NEW JERSEY COURT OF ERRORS AND APPEALS.

THOMAS MCMICHAEL,
Plaintiff and Appellant,
VS.
HARRY HORAY, *et al.*,
Defendants and Appellees.

BRIEF FOR PLAINTIFF-APPELLANT.

An action at law was brought by the plaintiff, Thomas McMichael, in the Camden County Circuit of the New Jersey Supreme Court, against the defendants, Harry Horay, Joseph G. Moore and John M. Barefoot, for damages claimed by the plaintiff to have been sustained by him as the result of the wrongful acts of the defendants. The complaint sets out that: The cattle of the plaintiff, on July 23, 1914, strayed from the lands of the plaintiff, through a line fence between the plaintiff and the defendant Barefoot, on to the lands of Barefoot who, thereupon, turned the cattle out of his lands and drove them into a public road and maliciously directed them into the truck patch of the defendant Horay; that, on August 16, 1914, part of plaintiff's cattle went from plaintiff's pasture field by the procurement of Barefoot, into Barefoot's lot and that Barefoot drove these cattle out to the public road, hunted

up and gathered together the remaining portion of the plaintiff's cattle and then drove the entire herd wilfully and maliciously on to the land of the defendant Horay, from which they went to the land of the defendant Moore; that no damage, or merely nominal damage was done by plaintiff's cattle on defendant's land on either of their two visits; that afterward, the three defendants conspired together to bring suit in the Camden City District Court against the plaintiff for damages alleged to have been sustained by them as a result of the trespass by the plaintiff's cattle, and by grossly exaggerating their losses and procuring false testimony to be given, seek to recover excessive damages; that said suits were brought at the same time, tried together before one jury which returned a single verdict against the plaintiff in the sum of $600.00 of which $300.00 was apportioned to Horay and $150.00 each to Barefoot and Moore; that the District Court denied plaintiff's application for a new trial, but reduced the amount of the verdict from $600.00 to $500.00; that executions were issued on these judgments which the plaintiff sought unsuccessfully permanently to restrain by the processes of the Court of Chancery; that in March, 1915, the plaintiff brought suit against the defendants in the Camden County Circuit Court for damages, but was unable to move the cause when called and was non-suited. The plaintiff afterward brought suit against the same defendants in the Supreme Court and the cause came on for trial at the September Term, 1915. At the conclusion of the opening by counsel for the plaintiff, a motion to non-suit on the opening was made by counsel for the defendant on the ground that there was no allegation of any concert of action on the part of the three defendants to do an illegal

act, or to do a legal act in an illegal manner. After hearing argument, the Court granted the non-suit and an exception was noted. Thereafter, judgment of non-suit was entered and this appeal was taken.

The sole ground of appeal is that the granting of the non-suit on the opening was erroneous.

POINT I.

The Rules With Respect to the Granting of Non-Suits Are Not As Rigidly Enforced When Applied to Openings of Counsel As They Are At the Close of the Plaintiff's Case.

Kelly vs. Bergen County Gas Co., 74 N. J. L. p. 604. Speaking for the Court of Errors in this case, the Chancellor said:

> "A motion for a non-suit upon the opening of counsel is not frequently resorted to. In dealing with it, it is obvious that the rule which is applied to a motion for a non-suit at the close of plaintiff's evidence is the one which should be applied. In both cases, the question presented is whether the facts stated or proved, and reasonable inferences which may be drawn therefrom, disclose that the plaintiff is not entitled to submit his case to the jury, because a verdict in his favor could not be maintained. In practice, a motion for a non-suit made upon the opening of counsel, is, perhaps, more liberally treated than an application for a non-suit at the close of the plaintiff's case."

POINT II.

In Considering a Motion to Non-Suit on the Opening, the Trial Court Must Take As Admitted, the Truth of the Statements Which Counsel Offers to Prove and of Every Inference of Fact That Can Be Legitimately Drawn Therefrom.

This principle is fairly deducible from the rule laid down in *Weston Electrical Instrument Co. vs. Benecke,* 82 Atl. 878, as follows:

> "A motion for a non-suit admits the truth of the plaintiff's evidence, and of every inference of fact that can be legitimately drawn therefrom, but denies its sufficiency in law."

The opening of counsel below, as supplemented by him in the argument on the motion to non-suit, presented facts and gave rise to legitimate inferences, which would have been sufficient in law to justify a finding in his favor.

The ground upon which the motion for non-suit was made by the defendant's counsel was that the opening did not show a conspiracy as alleged in the complaint. The trial Judge appeared also to take the view that it was necessary for the plaintiff to establish a conspiracy in order to get his case to the jury. This was erroneous. While, if the facts stated in the opening were proved, a conspiracy might have been inferred therefrom, the plaintiff was entitled to go to the jury even though he failed utterly to establish the fact of a conspiracy.

POINT III.

The Plaintiff Was Not Required to Prove Conspiracy.

In an action on the case against several for a tort, though a conspiracy be charged, one of the defendants may be found guilty and the others not guilty, the foundation of the action being the damage and not the conspiracy.—*Van Horn vs. Van Horn,* 56 N. J. L. p. 318.

In the Van Horn case, many English and American authorities are cited for this rule, and the principle is laid down that the action is founded on the tort.

POINT IV.

If the Plaintiff Was Not Required to Prove Conspiracy, It Was Not Necessary For Counsel, In His Opening, to Outline Facts Which Would Show Conspiracy or From Which Conspiracy Might Have Been Inferred.

The plaintiff's suit was in the nature of an action for malicious prosecution. It is pointed out in *Parker vs. Huntington,* 2 Gray, 124, cited in *Van Horn vs. Van Horn,* (*supra*), that:

> "By the ancient form of pleading, all actions for malicious prosecution, where two or more were made defendants, were laid with a charge of conspiracy which practice is supposed to have

its origin in the phraseology of 21 Edw., 1, but that the charge of conspiracy was never deemed essential; it is mere surplusage and need not be proved, and there may be a recovery against one or both."

POINT V.

The Plaintiff Was Entitled to Go to the Jury on the Question Whether a Wrong Had Been Perpetrated Upon Him By the Defendants, Or One of Them, With Malicious Intent.

The courts look through the instrumentality or means used to the wrong perpetrated with the malicious intent and base the right of action upon that.—*Van Horn vs. Van Horn* (*supra*).

If the opening stated facts from which a wrongful motive could be inferred as well as an innocent motive, it was error for the Court to deprive the plaintiff of his right to have a jury pass upon the facts.

The motion to non-suit was granted because, in the opinion of the Court, "No facts have been stated from which an innocent motive cannot be as readily inferred as any other." (Case, page 33, line 29.)

The question of motive could only be determined by the jury after hearing all the evidence. The burden resting upon the plaintiff was to show a wrongful motive upon the part of the defendants, but it was the function of the jury to decide whether he met that requirement. The trial Court, therefore, subjected the opening to a test which was more rig-

orous than could properly be applied to the plaintiff's case at its close.

It is respectfully submitted that the judgment of non-suit should be set aside.

JESS AND ROGERS,

Attorneys for Plaintiff-Appellant.

FRANK B. JESS,

Of Counsel with Plaintiff-Appellant.

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NOTICE OF APPEAL.

NEW JERSEY SUPREME COURT,
CAMDEN COUNTY CIRCUIT.

THOMAS MCMICHAEL,
Plaintiff,

vs.

HARRY HORAY, *et als.*,
Defendants.

ACTION AT LAW.
NOTICE OF APPEAL.

To Scovel & Harding, Atty's of Defendants:

Take notice that the plaintiff appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause, on the following ground:

1. The Court granted the motion of the defendants' attorneys to non-suit the plaintiff on the plaintiff's opening of the cause to the jury.

2. The Court stated to the jury: "The view that the Court takes of the statement made by counsel, to you, of the facts expected to be proven, is that they are unsufficient to sustain an action of the character set out in the plaintiff's complaint. The result is that you are relieved of the further consideration of the case.

JESS & ROGERS,
Attorneys of the Appellant.

[ENDORSED]

Due and legal service of the within notice hereby acknowledged as of this 8th day of May, 1916.

SCOVEL & HARDING,
Attorneys for Defendants.

JUDGMENT RECORD.

NEW JERSEY SUPREME COURT.

THOMAS MCMICHAEL,

vs.

HARRY HORAY, JOSEPH G. MOORE and JOHN M. BAREFOOT.

JUDGMENT RECORD.

JUDGMENT OF NON-SUIT.

Harry Horay, Joseph G. Moore and John M. Barefoot, the defendants in this cause, were summoned to answer unto Thomas McMichael, the plaintiff therein, in an action at law upon the following complaint:

(Summons issued July 9, 1915.)

The plaintiff, whose name is Thomas McMichael, and who resides at Somerdale, in Clementon Township, in the County of Camden, says that:

1. The plaintiff is a farmer and conducted and managed a farm, owned and possessed by him, situate at and near said Somerdale, containing about seventy (70) acres, in the months of July and August, 1914, and then owned and pastured on the pasture field of his said farm a herd of about thirteen (13) cattle, part cows and part calves.

2. The defendant, John M. Barefoot, during said period owned and occupied a house and lot of land of about twenty (20) acres, on which he then resided, situate in the said Township of Clementon, adjoining the farm of the plaintiff and lying between the meadow or pasture field of the plaintiff and the White Horse Turnpike Road (hereinafter called the Pike) on which lot the defendant pastured or turned in July and August, 1914, four (4) or more head of horses and colts.

3. The entire line fence between the pasture field of the plaintiff and the lot of the defendant Barefoot was kept up jointly by the plaintiff and said defendant, and plaintiff did his one-half part in building, maintaining and repairing the entire length of said fence up to and including July and August, 1914.

4. On July 23rd, 1914, said cattle of plaintiff went from his pasture field into the said lot of the defendant, John M. Barefoot, across or through said line fence, where it had been broken down by said defendant Barefoot, or his servants, or his horses and colts, and by the procurement of said Barefoot, and said Barefoot thereupon turned said cattle out of his said lot and drove them with whips and clubs by himself and servants, through the bars or gate-

way leading from his said lot into the Pike, which bars or gateway he had let down or opened for that purpose, and wilfully turned them up the said Pike and drove them with malicious intent to the plaintiff, and into the corn and truck patch of the defendant, Harry Horay.

5. On August 16th, 1914, about one-half of said cattle of plaintiff went from plaintiff's said pasture field by the procurement of said Barefoot into the lot of said Barefoot, across said line fence where it had been broken down by the defendant, or his horses and colts, or his servants, and the defendant Barefoot drove said one-half of said cattle out of the lot of said Barefoot through a gateway or bars, by him opened and let down for the purpose, into the Pike and thereupon said Barefoot hunted up and found and gathered together the other one-half of said cattle of plaintiff in a street of Somerdale, leading into said Pike near said lot of the defendant Barefoot, and thereupon on said August 16th, 1914, said Barefoot drove said other one-half of said cattle of plaintiff out into the Pike and then drove all of said cattle of plaintiff together and toward Magnolia on said Pike and thereupon the defendant Barefoot wilfully and with malicious intent to the plaintiff turned the said cattle on to the land and said truck patch of the said defendant, Harry Horay, and from thence they went to and on to the land and truck patch of the defendant, Joseph G. Moore.

6. That on said July 23rd, 1914, the said cattle of the plaintiff were driven back to his farm by the said Harry Horay, or his servants or agents, after having been in the said patch of the said Horay for

a very short time; and on said August 16th, 1914, the said cattle of the plaintiff were driven back to the farm of the plaintiff by the said Horay and Moore after having been in the truck patch of the said Moore a very short time, and also after having been in the truck patch of the said Horay a very short time as aforesaid.

7. That no damage was done by the said cattle of the plaintiff to the said lot of the said Barefoot on said July 23rd or August 16th, 1914; the land of the said Barefoot is of the character known as "Greenland," upon which everything dries up and burns off in the summer time and all the grasses and herbage had been burned, eaten and pastured off by the twentieth day of July, 1914; that the damage done by the said cattle of plaintiff to the truck and corn patch of the said Horay on July 23rd, 1914, was not over one dollar ($1.00) and that the damage done by the said cattle of the plaintiff to the said corn and truck patches of the said Horay and Moore on August 16th, 1914, was not over one dollar ($1.00) in each case, and that the said Horay has several times claimed that the damage done to his corn and truck patch on July 23rd, 1914, was not over thirty-five dollars ($35.00).

8. Afterwards, to wit, on or about September 8th, 1914, all three defendants and others, on the suggestion and coaxing of the said Barefoot made a combination and bargain that the said three defendants should bring three suits or actions at law against the plaintiff, one for each, each to allege and claim that the damages by, and by reason of the alleged trespass of the plaintiff's cattle in July and August, 1914, above stated, were five hundred dol-

lars ($500.00) in each case, for each suit, and said suits were to be brought as was bargained and confederated in the District Court of the City of Camden, and each of the defendants herein were by the oath of himself and other witnesses produced and sworn at the trial of each of said suits, as was further bargained, arranged and agreed upon, to swear falsely and corruptly that said damages were five hundred dollars ($500.00) in each case, and were by said bargain and arrangement of said defendants and others to procure all the damages possible for each of said three suing conspirators, and to divide the total damages among themselves said three bargainers and others without regard to the amount recovered by each respectively, whereby the plaintiff charges that there was formed an illegal conspiracy and confederacy to cheat and defraud the plaintiff and entered into by all three defendants and others from motives of malice and with malicious intent to injure, molest and aggrieve the plaintiff.

9. The said conspiracy or confederacy was performed, executed and carried out by the said Horay, Moore and Barefoot, by bringing three suits or actions at law in the District Court of the City of Camden on September 26th, 1914, one suit by each, and each alleging in his own state of demand and process in his own case, that his damages were five hundred dollars and by each bringing on the action to hearing at one and the same time, before one jury, in the District Court and by each swearing in the case of himself and others when the suits came on to be tried on November 27th, 1914, at one and the same time, before one and the same jury, that the damages of each caused by said several al-

leged trespasses of the plaintiff's cattle on July 23rd and August 16th, 1914, were five hundred dollars ($500.00), and the said conspiracy or confederacy was further carried out by the said defendants and other bargainors and conspirators by procuring a number of witnesses to swear falsely and corruptly, and by rote touching and concerning the herbage, truck and vegetables growing and being on the several closes of the said Horay, Moore and Barefoot, on said July 23rd, 1914, and especially on said August 16th, 1914, and by drilling the said witnesses, in large numbers, to swear to a number of hills of corn, tomatoes, watermelons, citron, and other truck which would occupy a large area, to wit, an area of six or seven acres, when the area of the closes of the said Horay and the said Moore were much smaller.

10. As a result of the said bargain and conspiracy of the said defendants and others and of the performance, execution and carrying out of the same as aforesaid, the Court and jury who tried the said three cases or suits at one and the same time as aforesaid, were imposed upon and deceived and the said jury found large and unjust and baseless verdicts for the said Horay, Moore and Barefoot, as one verdict the sum of six hundred dollars ($600.00) and as for the said Horay the said jury found a verdict of $300.00, and for the said Barefoot a verdict of $150.00 and for the said Moore a verdict of $150.00, besides large amounts of costs, in large part for witness fees which costs in the case of the said Horay amounted to twenty-three dollars and seventy-three cents ($23.73), and in the other cases of said Moore and Barefoot to thirteen dollars and seventy-four cents ($13.74) each.

11. That said District Court of the City of Camden, although application was made to it by the plaintiff for a new trial in all three cases on numerous affidavits showing the injustice of said verdicts, and the lack of any damages of any amount caused to the closes or truck of the said Barefoot, Horay and Moore, refused to grant a new trial in said causes, or any of them, and reduced the amount of the verdict in the said cases from six hundred dollars ($600.00) to five hundred dollars ($500.00) and in the case of the said Horay to two hundred and fifty dollars ($250.00) and in the case of the said Moore and Barefoot to one hundred and twenty-five dollars ($125.00) each.

12. The said defendants, Horay, Moore and Barefoot, caused writs of execution to be issued against the plaintiff out of the District Court of the City of Camden, on the said several judgments therein and caused the same to be placed in the hands of the sergeant-at-arms or executive officer of the said District Court and caused levies to be made thereunder upon the personal property of the plaintiff whereupon the personal property of the plaintiff to a large amount thereof, to wit, to the amount of one thousand dollars ($1000.00) and over was seized and taken into possession of the laws by the said sergeant-at-arms and notices of sale were by him posted on the premises of the plaintiff and elsewhere for which additional costs and execution fees were incurred against the plaintiff.

13. The plaintiff, in order to restrain the said unjust sale of his goods and chattels, filed his bill of complaint in Chancery of New Jersey, and obtained a preliminary injunction and stay of execution

pendente lite against the making of the sales of his said goods and chattels so seized as aforesaid, by levy under said executions.

14. The plaintiff, in March, 1915, brought suits or actions at law in the Circuit Court of the County of Camden, as follows: One against the said Barefoot and one against all of the said defendants herein and others, and the plaintiff in good faith endeavored to get the said causes to trial, but the same were reached at a time that was so complete a surprise to the plaintiff that he was unable to move said cause on the peremptory call, whereupon and on motion of the defendants, plaintiff was non-suited, and obliged to pay the costs of said non-suit, which amounted to over one hundred and twenty-five dollars ($125.00).

15. Plaintiff has been put to large expenses and has made large outlays of money for his own costs and traveling expenses and has suffered loss of time in attendance upon said suits in the District Court of the City of Camden and in the said cases in the Circuit Court of the County of Camden, and in the Court of Chancery of New Jersey, and has been obliged to pay other expenses for attorney and counsel fees, court costs and is threatened with the necessity of paying the damages obtained in the District Court of the City of Camden and has been obliged to pay the costs recovered by the said defendants on judgments of non-suit against the defendant in the said two actions in the Camden County Circuit Court, and plaintiff is obliged to further conduct his said cause in this court and in the Court of Errors and Appeals, in case the preliminary injunction obtained by the complainant should be dis-

missed by the Court of Chancery in the suit commenced by the complainant in that court.

The plaintiff demands as damages five thousand dollars.

H. A. DRAKE,
Attorney for Plaintiff.

(Filed Jul. 26, 1915.)

The defendant answered as follows:

John M. Barefoot, Harry Horay and Joseph G. Moore, who reside in the Township of Clementon, in the County of Camden, and State of New Jersey, in answer to the complaint of plaintiff, say:

(1.) They admit paragraphs 1 and 2 of the complaint.

(2.) They deny paragraphs 3 and 4 of the complaint.

(3.) Defendants deny the 5th paragraph, except that they admit it to be true, as stated in the 5th paragraph of the complaint, that plaintiff's cattle went upon the land of the defendant, John M. Barefoot, and that said defendant drove said cattle off his land.

(4.) Defendants admit the 6th paragraph of complaint, except in so far as said paragraph states that said cattle were on the respective patches or farms of said defendants for a short time, and aver it to be the truth that said cattle were on said farms for the greater part of the respective days named.

(5.) They deny the 7th paragraph of the complaint.

(6.) They deny the 8th paragraph of the complaint.

(7.) They deny the 9th paragraph of the complaint.

(8.) They admit, as alleged in the 10th paragraph, the recovery of said verdicts, but deny everything else contained in said paragraphs.

(9.) They admit the 11th paragraph.

(10.) As to the 12th paragraph, they have not sufficient knowledge or information whereon to form a belief.

(11.) They admit the 13th paragraph of the complaint.

(12.) They admit the 14th paragraph of the complaint, except they aver it to be the truth that no advantage was taken of complainant in said court, and that said complainant had the same notice and same time allowed for preparation as did the said defendants, who were ready to proceed to trial at the time in said paragraph stated.

(13.) As to the 15th paragraph, they have no information or knowledge whereon to form a belief, and reserve to themselves the right, either at said trial or any time prior thereto, by notice, to move to strike out said paragraph, on the ground that said paragraph constitutes no element of damage in said cause.

SCOVEL & HARDING,
Attys. for Defendants.

(Filed Jul. 20, 1915.)

This case was tried before Judge Frank T. Lloyd, sitting for the Hon. Charles G. Garrison, with a jury, at the Camden Circuit, on October fifth, A. D. nineteen hundred and fifteen.

Plaintiff having opened his case and addressed the jury, attorneys for defendants moved for a non-suit on the opening, and after argument heard on the motion, the Court granted the motion, and entered the judgment of non-suit accordingly.

Whereupon it is adjudged that the complaint of the plaintiff be dismissed, and that the defendants recover of the plaintiff, their costs which are taxed at fifty-two dollars and sixty cents.

Costs $52.60

Judgment entered Oct. 9, 1915.

WM. S. GUMMERE,
C. J.

TESTIMONY.

NEW JERSEY SUPREME COURT,
CAMDEN COUNTY CIRCUIT.

THOMAS MCMICHAEL,
Plaintiff,
vs.
HARRY HORAY, *et als.,*
Defendants.

ACTION AT LAW.

SEPTEMBER TERM, 1915.

APPEARANCES:
HERBERT A. DRAKE, ESQ., JESS & ROGERS, ESQS., for the plaintiff;
SCOVEL & HARDING, for the defendants.

Before LLOYD, J., and a jury.

(Mr. Drake opens the case for the plaintiff.)

(Mr. Harding makes a motion for a non-suit.)

(Motion for non-suit granted.)

THE CASE FOR THE PLAINTIFF.

Mr. Drake opens the case for the plaintiff to the jury as follows:

If the Court please, gentlemen of the jury, this is a case in which the issue joined is, I am sorry to say, one of fraud and conspiracy, an allegation of fraud and conspiracy. Now, what happened, as near as I can tell you in a few words, is that the plaintiff in this case, Thomas McMichael, who lives down at Somerdale on a farm of seventy acres adjoining lands amounting to considerable more, had a herd of cattle. Mr. McMichael's land bordered on highways to a very considerable extent, and he used to entrust his cattle sometimes to boys to put them out on the highway and sometimes the boys soldiered on him and the cattle were not in proper care, and sometimes the fence between him and Barefoot would get down—the defendant Barefoot owns twenty acres over on the Pike, lying between McMichael's land and the Pike, twenty acres, just even twenty acres. The land which McMichael owns is land which is ordinary farming land and has a little green land on. The land which Barefoot owns and occupies is almost entirely green land, on which it is difficult to raise crops. Now, Mr. McMichael's cattle got over into Mr. Barefoot's lot sometime in July, and that was one of the particular times, July 23rd, when these alleged trespasses for which suit was brought against Mr. McMichael took place. Barefoot, as I say, lived on the White Horse Pike near McMichael and his business is that of an oil merchant or an oil dealer; he deals in oil, sells oil around the neighborhood, and he has a number of horses and pastures horses and colts in his lot and

principally devotes it to that use, and sometimes pastures his road horses on Sundays and nights in the same lot. That is the principal use he makes of it. Mr. McMichael is an ordinary farmer and also owns some lots around about. Now, as I say, in July, 1914, Mr. McMichael's cattle got over into Barefoot's field; whether Barefoot procured them to get there or not is one of the questions you will have to decide. When they were there in the field, Barefoot drives them violently out into the Pike and turned them up the road, and as we shall show you, turned some of them or most of them down a lane which ran down to Horay's patch. Now, that brings us to Horay. Horay is another one of these defendants; John M. Barefoot is one and Horay is another. Horay lives near McMichael and he, in the summer of 1914, was farming a little patch of corn and some other truck. The corn patch was one and eleven-hundredths acres and the other truck was less than an acre, so that both of these together were less than two acres. Horay sublet a portion of his patch, not the portion I have mentioned, but another portion, to a man by the name of Joseph G. Moore, the other defendant, so Joseph G. Moore was in the occupancy of a little patch adjoining Horay's patch and Mr. McMichael's cows went down there on the 23rd of July, 1914, and they were brought back home again by somebody in relation to which it is immaterial.

The Court: They got into both lots, did they, Moore's and Horay's lot?

Mr. Drake: They got only into Horay's lot on the first occasion; they didn't go to Moore's lot.

The Court: I understood first that they got into Barefoot's lot first.

Mr. Drake: They got into Barefoot's lot, driven out of Barefoot's lot and turned up the Pike, and as we shall undertake to prove to you, they were turned down the lane leading into Horay's, all of which was within half a mile from Barefoot's place on the Pike, and there they committed this trespass in July, 1914, and they were not in Moore's patch and didn't do anything to Moore on this particular occasion. They were driven back to Mr. McMich-
10 ael's farm, to his pasture or to his barnyard. That was in July. Now, then, shortly after that, this man Barefoot complained and Mr. McMichael as soon as possible saw Horay about it and Horay and he arranged that there should be some appraisers to go on the land and see what the damage was, but in the meantime as soon as Mr. McMichael heard about it he went to the patch, and as soon as he saw Horay he arranged with Horay to meet him there at the patch, but Horay did not keep the arrangement,
20 did not keep the agreement. Then, shortly after that Mr. McMichael got two appraisers to go and Horay got two appraisers to go, and Horay, he claimed that his damages for this particular trespass were $35, and Mr. McMichael asked him if he meant thirty-five cents, and his two appraisers, men by the name of Bakely and Wilson, also said that the damage of this first trespass was $35 to Horay, and Mr. McMichael took two appraisers on the ground and they said the damage was nominal, that the damage
30 was not over a dollar altogether. Then, the other trespass took place on August 16th, that was Sunday, August 16th, 1914. What we will first call your attention to, although that may not be the exact order of proof of the cause, next in the order of events in this strange, eventful history, is that a part of McMichael's cows were seen in Barefoot's lot on

this Sunday morning, and Barefoot and his men were seen driving them out. A part of McMichael's cows were in a lane adjoining his land quietly pasturing there, and Barefoot's men gathered these cows up and drove them along the Pike to the other part of the herd, and after they were at the other part of the herd they were started up the Pike in the direction, driven up the Pike in the direction of this same lane which leads down to Horay and they went down this lane to Horay's patch, the same place they had been on the 23rd of July, and they were there a short time. They went from Horay's patch to Moore's patch, Moore's adjoining patch, and then they went across a short, small corn field to a man by the name of Long, lying between these patches of Horay's and Murray's, crossed Long's to the peach orchard and crab grass of this same man Moore. Now, after this happened, as we shall show you, these cows were started up the Pike somewhere about half-past nine on Sunday morning; as we shall also show you, they were brought back to Mr. McMichael's place and turned into his pasture about half-past ten on Sunday morning, and the claim made was that during that time, during that short time between half-past nine when these cows had to travel half a mile and commit this alleged trespass and get back again to Mr. McMichael's farm at half-past ten, another half mile, these cows at the time committed damage to the extent of $500 on Murray and $500 on Horay, less the $35 he claimed in the first trespass. These men, Horay and Murray, brought the cattle back on this particular Sunday to Mr. McMichael's farm, turned them in his pasture and came into his sitting-room to see him and talk the matter over, and Horay then said that his damages were perfectly overwhelming, the

damage was awful, yes, actually he was ruined, he said, and Moore sat there and made no claim of damages then, he simply smiled behind Horay's back while Horay was making this extravagant claim. Those were the facts as they existed at the middle of August, 1914. Then shortly after that—those are the principal transactions which it is necessary to call your attention to—shortly after that these three men, Barefoot, Horay and Murray, brought three suits in the Camden District Court. The suits were brought in September and the suits came on to trial in November, November 27th, and when the causes were brought on they were—the suits turned out to have been brought by the same attorneys—they were presented to the same jury and before the same Court. When they came on to trial Mr. McMichael provided himself, as he expected an ordinary case, with neighbors relating the small damage with himself and two or three other witnesses; the other people provided themselves with a great number of witnesses. The testimony will be given to you in respect to that, to the number of witnesses that were produced by them and to the character of the testimony which they gave. A number of witnesses swore that the damages were $500 and a number of witnesses swore to having counted the exact number of hills on an acre of ground and stated that they were about 5700 hills, and that these cattle had destroyed the whole thing. Then, Mr. McMichael came on and he showed by his witnesses that this was absolutely untrue, that by no means could this damage have arisen, but he was surprised, he was overwhelmed, dumbfounded by the number of witnesses brought there to testify against him as to the amount of damages which he and every farmer which he had consulted had assured him and he had assured

himself were of the merest nominal character. So the case went to the jury and to Mr. McMichael's further surprise the jury found in one case for Horay $300, in another case for——

The Court: This is not a proper opening, Mr. Drake.

Mr. Drake: Well, the jury found damages against——

The Court: I do not mean that the finding of the jury is not, but the attitude of the defendant toward the verdict is not proper.

Mr. Drake: As to the surprise?

The Court: Yes.

Mr. Drake: Well, it seemed to me it was, if the Court please.

The Court: Well, I think it is not.

Mr. Drake: Mr. McMichael took further action to get clear of these damages; he applied for a new trial or applied for a rule to show cause. He supported that by a number of affidavits, witnesses taken by him on the property who will be called here today to tell you as to the damages. Then the result of that application was that the damages which amounted to $600 were reduced to $500, that is, the whole damages to all three men, $600, was reduced to $500, namely, Horay, $300, was reduced to $250——

The Court: The cases tried together, were they, in that court?

Mr. Drake: All tried together in that one court, and, as I say, those were the damages. Mr. McMichael then went into the Court of Chancery to try to restrain these verdicts and spent some time in that. He also brought a case similar to this, exactly similar to this, and he was unable to bring it to trial at the day it was marked for by the Court, and the Court under the rules of law refused to allow the plaintiff another day to try his case. The other side objected to another day for trial, he couldn't go to trial that day; he was required by the Court to move his case and he was unable to do so and refused to move it, and the other side, the defendants, asked for a non-suit, and a non-suit was granted, and he had to pay costs. Then, in the Court of Chancery he pursued his remedy there as far as he could, and finally the Court of Chancery has denied him the right to have this case restrained by the Court of Chancery; they say he must go before a jury and try out the questions which are to be tried out here before you today.

The Court: Is that in the opinion? Is that in the Court's reasoning?

Mr. Harding: That is not in the opinion, if the Court please; I have the opinion here.

Mr. Drake: What the Court did say was that, having chosen his remedy at law he must abide by that; the Court of Chancery won't help him.

The Court: Was this decision rendered without prejudice?

Mr. Drake: Without prejudice to his rights here.

The Court: That is specified in the opinion, is it?

Mr. Harding: It says if he had any action it would be in a court of law.

The Court: What I am trying to get at is whether the Court's ruling was conclusive here. If it was simply a refusal to allow his claim because he had an adequate remedy at law——

Mr. Drake: No, he didn't pass on that question. What the Court said was that having elected to pursue our remedy at law that we must abide by that and the Court of Chancery would not help us, and the Court also criticised adversely to Mr. McMichael the fact that he did not bring on his case for trial, a similar case to this, in last April. In the words of the Chief Justice, he said, "You took a chance in not bringing the case on." Our complaint is that the defendants here today could have allowed us an opportunity to go on and try the case and not to put us to that damage and put us to that effort and those services of counsel.

The Court: So that the case, the appeal is still pending there?

Mr. Drake: The appeal pending. Now, what Mr. McMichael has done—I think we will give you a general outline of what the case is, gentlemen—what Mr. McMichael has done, concretely, is that he paid counsel for himself in defending the case in the District Court $52; that he paid costs on a non-suit $128; that he paid costs and expenses in the Court of Chancery $140; that he has made a deposit of costs in the Court of Chancery to answer for the

costs of appeal of $100; that he has paid on account of the printer's bill, he has a printer's bill of $115.50 in the Court of Chancery, and he has paid these judgments, $578.21. And what Mr. McMichael claims is that he is entitled to compensatory damages of $300 and exemplary damages of $3,000. Now, the issue which you will find in the pleadings, gentlemen, you will find that by an order of this Court made last Monday, the 13th paragraph of the transcript has been amended so as to read: "The plaintiff, in order to restrain the said unjust sale of his goods and chattels, filed his bill of complaint in Chancery of New Jersey and obtained a preliminary injunction staying said execution pendente lite against the making of sale of his goods and chattels so seized as aforesaid." (Reading.) As you will understand, executions were issued out of the District Court.

Now, as I say, the issue here is what we claim to be the perjury, fraud and conspiracy of these defendants and the suborned witnesses which they brought into the District Court to deceive that Court and jury and obtain a verdict which was baseless as to damages, which hadn't any damages, or any damages of any amount to support it. We say that what we claim that it is bad enough for one man to defraud another in an ordinary case, but we claim that this fraud was committed by deceiving the Court and deceiving a jury. We do not raise any question about the honesty of the Court or the honesty of the jury, but we say that the multitude of witnesses and character of proof which was brought there, so many witnesses swearing to this set of facts, which were without foundation, resulted in the deception, and we will also show you before the case is concluded certain facts of unity of action, certain

facts where the three acted together, so that we will show you, as we think, that there was confederacy, conspiracy and a united action of the three. But, if the Court please, it is not necessary in this case to show conspiracy, the foundation of an action of this sort is damages.

The Court: It is the result of an action of this sort, isn't it, not the foundation of it? Mr. Drake, aren't you obliged to set out in your opening the facts which you claim constitute the conspiracy and combination?

Mr. Drake: No, sir, I am not obliged to do that. In a prosecution of a criminal case that is necessary, but in the case of VanHorn vs. VanHorn——

The Court: No, not in your pleadings; I say, are you not obliged to set out in your opening such facts of conspiracy that will justify a jury in inferring that there was a combination? I have my doubts about whether you have gone far enough yet.

Mr. Drake: You think in order to ask a jury for a verdict on conspiracy——

The Court: In other words, you have alleged conspiracy in your pleadings, which is perfectly proper. Now, when you come to open up the evidence that supports that, are you not obliged to state what you will prove?

Mr. Drake: We will prove in the first place that all three of these men, Barefoot, Horay and Moore, swore to each other's damages, that is, Barefoot, Horay and Moore swore to Horay's damages of

$500; Barefoot, Horay and Moore swore to Moore's damages of $500; Barefoot himself swore to his own damages; these other men did not swear. There was unity of action as to that. They all brought three suits on one day, on the same day; they brought them to trial at the same time before the same Court and before the same jury; they succeeded by unity of action in having witnesses of Horay swear for himself and Moore in getting damages for Horay and Moore, which were baseless, which hadn't any foundation. When these cattle were brought back to McMichael's pasture on the second Sunday—on the Sunday when this occurred, they were brought back by Moore and Horay. Now, our claim is that these cattle were taken by this man Barefoot after the first trespass and by unity of action with this man Horay, and that they were driven so that they would go down into Horay's patch. The unity of action which we claim here, after they had come there—Barefoot makes the point continually that his fence was all the time kept up—after these men had left Mr. McMichael's on this particular Sunday and were going home a curious thing happened, that Horay and Moore went and examined the fence between McMichael and Barefoot, and they swore in their affidavits in the Court of Chancery that they found the fence intact, there was not any opportunity for cows to get over into Barefoot's field. We say when the first trespass took place no conspiracy existed, but when the second trespass took place, we say a conspiracy did exist, because Horay came back there claiming damages which were out of proportion to the damages which were claimed in the first place, and then when he examined Mr. McMichael's fence he supported Barefoot in Barefoot's claim that the fence was always kept up by

him entirely, the fence was always intact and the cows could never get over there, and there are a number of other facts which we will call your attention to, gentlemen, in the same line to show that these men were acting together. It seems to me that is a matter of argument to be taken up on the facts which are presented to the jury.

ARGUMENT ON MOTION FOR NON-SUIT.

Mr. Harding: If the Court please, I think we are entitled to a non-suit on the opening. There has not been a single allegation made by my distinguished friend to show any concert of action on the part of these three defendants to do an illegal act or to do a legal act in an illegal manner. Now, if, as they have alleged, there is a conspiracy here, there must have been some concert, some combination of these three men, and there must have been some overt act. Now, as far as the opening went, I have not been able to see where there is any conspiracy here and I am satisfied that the Court from the facts that were alleged cannot ascertain that there was any conspiracy or that there was any evidence of any conspiracy.

Mr. Jess: If the Court please, if this is to take the form of a motion to non-suit, we would like to have it heard apart from the jury.

The Court: Very good; come in the other room.

(Counsel and Court then adjourned to the Judge's room, where the argument was resumed.)

Mr. Harding: Now, if the Court please, in the

opening the only two acts complained of by the plaintiff in this case is that in the first instance in July of 1914, Barefoot had turned McMichael's cattle out of Barefoot's close, where the cattle had no right to be and which we admit in the pleadings is true, that he did drive them out of there. Now, at that time Horay and Moore had nothing to do with this act of Barefoot's and we respectfully insist that Barefoot's act was absolutely legal in every respect, because he was not obliged to have those cattle on his premises destroying his crop or eating his grass. Now, when we come to Sunday, August 16th, the allegation in the opening is that the cattle had left McMichael's close somewhere about nine or nine-thirty, were brought back to McMichael's house about half an hour or an hour later and that Horay used some language to McMichael indicating that the cattle had completely destroyed his farm, and my friend says in the opening that Moore sat silent and said nothing. Now, that is the second allegation of the so-called conspiracy. The third one was made after your Honor had requested information regarding the details of the conspiracy and is to the effect that Barefoot, Horay and Moore in the District Court swore to each other's damages. Is that an illegal act? May I not, if I care to, join two or three other people in suits? May I not, if I am acquainted with the damage that has happened, if I have been over the situation and have seen what has happened, may I not go on the witness stand and testify just as well as they to what damages actually happened? Is a man barred from being a witness in a case because he happens to be a party? Now, that is what my friend seems to allege as part of the conspiracy; he says three suits were brought on the same day, tried in the same

court before the same Judge and before the same jury. Now, if your Honor please, our answer to that would have been that if the cases had been tried separately we might have gotten larger verdicts than we did; we might have collected more costs than we did, and we might have had the advantage in case one suit had terminated to the detriment of Mr. McMichael to have either driven better settlements regarding the other two cases or at least gotten verdicts based pretty much upon the evidence in the first case. Now, is it an illegal act to bring three suits on the same day in the same court before the same Judge and before the same jury? Now, take those elements out of this case and there is nothing else to it. Every act that they allege in their opening which they charge to be acts of conspiracy were absolutely legal acts and were brought about, they themselves allege, in a legal manner, so that where conspiracy exists in this case I fail to see. Now, in the VanHorn case, which my friend has alluded to, that was a case where a husband and wife brought suit for conspiracy against some concern that dealt, I believe, in clothe, these clothing concerns evidently intended to put this woman out of business. In the VanHorn case there was a conspiracy alleged and the Court said this in effect, that as far as the concerns went in combining and refusing to give credit to Mrs. VanHorn they were strictly within their rights, but when they went a step further and interfered in a contract which she had made with another concern, then it raised an entirely different issue, and for the interference of contract, the gravamen of the conspiracy suit being the damage which was caused Mrs. VanHorn, notwithstanding the fact that two or three of the defendants escaped, the Court said that she still could

hold one of the defendants for the damage caused her by the interference in the contract. Now, we haven't any such element in this case at all. They admit here—they admitted it in the Court of Chancery and they admitted it in the District Court that there was damage in each instance. Your Honor, from your experience in the courts, knows how jurors vary regarding damages. Horay, for instance, regarding this damage which was caused him in July——

The Court: Were three separate verdicts rendered in the case?

Mr. Harding: Yes.

The Court: So much to each man?

Mr. Harding: So much to each man, and in the aggregate $600, and Judge French subsequently reduced the verdict to $500 on an application by the then attorney, Mr. Carrow, for a new trial, so that every act which has been done by these men has been done in the ascertainment of their legal rights regarding the trespass of these cattle, and as far as the case is concerned in your court at the present time, I fail to see a single element either of fraud or conspiracy that we should be called upon to meet. I might say, if the Court please, just before I close that when this case was in the Court of Chancery originally Mr. Drake then urged that the conspiracy consisted in the fact that one of these defendants had persuaded the other two to join him in suits, and the Vice-Chancellor at that time said to him, "Mr. Drake, assuming that is true, where is the conspiracy?" That is the same case here; he attacks

the concert on the part of these men to do something which is absolutely legal, to wit, to try to get redress from the Court for damages which have been caused them.

Mr. Drake: I am very much obliged to counsel; that is an element which I overlooked stating to the jury. Horay stated that he would not have gone into this case at all if he had not been persuaded to by Barefoot, and we have another witness whose testimony I have not alluded to in my opening to the jury, namely, Farr, who said that after the case had gone to the jury in the District Court Farr was present where Horay and two or three others were together, and Horay had said if McMichael had come to him right he would have taken $50 for his damages. Now, counsel is entirely mistaken about the attitude which I think the Court ought to assume in a case of this sort, and I will read the law as I find it in the encyclopedia of evidence. The authorities right along down, all the way through to VanHorn vs. VanHorn have upheld the position which I take. (Citing cases.)

Mr. Harding: I might ask your Honor, if you please, if you take the conspiracy out altogether, drop the conspiracy feature of this case, what is there in the opening to establish any claim for damage under their declaration?

The Court: My difficulty in this case is this: I think it is undoubtedly true that if a verdict is procured by perjury or by a conspiracy in law, which, of course, implies that illegal means or an illegal act has been consummated and that fact is set out, how far this Court is precluded by the ruling in the

other case. I think it is pretty well established that a verdict procured by false testimony is actionable; there must, however, be a limit somewhere, and the mere allegation that such testimony is false without averring the means of proof which the opening is called upon to make, whereby such falsity is to be established, or that a conspiracy was originally entered into—how can an action of this kind be sustained before a jury and before a Court on a motion of this kind?

Mr. Drake: If the Court please, will your Honor permit an interruption just at that point? I was not aware that I had to set out how this lack of damages would be shown. The way that lack of damages—and I will add it to the opening if the Court thinks I ought to add it to the opening—the way that damage was shown was this: Immediately after the trial here and the verdict in the District Court, Mr. McMichael procured some ten or a dozen, I don't know, farmers, and they went down with him to look at this property, to look and see what was done, and they saw from the character of the ground and from the character of the corn that was there and from all the indications which we will prove, that no damage had been done to amount to anything. We will also prove by a man by the name of Long, who was the intervening owner, that the cattle came across him on the second trespass, came across his ground in order to get over to Moore's ground, and while he does not know what happened to Horay's patch, he does know that no damages were sustained by him by reason of the cows coming through his corn field, and he also will prove that no damages done to Moore's, to his peach orchard and crab grass after they got over

to Moore's, and we will also show by him that the cattle were there a very short time, as soon as they were seen they were driven back.

The Court: Now, that was all submitted to the jury, no doubt, as a matter of finding for them?

Mr. Drake: The other jury?

The Court: Yes.

Mr. Drake: Not a bit of it, not one iota of it. The only witnesses Mr. McMichael had there were two, two witnesses.

The Court: Well, Mr. Drake, assuming that that is what will be shown in the case, where is the evidence that that indicates bad faith on the part of any one, rather than a mistaken judgment, if you please, or a mistaken opinion? Is every case of a disappointed litigant to come into the court on a mere allegation that a verdict is wrong because the testimony is incorrect and be set aside in effect and a new cause of action created? If that were done, we would come to an interminable line of litigation. You must set out facts, I apprehend, which show a wrongful act on the part of some of these men, at least wrongful in the sense that the law would recognize as wrongful.

Mr. Drake: We propose also to show, although I did not open it to the jury, that both Horay and Barefoot are men whose reputation for truth and veracity and honesty and fair dealing is bad; we propose to show all that. That is also to be shown, but I opened distinctly to the Court the fact that

these witnesses were brought there and swore that there were 5700 hills of corn on an acre of ground when by no possibility could there have been over 2700 hills on the same acre of ground.

The Court: I know, but you do not prove perjury thereby.

Mr. Drake: And these witnesses swore as if by rote, one after the other.

The Court: No, perjury is wilful false swearing, the wilful giving of false testimony concerning a material matter in issue.

Mr. Drake: Well, when we show in answer to that that there was not enough corn raised on this particular lot—there wasn't over $15 worth of corn raised there—there could not by any possibility be over $15 worth of corn raised on this lot——

The Court: Do not get the matter confused, I am only dealing with the motion that has been made; I am not dealing with things that have been talked about now; I am not going to talk about things that are conjectural, but I am dealing only with the things that have been opened to the jury.

Mr. Drake: Does your Honor hold that if the plaintiff makes an application to your Honor to amend his opening by adding additional facts which he may have overlooked, that that motion would not prevail?

The Court: No, I do not say that, but I am not going to treat mere innuendo and suggestion now as

substantial statements and responsible statements of expected proof; I want to be very explicit about that.

Mr. Drake: We have got the proof to show that there were not any damages there; I do not know why I am obliged to open any more than that. If we show that damages were recovered in this case where no damages existed, I think we are going a great many steps toward showing conspiracy between these two men, three cases brought at the same time before the same Court and the same jury and the same attorneys.

MOTION FOR NON-SUIT GRANTED.

The Court: Gentlemen, I am inclined to have this matter presented to the Court of Errors on the issue as presented here. I will grant this motion. I cannot bring it to my mind that every allegation of a wrong result, wrongful testimony that does not go further and impute bad faith to the defendant or defendants, and supported by allegations of fact from which a jury would be justified in inferring such bad faith is sufficient to take such a case to the jury, and therefore I will grant the motion on the opening in this case, because my judgment is that no facts have been stated from which an innocent motive cannot be as readily inferred as any other. The motion will be allowed and an exception noted.

Mr. Drake: We want the advantage of adding—this motion is a surprise to us—and we want the advantage of adding any additional facts—your Honor said you would not refuse to listen to a mo-

tion to amend the opening, so that we would still be within the ruling——

The Court: Well, you didn't make any; you simply asked me a hypothetical or an academic question. If you meant that to be an application to enlarge the opening——

Mr. Drake: I meant that to be an application to enlarge the opening.

The Court: Yes; then, Mr. Drake, why do you not at this time outline or indicate how you are going to enlarge it?

Mr. Harding: I think, if your Honor please, for the convenience of the Court and jury and every one, that Mr. Drake now in this opening or this amendment that he has proposed should be ready to prove whatever he is going to assert; in other words, don't let us have a trial here on presumptions and then get no proof of it.

Mr. Drake: As I understand it, the Court takes what counsel opens as—the Court takes the ability of counsel to prove what he says he can prove as a substantial part of the opening; am I right about that?

The Court: Oh, yes, of course. Now, do you want to add any additional facts as elements of proofs that you want to establish in this case?

Mr. Drake: Yes.

The Court: Now, state them just as concisely as you can specifically.

Mr. Drake: The first element of proof which I want to call attention to——

The Court: No, I want the facts that you expect to prove.

Mr. Drake: When Horay and Moore went away from McMichael's house on Sunday, August 16th, 1914, Moore was claiming no damages. When they left the house they went to Barefoot's fence and examined Barefoot's fence and now swear that Barefoot's fence was intact and there was no opportunity for McMichael's cows to get over into Barefoot's field on that day.

Mr. Harding: That has already been stated in the opening.

Mr. Drake: Immediately after that a witness saw Horay on the highway and Horay spoke to this man and Horay said to Gilroy, that he wouldn't have gone into the case unless he had been persuaded by Barefoot. While the jury was out in the District Court case Horay stated in the presence of Farr, a witness, that if McMichael had come to him right he would have settled for $50.

Mr. Jess: I think you did include this in your opening, that you are also expecting to prove by at least two witnesses that Barefoot was seen to drive McMichael's cattle out of Barefoot's land down the road on the White Horse Pike and direct them into a lane leading into Horay's place.

Mr. Harding: He didn't say that in the opening and I don't think he can prove that; I am frank

at this time to say that he cannot prove that, because that came out in the Criminal Court the other day. He did say in his opening that Barefoot drove McMichael's cattle out of his, Barefoot's, land into the lane, and that they then turned toward Horay's lane; that is what he said in the opening.

Mr. Drake: What I want to state in the opening now is that Barefoot drove McMichael's cattle out of Barefoot's field on the first occasion when they were all there with sticks and clubs, showing malice to McMichael; that on the second occasion Barefoot drove a part of McMichael's cows out of his field, where he swears there was no opportunity for them to have gotten in there over the fence and sent his man to gather another part of this herd, and having gathered them up in front of Barefoot's lot he started them all up the Pike in the direction of the lane that leads down to Horay's, and the natural inference we claim would be that having been down there just three weeks before in Horay's corn patch they naturally would go down there again, and we will also prove that these cattle were driven up the Pike on the first occasion, expect to prove these cattle were driven up the Pike on the first occasion and turned or partly turned down into this lane leading to Horay's patch by an employee of Barefoot.

The Court: I will let the ruling stand as it is. Note an exception.

(Court and counsel then return to the court room.)

The Court: (To the jury.) The view that the Court takes of the statement made by counsel to you

of the facts expected to be proven is that they are insufficient to sustain an action of the character set out in the plaintiff's complaint. If I am wrong in this it can be corrected without much expense to either party by another Court. The result is that you are relieved of the further consideration of the case.

NEW JERSEY COURT OF ERRORS AND APPEALS

THOMAS MCMICHAEL,
Plaintiff-Appellant,

vs.

HARRY HORAY, *et als.*,
Defendants-Appellees.

BRIEF FOR DEFENDANTS-APPELLEES.

BRIEF FOR DEFENDANTS-APPELLEES

The appeal in this case is from a judgment of non-suit in the Camden County Circuit Court. The appellant, after making a lengthy statement to the Court and jury in opening a case of what purported to constitute appellant's claim, was interrupted by the Court with the query:

> "Mr. Drake, aren't you obliged to set out in your opening the facts which you claim constitute the conspiracy and combination?"

To this counsel for plaintiff replied:

> "No, sir, I am not obliged to do that. In the prosecution of a criminal case that is necessary, but in the case of Van Horn vs. Van Horn ——
>
> The Court: No, not in your pleadings; I say are you not obliged to set out in your opening

> such facts of conspiracy that will justify a jury in inferring that there was a combination? I have my doubts whether you have gone far enough yet."

This colloquy between the Court and counsel proceeded without counsel accepting the Court's doctrine, and, in fact, denying the proposition in principle. (See printed book, page 23.)

It seems to be the theory of plaintiff that he is entitled to go to the jury on a state of facts, even though these facts taken together would not constitute a civil cause of action, and he argued this proposition to the very end. In a word, his case of conspiracy is founded on the following proposition:

Three persons, Barefoot, Horay and Moore, having suffered damage, or claiming to have suffered damage, bring three suits at the same time before the same court and jury and by the same attorneys. That is all there is to his case, and he argues that this proposition makes a clean-cut case of conspiracy. (See printed book, line 4, page 33.) He even goes so far as to say, "We have got the proof to show that there were not any damages there. I do not know why I am obliged to open any more than that."

The declaration by plaintiff that defendants suffered no damage when they brought their action in the Camden City District Court is of no legal value since the jury in that court, after trial, found verdicts in the aggregate $600, which were subsequently reduced by the Court on application to $500. The expense that appellant offers, viz., that "he was surprised, overwhelmed, dumbfounded by the number of witnesses" (opening, printed book, page 18, line 33) might be offered in every case, where one

side prepares its case and the other does not. He does not deny, however, that Mr. McMichael did not have an opportunity to testify, and that he and his witnesses, in fact, did testify (printed book, line 29, page 18).

The real situation in this case is that the plaintiff was obliged in the District Court of Camden to pay damages to three farmers upon whose crops plaintiff's cattle had trespassed, and now desires by a cross-action in the nature of a civil suit for conspiracy to recover the amounts he has paid out (see statement in opening of Mr. Drake, printed book, line 28, page 21). The appellant endeavored, through the Court of Chancery, to restrain the sale under the judgments in the District Court, and meeting with defeat there, carried his case to the Court of Errors and Appeals (see opinion of his Honor, the Chancellor—"McMichael vs. Barefoot, et als." 95 Atl. 620).

The basis of his appeal from the decision of the Chancellor to the Court of Errors and Appeals was that a suit at law for conspiracy was pending in the Camden Circuit. It appears that when the suit was called for trial, a judgment of non-suit was entered because of appellant's failure to move his suit. After the decision of the Court of Errors and Appeals, appellant then brought a similar suit in the Supreme Court. It is from the judgment in that suit he now appeals.

The whole weakness of appellant's suit is that, while his complaint fairly states a cause of action, his opening of the case plainly disclosed that appellant was resorting to his old tactics of speculating with the Court. As proof of this, listen to his opening (page 15, line 5): "Now, as I say, in July, 1914, Mr. McMichael's cattle got over into Bare-

foot's field; whether Barefoot procured them to get there or not is one of the questions you will have to decide." This statement was evidently fathered with the hope and expectation that something might develop in the case that would show that Barefoot had procured the cattle to trespass on his own field.

Again, the whole conspiracy case is outlined in the opening (printed book, line 32, page 23). In other words, unity of purpose, accompanied by unity of action and the engagement of one counsel for all actions and trial of same actions in the one court at the same time, constitute conspiracy! The proposition is startling, but the idea is not at all new with appellant. He has urged in every court and will keep on urging it until he receives an emphatic redeclaration of the maxim that, "There must be an end to litigation."

The whole pliant of appellant is that he has been mulcted in damages and that he should have another chance to recover these damages, including his costs and expenses. He is evidently giving no consideration to the expense and trouble he has put his suitors to, in defending the numerous actions he has brought against them.

Law.

The plaintiff attacks the Court's judgment of nonsuit first, upon the ground that it was improper as to time. In other words, his contention is that plaintiff should not have been non-suited on his opening of his cause.

While it is true that a judgment of non-suit should not be entered if there is any evidence at all to support plaintiff's case, it is immaterial, when the judg-

ment is given where it is apparent that no cause of action exists. The subject was treated by Chancellor Magee in the case of *Kelly vs. Bergen County Gas Co.* He says the rule which is applied to a motion for a non-suit at the opening is the rule applied at the conclusion of plaintiff's case. The real question is, as he says, whether the facts stated or proved and reasonable inferences which may be withdrawn therefrom, disclose that plaintiff is not entitled to submit his case to the jury, because a verdict in his favor could not be maintained. He then proceeds: "In practice, a motion for a non-suit made upon the opening of counsel, is, perhaps, more liberally treated than an application for a non-suit at the close of plaintiff's case. In the former case, if objection is made to a statement too meagre to sustain the plaintiff's case, counsel will doubtless be permitted to enlarge his statement."

Now, in the case at bar, at the Court's suggestion, counsel enlarged his statement. The Court then said: "Now, do you want to add any additional facts as elements of proofs that you want to establish in this case?" Counsel having replied in the affirmative, the Court said, "Now, state them just as concisely as you can, specifically."

Counsel then proceeded to enlarge his statement (see printed book, page 34, line 30).

It may be here remarked that the Court of Errors and Appeals held the ruling of the trial Court in the Kelly case erroneous, because the statement itself showed a *prima facie* case of negligence.

In the case of *Jordan vs. Reed,* 77 N. J. L. 584, the Court again restated the rule in the same words. However, in this case the plaintiff, notwithstanding his declaration, which showed a case on negotiable paper, in his opening statement offered to prove a

contract different from that declared on and because some of his averments would under the Negotiable Instrument Act show a liability, the Court permitted plaintiff to proceed with his proofs and refused motions to non-suit on the opening, and finally directed a verdict for the plaintiff, which ruling was reversed by this Court.

The doctrine of these cases is that a non-suit on the opening is permissible if the statement of counsel renders it clearly evident, either that no case is made out, or that a recovery is precluded.

When there are no facts upon which reasonably and legitimately a liability can be based, the Court must either order a judgment of non-suit or direct a verdict in favor of the defendant. *Regan vs. Palo,* 62 N. J. L. 30.

It is the Court's preliminary duty to decide whether there is any evidence legally sufficient to be considered by the jury, depending on whether it is of such probative force to enable an ordinarily intelligent mind to draw a rational conclusion therefrom in support of the proposition sought to be maintained by it. *Burke vs. City of Baltimore,* 96 Atl. 693.

The other ground of reversal urged by appellant is without merit for the reason that the case he cited at the argument for the non-suit is radically different from the case at bar. The case he cites, *Van Horn vs. Van Horn,* 56 N. J. L. 318, was an action in tort. The declaration alleged that the two defendants conspired to injure one Emma Van Horn in her business of selling fancy goods. The case leaves no doubt that one or both defendants had maliciously and designedly committed an overt act to injure plaintiff in her business, and as the Court well said, quoting from *Parker vs. Huntington,* 2

Gray, 124, actions for malicious prosecution, where two or more were made defendants, were laid with a charge of conspiracy, but that the charge of conspiracy was never deemed essential. It is mere surplusage and need not be proved, and there may be a recovery against one or both. There is no doubt, however, that the declaration and proof in the Van Horn case showed a plain case of actionable wrong committed by the defendants, or either of them. It is and always has been held actionable to damage a person in business by false and malicious statements. The Court found as a fact that one of the defendants in the Van Horn case was guilty of making such statements.

No decision, however, has gone so far as to say that the bringing of actions by several persons for damages for trespass in the same court and before the same jury by the same attorneys, even though all the actions are consolidated and tried at once, is an act of conspiracy, or any actionable wrong, and while plaintiff's declaration in the case at bar apparently bolsters up an action for conspiracy based on alleged perjured testimony, appellant's opening of the case showed that the declaration itself was a sham and a subterfuge to force the defendants to appear once again in court to respond to the numerous actions brought against them by appellant, because he failed, even after the Court's insistence, to state anything which would show a conspiracy or even an actionable wrong on the part of any one of the defendants.

In the case of *Austin vs. Barrows,* cited in the Van Horn case, it was stated that the allegation of conspiracy brought no strength to the declaration, for it shows no additional cause of action. An act which, if done by one alone, is no cause of action, is

not rendered actionable by being done in pursuance of a conspiracy (41 Conn. 387).

See also *Boston vs. Simmons,* 150 Mass. 461.

It is not an actionable wrong to bring a suit in good faith, and does not matter whether the suit is brought by one person alone or by a dozen jointly.

It was held in the case of *Dunlap vs. Glidden,* 31 Me. 433; 52 Am. Dec. 625; and also in *Garing vs. Fraser,* 76 Me. 37, that no action will lie where a verdict and judgment has been recovered against plaintiff, so long as the judgment remains unreversed, nor where a *nolle prosequi* has been entered.

The appellant's action for conspiracy, therefore, when boiled down, produces the conclusion that his action in the Circuit Court, which was non-suited and his subsequent action of like nature in the Supreme Court, the non-suit of which he now asks be taken off, were nothing more than appeals in the nature of cross-actions to recover the damages and costs assessed against him in the District Court.

It would, therefore, be the limit of inconsistency for this judgment to be reversed as long as the judgments in the District Court remain undisturbed.

In other words, the reversing of the judgment of non-suit will open up to litigants an entirely new procedure to defeat judgments at law without appeal, if appellant is accorded the favor he asks of this Court.

Perjured Testimony Not a Ground of Action Against Perjurer.

Finally, assuming that appellees were directly or indirectly guilty of giving perjured testimony in the District Court, such would not give appellant an ac-

tion against them for damages, *Schant vs. Ferrell,* 81 Atl. 789.

This is a Maryland case, but is in harmony with the tread of judicial opinion in this country. The cases are reviewed in the foot note to *Godette vs. Gaskill,* 24 L. R. A. (N. S.) 265, where it is held that the perjurer will not be held liable even though the perjurer may have been a party to the proceeding wherein the judgment was entered, and the most weighty reason given for the decision is that in allowing the maintenance of such an action, the proceedings of the jury before whom the testimony was given would be brought into question with the result that virtually a new trial of the former suit would be necessary.

It follows, therefore, that the judgment of non-suit was proper because the trial Court would have undoubtedly allowed a judgment of non-suit at the close of appellant's case or have directed a verdict against him, and for the further reason that the plaintiff's declaration under a state of admitted facts regarding the parties might have been dismissed on motion.

It is respectfully submitted, therefore, that on the facts of this case and the law applicable thereto the judgment of non-suit was proper and should not be taken off.

SCOVEL & HARDING,
Attys. for Appellees.