v. U.S.*, 328 U.S. 781, 66 S. Ct.

*Dr. Miles Medical Co. v. Park Sons*, 220 U.S. 373

*U.S. v. Griffith*, 68 S. Ct. 941, 334 U.S. 100

*Hale v. Hatch*, 204 Fed. 433

*Central Coal v. Hartman*, 111 Fed. 96

*U.S. v. Socony Vacuum Oil*, 310 U.S. 150, 60 S. Ct. 811

*Straus v. Victor Talking Mach.*, 297 F. 791

*Brown and Allen v. Jacobs Pharmacy*, 57 LRA 547

*Federal Trade v. Cement Institute*, 68 S. Ct. 793, 333 U.S. 683

But brief mention of the prima facie elements of the conspiracy need be mentioned; but each defendant before the court prior to the verdict is inescapably tied in. Many of the things done might have been lawful had they not been a part of a pattern or plan for concerted action, but the evidence shows unmistakably the plan of all.

Also as a property in the drama enacted, there is a great principle for which many people fight today called free enterprise. It is under this system that people are encouraged to make their own way without fear or favor. Price-fixing has ever been looked on with abhorrence by our system of law, except in short periods of history when people who do not believe really in free enterprise have the upper hand in democratic government. But in the end, the tyranny is cast down as was so recently done with what has been so grossly mis-named the "Fair Trade Practice Acts."

*Schwegman Bros. v. Calvert Corp.*, 340 U.S. 925,  
71 S. Ct. 491

The ten conspirators in this law suit went out to destroy a business which was run on the old-fashioned principle of American competition. That respondent did not adhere to fixed prices was abhorrent to the appellants. Yet who can deny that price competition is not of the very essence of a free capitalistic competitive economy?

That there was a conspiracy to fix prices, and that each of the defendants was tied in, is demonstrated from the following:

Defendants Nevins, ZCMI, Royle, the Paris Co. were all concerned about the price policy of respondent and had had conversations with concerned persons by the 12th day of December.

Flint had sent his man to warn Uptown not to cut prices as the latter was being watched, but Uptown did its own business as usual only to have that same man return on December 11th to state Flint required them to make it right. (R. 751)

At a meeting two days later between respondent's four officers and Flint, respondent's price-cutting practices were reviewed, and Flint warned Uptown's officers it would be destroyed within 90 days if it didn't quit cutting prices. (R. 756, 1017) The boycott commenced immediately under the leadership of Mr. Flint and Mr. Dreyfous. Note the succession of events all occurring within the next sixty days:

1. Flint's cancellation of Kelvinator, Bendix, and Foulmer lines was announced by him on December 16th and the merchandise was substantially out by Christmas. (R. 768)

2. Flint and defendant Nevins visited Bennett of ZCMI (who had supplied Uptown with Easy washers) the next day and discussed respondent's price cutting.

Bennett, Nevins, nor Flint liked it. Flint told of his termination. Easy washers were removed within five days from Uptown, and the ZCMI persons effecting the cancellation stated it was all the doings of Flint. (R. 773, 1022)

3. The Graybar Hotpoint man called on Uptown on December 22nd announcing that Nevins had called the manager about his supplying Uptown with merchandise and that another supplier had done the same. (R. 2080) He demanded that the Pierpont store be closed as a condition of future supply by Graybar. Inducements were suggested if Uptown would so close the warehouse. It did close the warehouse immediately, only to have the same company return on January 4th to announce that Uptown could sell no merchandise except at suggested retail prices. This mandate was not confined to Graybar merchandise but applied to all. (R. 1159) Defendants Nevins and the Paris Co. were large Hotpoint accounts.

4. Defendants Royle and Nevin's man Crowton each called the Salt Lake Hardware complaining about the pricing of records by Uptown. (944A.)

5. Dreyfous of the Paris Co. decided to call a meeting of the dealers to see what they could do about Uptown's price policy. The testimony shows the moth-eaten cloak of fair-trade laws was hoped to be a shield for the conspiratorial gathering, but the conspirators could not anticipate that the U. S. Supreme Court would take the

cloak from their sinful skins leaving them in the Hotel Utah meeting doing just what their eminent lawyer Mr. Nebeker told them they were doing, committing conspiracy. (R. 997) The subject of the meeting was *price-fixing* unadulterated, and what they could do to bring it about. They decided to send the man who had called the meeting to the Victor record supplier of Uptown and he certainly put the pressure on. (R. 598, 997) This was Mr. Dreyfous of the defendant Paris Co. They all put the pressure on, telling Mr. Earl that if he did not cease selling Uptown they would require him under the fair trade law to buy back their large inventories amounting to about \$80,000.00, or they would flood the market at great discounts which would destroy his business. Bigelow called Earl three times in one day urging cancellation. Earl succumbed. A week after the meeting, they had run Uptown out of the sale of Victor records and the dealer defendants applauded. (R. 601 to 606) But that was not enough.

6. Mr. Bennett of ZCMI voluntarily, and no doubt at the prompting of Mr. Flint, did his additional and hurtful part and phoned the President of the defendant Salt Lake Hardware advising the latter of the discount policies of Uptown, stating to Mr. Wheeler that Uptown's policy of price reductions was "disrupting." A more telling, conspiratorial word could not have been used by Bennett (R. 1914) Wheeler said Uptown "upset the market." This was no innocent call.



7. On January 20th the rest of the records went out, together with Stromberg Carlson Radio, leaving only RCA radio instruments and Hotpoint appliances as major lines.

8. On February 7th the representative of Defendant Graybar cancelled out Uptown's privilege to purchase Hotpoint even on a C.O.D. basis, (R. 790, 793) knowing at the time this would mean that respondent could get no other merchandise, and knowing that each of the other suppliers had removed their merchandise! Indeed Flint was right. If the respondent corporation did not reform its competitive price policy it would be destroyed, except that under the generalship of himself aided by Jules Dreyfous, Vice-President of the Paris Company, and also by Nevins, Royle, Bigelow, Graybar's people, Bennett, and Salt Lake Hardware, it didn't take that 90 days. It is true, a coffin was placed in the window of the respondent to announce to its friends that it was no more to serve the public. That coffin is in the ground and will remain until a new trail is given, and a jury of American citizens realize that injustice has been done. Possibly the respondent may not have the power to persuade another jury any better than it did the last; but the trial court saw and heard the fascinating drama and could come to but one conclusion at the end of the case, that a new trial was *required* in order to avoid a miscarriage of justice.

Certainly this court will not substitute its judg-

ment for that of one who saw so much and said appropriate words in his order granting a new trial.

*Valotis v. Utah Apex Mining* 184 P. 802.

The meeting at the Hotel Utah was not, as of old, as stated in *Ball v. Paramount*, 169 F2 317, "the picture of conspiracy as a meeting by twilight of a trio of sinister persons with pointed hats close together." It was, in terms of the law of this land a bald, unconscionable group of appliance dealers meeting for the unholy express purpose of eliminating Uptown Appliance as a competitor as it refused to join in illegal pricing of merchandise.

The conspirators claimed immunity under the cloak of a fair trade law that has been thrown out as contravening the Sherman Anti-trust Act, 15, U.S.C.1. Now that the fair trade law is no more, the mask is off. The appellants must answer for their illegal, conspiratorial meeting as though the fair trade law had never been passed. Indeed, as stated in 11 Am. Jur. 828.

Since an unconstitutional law is void, the general principles follow that it imposes no duties, confers no rights, creates no office, bestows no power or authority on anyone, affords no protection, and justifies no acts performed under it.

When these dealer defendants met to conspire the downfall of respondent, they met at their peril and were fore-warned by their own counsel. (R. 997) The

trial court clearly mandated that they should again answer for their wrong.

### III

THE GRANTING OF A NEW TRIAL WAS NEITHER ARBITRARY, CAPRICIOUS, NOR AN ABUSE OF DISCRETION BUT WAS BASED ON A SOUND EXERCISE OF LEGAL AUTHORITY.

The last point labored by appellant is that the trial court abused its discretion in granting respondents a new trial. Irrelevant matters in the record are referred to, to obfuscate the real issues involved in the use of the trial court's discretion. The question of law involved in the use of the trial court's wide powers is easy of understanding, although appellant's brief is entirely absent of any help to the court on the subject.

Throughout all the cases, the courts have given wide power to the trial court to grant the new trial provided the "record discloses substantial evidence in support of the conclusion that has been reached by the trial court in that respect."

*Nelson v. Angelus Hospital Assn.*, 72 P2d 169.

While the King case suggests the same test, it is noted that in the Stack v. Kearns decision *supra*, this court stated that where there appears in the record *competent evidence* which would support a verdict in favor

of a party moving for a new trial, there is no abuse of discretion on the part of the trial court in granting the motion on that ground.

The courts have uniformly held that where a new trial has been granted on the grounds of insufficiency of the evidence, the action of the trial judge is conclusive on the appellate court, unless there has been an abuse of discretion . . . because the trial judge must weigh and consider the evidence of both parties and determine for itself the just conclusion to be drawn from it; and it is the duty of such court to grant a new trial if not legally satisfied with the decision.

*Hanlon D. and S. v. So. Pac.*, 92 Cal. App. 230, 268 P. 385 as cited in *Prout v. Perkins*, 69 P2d 194

The Utah Supreme Court in the King case, *supra*, also quoted with approval from *Tell. v. Campden Fire Ins. Assn.* 1 Cal. App. 2d 625, 37 P2d 131 as follows:

If there is any appreciable conflict . . . action of the court in granting a new trial is conclusive on the appellate court.

The courts indulge a presumption in favor of the proper exercise by the court below of its judicial discretion in granting a new trial upon the ground of the insufficiency of the evidence to support the decision.

*Prout v. Perkins*, 69 P2d 194

The Utah Supreme Court held in 1919 in *Valiotis v. Utah-Apex Mining Co.* 184 P 802 that

While the trial court may, as we have seen, review the evidence, consider its weight and the credibility of witnesses, and grant a new trial, if satisfied that there is a marked and clear preponderance of the evidence against the verdict, it is quite generally held that an appellate court has no such jurisdiction.

In the case at bar, there is great and convincing evidence of a conspiracy. It was predicted by Flint: he said if respondent did not cease cutting prices, it would be destroyed. Respondent was destroyed in precisely the way Flint had stated, and by the dealer defendants with the aid of certain distributor defendants of which he was one. Certainly the respondent's factual presentation before the trial court satisfies the test of "substantial" evidence, as well as the later test applied by this court in the Stack case that there must simply be "*competent evidence*" which would support a verdict in favor of respondent. The record would certainly and without question support a verdict in respondent's favor. There was no abuse of discretion, although appellant would drag in irrelevant matters in an effort to cloud the simple issue before this court. The matter of the trial court's alleged bias, treated in the latter part of appellants' brief as stated on page 67 of their brief "was overcome by the verdict of the jury" and should not further be labored. The court had the right and



duty to grant a new trial if it felt justice was not done in the first trial.

In *Prout v. Perkins*, 69 P2, 194 at page 195 the California court laid down the rule as to abuse of discretion as follows:

When, therefore, an appeal is taken from an order granting a new trial on this ground, it is incumbent upon the appellant to show that the trial judge abused the discretion lodged with him and this can rarely be done except by showing that there is *no evidence* which would have supported a verdict for the respondent.

*Hanlon Drydock v. Southern Pac.*, 268 P. 385

Appellant would undertake to discredit respondent's evidence of conspiracy on various grounds. However, it must be admitted that in the language of the Stack case, *supra*, there was "competent" evidence, and in the language of a host of other cases heretofore cited, there was "substantial" evidence that defendants got together to achieve a cessation of respondent cutting prices.

The fact still remains that Mr. Flint took essential lines from respondent, and deliberately went with Nevins to Bennett and so told Bennett, the latter immediately thereafter terminating sales of Easy washers. Bennett, after attending the Hotel Utah meeting, was primarily responsible for Uptown losing Decca records because of his call to the President of Salt Lake Hardware, the

latter company undertaking to help along the conspiracy by phoning the credit connection of Uptown, the Strevell-Paterson Finance Company and discouraging business with a firm cutting prices. The Paris Co., through its vice president, gave Flint evidence of price-cutting on a Zenith radio which helped to precipitate the fateful meeting of December 12th wherein Flint admonished respondents on price-cutting, predicting their downfall. All the defendants in the suit contributed to that downfall. Certainly there is some evidence, some competent evidence, some substantial evidence, enough evidence, to sustain a verdict for the plaintiff against each defendant. And this quantum of evidence in the record is sufficient to deprive the trial court of any claimed arbitrary or capricious action. Its granting a new trial should not, nor indeed cannot, under the circumstances be disturbed.

#### EFFECT OF DISMISSAL OF SOME DEFENDANTS

Appellants take the erroneous view that because the trial court excluded certain defendants from its order granting a new trial that in a new trial evidence concerning the dismissed person's connection in the conspiracy will be inadmissible hearsay. They cite not a single case to the court to prove the point, and there is none. The fact remains that even though the trial court let ZCMI out of the conspiracy, the acts of Mr. Bennett, are admissible, if he can be tied in as a confederate, and he can. There is no rule of evidence that a confed-



erate must be equally guilty at law with a conspirator. The law of admissibility of evidence of co-conspirators does not require such to be charged with crime, or with conspiracy. The question is: Were the acts and declarations made in pursuance of the common design and before the consummation of its purpose? If so, the words and acts are admissible against those charged. The conversations between Flint and Bennett will always be admissible, whether ZCMI is a defendant or not. If a conspiracy is proven, those who act to further its purpose whether charged with crime or civil consequences, are *confederates*; and their words and acts are admissible against the other co-conspirators, even though such words and acts were uttered out of the presence of the other co-conspirators.

*Standard Oil v. Doyle*, 82 S.W. 271.

*Samara v. United States*, 263 F. 12, (2nd circuit)

*People v. Ferlin*, 265 P. 230 (Calif.)

2 *Wharton's Criminal Evidence*, 11th Ed., 1194

1 *Jones on Evidence*, 4th Ed., 482

## CONCLUSION

Respondent submits that the position taken by appellant is without merit, and that the new trial granted by the trial court should go on without delay. Appellants have cited no law to support their position. Re-

spondent has cited a host of cases, all representing the overwhelming authority back of the trial court's action, which in no event should be disturbed.

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JULY 1951