

NOTRE DAME CIRCUIT COURT

Record of Cases.

(Lawrence B. Stephan)

CAUSE NO. 1.

William Smith
vs.
Frank Brown

Arthur B. Hunter,
Thomas V. Truder,
Attorneys for Plaintiff.
Harry P. Nester,
Lawrence S. Stephan,
Attorneys for Defendant.

Action on a negotiable instrument given to plaintiff by defendant, which is due and unpaid. Demand \$116.25.

Complaint in one paragraph.

Plaintiff files amended complaint.

Defendant files answer, in one paragraph, in confession and avoidance, alleging failure of consideration.

Plaintiff files reply in general denial.

Cause submitted to the court, jury being waived, and trial had.

Harry P. Nester opens argument for defense and is followed by Arthur B. Hunter for the plaintiff, and Thomas V. Truder closes for the plaintiff while Lawrence S. Stephan concludes the argument for the defense.

Judgment rendered in favor of plaintiff in the sum of \$106.25, principal and interest, together with attorneys' fees of \$20.00 and costs, which judgment is entered without relief from valuation or appraisal laws.

CAUSE NO. 2.

Henry Lang
vs.
Frank Cramer

Richard B. Swift,
Clement B. Mulholland,
Attorneys for Plaintiff.
Humphrey L. Leslie,
M. Edward Doran,
Attorneys for Defendant.

Plaintiff brings action on an account to which defendant claims as set-off, compensation for services rendered. Demand \$65.00.

Complaint in one paragraph, action on an open account.

Defendant files answer in three paragraphs; (1) General Denial; (2) Payment; (3) Set-Off.

Plaintiff files reply of general denial, to each of the paragraphs numbered (2) and (3) of the defendant's answer.

Judgment rendered in favor of plaintiff and against defendant's second and third paragraphs of answer.

CAUSE NO. 3.

John Sullivan
vs.
Harry Dorman

Francis J. Murphy,
Francis J. Clohessy,
Attorneys for Plaintiff.
Edward C. Donnelly,
Delbert D. Smith,
Attorneys for Defendant.

Action on a promissory note. Demand \$500.00.

Complaint on negotiable promissory note in one paragraph, said note being due and unpaid.

Defendant files answer in two paragraphs: (1) general denial and (2) *non est factum*.

Plaintiff files reply to the second paragraph of answer, reply being in general denial.

Cause submitted to the court, jury being waived, and trial had.

Judgment in favor of plaintiff in the sum of \$50.000 for which judgment is entered without relief from valuation or appraisal laws.

CAUSE NO. 4.

John Hamilton

vs.

Charles Simpson

Sherwood Dixon,

Robert E. McGlynn,

Attorneys for Plaintiff.

Leo J. Hassenauer,

Clifford P. O'Sullivan,

Attorneys for Defendant.

This is an action on a contract for the sale of certain hogs valued at \$83.50, which defendant refused to accept.

Plaintiff files declaration and praecipe.

Defendant files plea to the jurisdiction, alleging improper service.

Plaintiff admits plea.

Defendant waives service and files plea in abatement, as to defect in the name of the plaintiff, which is sustained.

Plaintiff files amended declaration.

Defendant files plea in two counts:

(1) general denial; (2) breach of warranty.

Plaintiff files general demurrer to count (2) of defendant's plea, which is overruled, and plaintiff takes exception.

Plaintiff files replication in two counts: (1) Similiter to paragraph one of plea and (2) general issue to second count of plea.

Defendant files similiter.

Cause at issue, jury waived, and trial had.

Judgment for plaintiff in the sum of \$83.50.

CAUSE NO. 5.

Fred Schultz

vs.

Hale Paul and

William Paul

Edwin A. Frederickson,

George L. Murphy,

Attorneys for Plaintiff.

Arthur B. Hunter,

Harry A. Richwine,

Attorneys for Defendants.

Action for damages occasioned by the removal of a fence on the land of plaintiff, landlord, erected there by defendant William Paul, tenant, and plaintiff was assaulted by Hale Paul the son of William Paul while in the act of removing such fence. Demand \$5000.00.

Complaint in three paragraphs: (1) theory of master and servant relation between father and son; (2) conspiracy; (3) that father counseled and directed the son to commit assault and battery.

Defendants file separate and several demurrer.

Demurrer sustained in behalf of each defendant to the second and

third paragraphs of complaint, and leave taken to amend.

Plaintiff files amended third paragraph of complaint.

Defendants file separate demurrer to the amended third paragraph which is overruled and defendants separately except.

Defendants file answer in three paragraphs: (1) general denial; (2) *son assault demesne*; (3) defence of property.

Plaintiff files reply to the second and third paragraphs of answer, the reply being traverse *de injuria*.

Jury impanelled, cause submitted, and trial had.

Plaintiff tenders twelve instructions in writing, seven of which were indicated as given, and five refused. Defendant tenders two instructions in writing, one of which is indicated as given and one refused. To the giving and refusal to give these tendered instructions plaintiff and defendant properly except.

Defendants tender 25 interrogatories with request that they and each of them be submitted to the jury to be answered and returned with the general verdict. Then court refuses to submit interrogatories Nos. 4, 12, 22, and 23, to which refusal the defendants separately and severally except.

George L. Murphy opens argument for plaintiff and is followed by Harry A. Richwine for the defendants. Arthur B. Hunter concludes the argument for defendants and Edwin A. Frederickson closes for the plaintiff.

The court now instructs the jury in writing and files the instructions numbered from 1 to 19 inclusive and orders that they become part of the record without bill of exceptions.

The jury retire and return into

open court their verdict:—"We the jury, find for the plaintiff as against the defendant Hale Paul and we assess the damages at \$5000. And we further find for the defendant William Paul as against the plaintiff."

The jury also return the interrogatories with their answers thereto.

Hale Paul files separate motion for judgment on the answers to the interrogatories *non obstante veredicto*. Motion overruled to which defendant Hale Paul excepts.

Defendant Hale Paul files motion and twelve causes for a new trial which is overruled and he excepts.

Plaintiff now files motion and four causes for the new trial as against the defendant William Paul which motion the court overrules and the plaintiff excepts.

Judgment on the verdict for plaintiff as against defendant Hale Paul, to which said defendant objects and excepts, and judgment on the verdict for defendant William Paul as against plaintiff to which plaintiff objects and excepts.

Defendant, Hale Paul, prays an appeal to the Supreme Court of Notre Dame, which is granted and ten days in which to file general bill of exceptions. Thirty days granted said defendant to file appeal bond in the sum of \$500.00 with Francis T. Walsh and Jerome Martin as sureties, which sureties are hereby approved by the court.

Plaintiff prays an appeal to the Supreme Court which is granted and ten days given in which to file general bill of exceptions. Thirty days granted plaintiff in which to file appeal bond in the sum of \$200, which bond is hereby approved.

NOTE:—The decision of the case by the Supreme Court of Notre Dame

is elsewhere reported in this number of the Reporter, as also are the arguments to the jury made by Edwin A. Frederickson for the plaintiff and Arthur B. Hunter for the defendant.

CAUSE NO. 6.

William Hunter

vs.

John Elam

Michael E. Doran,
Edward McMahon,
Attorneys for Plaintiff.

Jerome J. Martin,
Humphrey L. Leslie,
Attorneys for Defendant.

This is an action in replevin, to recover a horse alleged to be owned by the plaintiff, in virtue of a contract of sale prior to that by which defendant purchased and secured possession from the the same vendor.

Plaintiff files complaint in one paragraph in replevin.

Defendant files demurrer to complaint, which is overruled and exception taken.

Defendant files answer in two paragraphs: (1) general denial and (2) bona fide purchaser. Demurrer by plaintiff to the second paragraph is sustained, to which defendant excepts.

Plaintiff files reply in two paragraphs to paragraph (2) of answer: (1) general denial; (2) setting up ownership.

Defendant files motion to strike out second paragraph of plaintiff's reply on the ground that it is an argumentative general denial. Motion sustained; second paragraph of reply stricken from the record; plaintiff takes exception to this ruling.

Cause at issue, trial by jury.

Before argument plaintiff tenders instructions, all of which are refused, to which the plaintiff severally excepts as to each instruction tendered and refused. Defendant tenders instructions all of which are refused and the defendant excepts severally to each ruling.

Plaintiff submits interrogatories, as also does the defendant.

Arguments by Ed. McMahon opening for the plaintiff and H. L. Leslie for the defense, while J. J. Martin closes for the defense and M. E. Doran for plaintiff.

Court instructs the jury in writing and orders instructions to be filed and made part of the record without bill of exceptions.

Jury retires and returns into open court this verdict:—"We the jury find for the defendant and against the plaintiff."

Answers to the interrogatories were also returned.

Plaintiff moves for judgment *non obstante veredicto* on the answers to the interrogatories. Motion overruled to which plaintiff excepts.

Plaintiff files motion and ten causes for new trial, which motion is overruled and plaintiff takes exception.

Defendant moves for judgment on the verdict.

Judgment rendered for defendant that the plaintiff take nothing by his action and that defendant recover his costs, to which judgment plaintiff objects and excepts.

Plaintiff prays an appeal to the Supreme Court of Notre Dame. Appeal granted and five days given to file appeal bond in the sum of \$300.00 which bond and sureties on such bond are hereby approved by the court.

Plaintiff is granted ten days to file general bill of exceptions.

NOTE:—The opinion rendered by the Supreme Court of Notre Dame on this case is to be found elsewhere in this Reporter, as also are the briefs submitted on the case by Messrs. Michael E. Doran and Humphrey L. Leslie.

CAUSE NO. 7.

Mary McClelland
vs.
William Meyers

Clement B. Mulholland,
Edwin C. Donnelly,
Attorneys for Plaintiff.
Richard B. Swift,
Thomas V. Truder,
Attorneys for Defendant.

This is an action for personal injuries alleged to have been sustained by the plaintiff, due to the careless and negligent driving of an automobile by the defendant's son. Demand \$1500.00.

Plaintiff files complain in two paragraphs: (1) on the theory of master and servant; (2) on the theory of negligence of master.

Defendant files motion to make more specific which is overruled.

Defendant files several demurrer to complaint alleging (1) failure to specify the relation between plaintiff and defendant; (2) that second paragraph does not state specific act or omission which caused the injury. Court overrules demurrer to each paragraph to which ruling on each paragraph defendant excepts.

Defendant files answer in three paragraphs (1) general denial; (2)

contributory negligence; (3) alleging ordinary and reasonable care.

Plaintiff makes motion to strike out paragraphs two and three of answer, which motion is sustained, and the defendant severally excepts.

Jury impanelled, cause submitted and tried.

Plaintiff tenders four instructions; three instructions given and one refused. Defendant tenders three instructions two of which are given and one given as modified. Defendant excepts to the giving of the plaintiff's instructions numbered 2, 3 and 4, and also takes exception to the ruling on the court in refusing his tendered instruction No. 1. Plaintiff excepts to the giving of each of defendant's instructions.

Plaintiff submits interrogatories numbered one to seven all of which are given. Defendant submits interrogatories numbered one to eleven, the court refusing all but numbers 1 and 11, to which ruling defendant excepts.

Edwin C. Donnelly opened the argument for the plaintiff, followed by Richard B. Swift for the defendant. Thomas V. Truder closes the argument for the defense and Clement B. Mulholland concludes the case for the plaintiff.

The court now instructs the jury in writing and files the instructions, ordering that they be made a part of the record without bill of exceptions.

The jury retire and return into open court the general verdict in favor of plaintiff, fixing damages at the sum of \$750.00.

The jury also return the interrogatories with their answers thereto.

Defendant files motion for new trial, which the court overrules, to which the defendant takes exception.

Judgment rendered in favor of plaintiff in the sum of \$750.00.

Defendant prays an appeal to the Supreme Court of Notre Dame which is granted and five days given in

which to file general bill of exceptions. Thirty days granted said defendant to file appeal bond in the sum of \$1000.00, which bond and sureties thereon is hereby approved.

IN THE NOTRE DAME CIRCUIT COURT

HON. F. J. VULPILLAT, JUDGE

Arguments in the Case of

FRED SCHULTZ V. HALE PAUL AND WILLIAM PAUL

by

EDWIN A. FREDRICKSON, ATTORNEY FOR PLAINTIFF

and

ARTHUR B HUNTER, ATTORNEY FOR DEFENDANTS

FREDRICKSON FOR PLAINTIFF.

Your Honor; Gentlemen of the Jury:

I don't believe that it is necessary for me to argue for any great length of time in behalf of the plaintiff in this case, Mr. Schultz, in view of the fact that certain matters, certain facts, have been brought out in the evidence submitted to you in this cause, which facts, when the law is applied to them as per the instructions that will be given you by this court, leave you with but one course to pursue in arriving at your verdict: Gentlemen of the jury, in my mind you are virtually compelled to find for Mr. Schultz as against both William Paul and Hale Paul, awarding Mr. Schultz the five thousand dollars asked for and not one penny less.

This is an action in damages; an action brought by Mr. Schultz as result of an assault and battery committed upon him by Hale Paul the 5th day of June, 1919, on a farm some two and a half miles west of the city of South Bend. For all the natural and probable consequences of this assault Mr. Hale Paul, under certain circumstances, is liable, which circumstances I believe we have conclusively proven; and for all the natural and probable consequences of this same assault Mr. William Paul, under certain circumstances, is likewise liable, which circumstances I be-

lieve we have likewise proven. Now then, gentlemen of the jury, it has not been necessary in this case for us to prove the assault itself, for both Hale Paul and William Paul, while on the witness stand, admitted the striking of the blow complained of. What then are the defenses offered by these defendants in their hope to escape liability? Well, they are two in number. Hale Paul tells you, first of all, that he struck Fred Schultz in self-defense; and, secondly, that he struck Mr. Schultz in defense of his master's property. Gentlemen of the jury, I ask you is either of these defenses sustained by the evidence?

Before you can conscientiously believe that Hale Paul struck Fred Schultz in self-defense, you must certainly believe that, prior to the assault, Mr. Schultz assumed some sort of a threatening attitude towards Hale Paul; in other words, that Hale Paul had reasonable grounds to fear bodily injury at the hands of Mr. Schultz. But what is the evidence on this point? First of all, the allegation by the Pauls, on the one side, of the fact that Mr. Schultz did assume a threatening attitude, but on the other side, the absolute denial of that fact by Mr. Schultz, with his testimony corroborated by the testimony of Mr. Leslie, an eye witness to the entire transaction. And this is not

the only evidence that must be considered by you relative to this point. This court will instruct you that, in deciding upon any disputed question, you must not rely alone upon the testimony of the various witnesses with reference to that particular question, but that you must consider all the evidence, all the facts and attending circumstances, as brought out by the evidence. And now let us review these other facts. Surely, before you can believe that Mr. Schultz ever offered to inflict bodily harm upon Hale Paul, you must believe one of two things: either that when he went out to that farm he carried in his heart the intention of committing an assault upon Hale Paul, or else that, after reaching the farm, Mr. Schultz was so angered or incensed by the deeds or words of Hale Paul that he was suddenly rendered willing to do Hale Paul personal injury. But does it appear that Fred Schultz sought out Hale Paul upon arriving at the farm as he unquestionably would have done had he intended to assault him? Most certainly not. He proceeded at once to the fence he had gone out to remove, paying not attention to Hale Paul, some hundred feet distant in the corn field. And now just what took place there at that fence? First of all, Hale Paul came running over yelling out, "Mr. Schultz, you leave that fence alone," to which remark Schultz paid no attention. And then what happened?

A little later Hale cried out, "Damn you, Schultz, if you don't stop I'll make you stop," to which remark Schultz again paid no attention, whereupon Hale Paul merely repeated the identical words, "damn you, Schultz, if you don't stop I'll make you stop," whereupon, the Pauls

claim, Mr. Schultz then assumed a threatening attitude. Gentlemen of the jury, without a doubt Hale Paul made use here of some very forcible language, but my theory is, and certainly your conclusion must likewise be, that if these strong words could ever have so roused the anger of Fred Schultz as to incite him to the commission of an assault upon Hale Paul, they would most certainly have had that effect the first time that they were addressed to him. And yet the Pauls would have you believe, in spite of the testimony of Mr. Schultz, backed up by the testimony of Mr. Leslie, and in spite of all these inconsistent circumstances, that Mr. Schultz did assume a threatening attitude.

And here is still another point. Recall, if you will please, the fact as brought out by the testimony of the defendants themselves—and I am very careful to question both Hale Paul and William Paul on this point—the fact that Hale Paul picked up that fence rail some time prior to the time at which the Pauls claim that Fred Schultz assumed a threatening attitude. What did Hale Paul pick up that club for, if not for the very purpose for which it was used only a few moments later, namely, of striking Mr. Schultz upon the head with it with such force and violence as to flatten him to the ground senseless? What did Hale Paul pick up that club for, I ask you, did he want to pick his teeth with it? Recall too, if you will, the manner in which William Paul warned his son not to strike Mr. Schultz, of how upon his arrival at the fence he cried out, "You'd better not strike him, Hale." What if anything do these words indicate, if not, that either the Pauls

had conspired to assault Mr. Schultz, or else that Hale is possessed of a most violent and ungovernable temper? And yet Hale Paul tells you that he struck in self-defense.

And, gentlemen of the jury, even if Hale Paul had actually acted in self-defense, had used force as a means of self-protection, it could not be contended by these defendants that he only used such force as was reasonably or seemingly necessary under the circumstances. It must be remembered that at all times during the affair out there on that farm a five-foot fence was between the two men, that Hale Paul was in the corn field, and that Mr. Schultz was in the clover field, and that a substantial five-foot barrier intervened between them. Certainly the position of Hale Paul was actually and seemingly much less dangerous than it would have been had there been no fence in existence. And it was unquestionably unnecessary for Mr. Hale Paul to reach over that fence and to deal Mr. Schultz a blow so vicious that it leveled him to the ground unconscious. And, gentlemen of the jury, the law does not countenance the use of excessive force by one really acting in defense of either person or property, and this court will so instruct you. I tell you, gentlemen of the jury, that Hale Paul has failed utterly to prove up in this case, either the plea of self-defense or defense of his master's property, such as is recognized by the law.

Now then, relative to the liability of Mr. William Paul; I don't intend to spend much time on that phase of this case. If Hale Paul is liable for this assault, as undoubtedly he is, then William Paul is also liable, for the master is always liable for the

tortious act of his servant committed by such servant while acting within the scope of his employment and in furtherance of his master's business or interests. On the witness stand both Hale Paul and William Paul testified that on the 5th day of June, 1919, and for some time previous thereto Hale Paul was and had been in the employ of his father, acting as his servant and assisting him in the operation of his farm. And both defendants also admitted that at the very time the blow was struck Hale Paul was such servant, acting within the scope of his employment and in furtherance of his master's interests, namely, attempting to prevent the removal of that division fence. And so I say, that I don't feel the necessity of tarrying long upon the proposition of William Paul's liability.

And now just a few words with reference to the damages asked for and I am through. Gentlemen of the jury, surely you must realize that no verdict that you could possibly return could ever right the wrong that has been committed upon Mr. Schultz; that no verdict that you could possibly return could ever place him in the position he was in prior to the 5th day of June, 1919. And surely, therefore, you must feel it your solemn duty to award him such monetary damages as will compensate him as best they can for the loss he has sustained. And now what are the proper elements of his damages? Are they merely the medical and nursing expenses he has incurred, the wages he has already lost, the mental and physical suffering he has endured? Hardly. Dr. Royans has told you that Mr. Schultz is permanently injured, that he is suffering from an

organized thrombus resulting in the permanent paralysis with which he is afflicted; and has told you further that Mr. Schultz will never again be able to do a day's labor. Oh! I am not unmindful, gentlemen of the jury, of what Dr. Allney had to say with regard to paralysis, bloodclots, etc., but I want to tell you that, personally, I haven't very much respect for the medical opinion of a physician who would have me believe that human heads don't vary in shape and size; and who is wont to compare the human blood stream to the lubricating system of an automobile. Why, gentlemen, I have just a little too much regard for the greatest piece of handiwork of God to believe that the human blood stream is but a lubricating system. I wonder what Dr. Allney thinks its purpose is—perhaps a means of oiling the joints. No I am not fearful of the effect of Dr. Allney's testimony. And now if Fred Schultz is permanently paralyzed, as unquestionably he is, and incapable of ever doing another day's labor, what additional loss has he sustained as result of this tortious assault? Simply the complete loss of all such earnings as he might have made in the future; and now when one stops to consider that, as per the testimony of Mr. Schultz himself and of Mr. O'Hara, his employer, Mr. Schultz had for some time previous to 5th day of June, 1919, been earning a salary of one hundred and fifty dollars per month; and that, as per the testimony of Mr. Doran and as per the American Table of Mortality, Mr. Schultz has expectation of life amounting to some twenty-four years, one needn't be possessed of exceptional mathematical ability to figure out that the present value of

such a salary most certainly amounts to a sum much greater than the five thousand dollars asked for. But, gentlemen of the jury, why should you haggle over the question of damages? Look at Mt. Schultz! What is he today but a mere miserable shadow of his former self, a misery to himself, a misery to his family, a misery to everyone with whom he comes in contact; a man not only deprived of the ability of ever doing another day's labor, but a man deprived of something even more valuable than that—a man deprived of the satisfaction that comes to every man at the conclusion of an honest day's toil. and all as the result of the malicious and tortious assault committed upon him by Hale Paul? Why, gentlemen of the jury, can there be any doubt in your mind of the fact that, if Fred Schultz were to have his choice, he would rather have the health and vigor and physical well-being that were his prior to the 5th day of June 1919. than to have you award him a hundred thousand dollars damages! So now go into the jury room, gentlemen of the jury, and consider the evidence in this case, and consider the law, and then all that I ask of you is that you of your moral consciences. act in accordance with the dictations

HUNTER FOR DEFENDANTS

Your Honor—Gentlemen:

Not only do we believe, as has been ably pointed out by my co-counsel in his argument, that the evidence in this case is clearly in favor of the defendants, separately and jointly, but we are also convinced that the law is clearly in our favor on the issues involved.

There are at least four phases of

the alleged liability of the defendants in this case on the paragraphs of plaintiff's complaint. They may be represented by four questions.

1. Is William Paul liable on the first paragraph of the complaint?

2. Is William Paul liable on the amended third paragraph of the complaint?

3. Is Hale Paul liable on the first paragraph of the complaint?

4. Is Hale Paul liable on the amended third paragraph of the complaint?

It shall be my purpose to treat these four questions.

William Paul is not liable on the plaintiff's allegations in the first paragraph of complaint because: firstly, the mere relationship of parent to child does not make the father liable for any tort committed by his child; secondly, the plaintiff has not shown by a preponderance of the evidence that the son at the time of the assault was working as his father's servant; thirdly, and most important of all, there was no unlawful assault committed by Hale Paul as alleged in the first paragraph. If no such assault was committed, and you have heard the evidence, gentlemen, clearly showing that it was not, then certainly William Paul is not liable on any theory for a tort never committed.

Then, too, William Paul is not liable on the plaintiff's allegations in the third paragraph of complaint because it nowhere appears in the evidence that William Paul did or said anything to induce his son to go to the place where the plaintiff was, or that he aided, abetted, encouraged, or counselled any retaliation, even for the assault which the plaintiff committed before he was downed by a blow from the light stick in the hands

of the boy Hale Paul. Rather it does appear that he at the time counselled his son and called to him not to strike the plaintiff, under and provocation or assault, for the reason that he knew the plaintiff's general reputation for turbulence of character in the community in which the plaintiff resides. If William Paul did not counsel, aid, or abet his son, even to defend himself, certainly plaintiff's failure to prove facts sustaining his third paragraph of complaint releases William Paul from all liability thereon. The learned court will instruct you that every material fact alleged by the plaintiff must be proved by him by a preponderance of the evidence.

But let us get down to the two parties most intimately involved in this case and try to discover what, if any, liability attaches to the defendant Hale Paul from the proof or lack of proof of facts alleged in the plaintiff's first and amended third paragraphs of complaint.

The defendant Hale Paul is charged with the direct commission of an assault and battery in each of these paragraphs. The allegations as to Hale Paul's part in the alleged tort are practically the same in both cases. Suffice it to say that either the second or the third paragraph of answer alleges facts sufficient to free Hale Paul of any liability for any act of his directed against the plaintiff on the fifth of June last.

It is the law and the court will instruct you that not only must the plaintiff prove the operative facts of at least one of his paragraphs of complaint, but he must also meet successfully as to each paragraph the special items of defense set up by each of the defendants in their second and

third paragraphs of answer. The court will instruct you that if you believe that Hale Paul committed an assault and battery on the plaintiff, in the defense of his property rights or in defense of his person, and that at the time Hale Paul was himself without fault and in a place where he had a right to be and that he believed that he would suffer bodily harm at the hands of the plaintiff, and, while so believing, struck the plaintiff, using no more force than was necessary to defend himself against the threatened injury he believed was about to be inflicted upon him, that he struck the plaintiff in the proper and reasonable defense of his property rights, that if you believe either of these states of facts to have existed, then you must find for the defendant Hale Paul. Certainly, gentlemen, both of these justifications, as has been shown in the argument of my co-counsel on the evidence in this case, did exist.

We are not contending that the mere words of the plaintiff at the time just preceding and at the time of the threatened injury to Hale Paul were sufficient provocation or excuse to entitle the defendant Hale Paul to "whale away" and slap the plaintiff over the left ear, but we do contend that even such words strengthened the defendant Hale Paul in his belief, already existing, that he was in danger of bodily harm, and when coupled with the fact that the plaintiff advanced towards him in a menacing attitude and with a spoken threat, that belief became so acute that Hale Paul was absolutely certain, as would any one of you gentlemen have been under like circumstances, that he was in grave and immediate danger of bodily harm.

Remember also that Hale Paul was

in a place where he had a right to be; on a farm leased from the plaintiff by William Paul for a cash rental and on a farm in the crops and stock of which, the plaintiff has shown absolutely no interest; and at a fence on that farm, which fence was plainly a temporary fence, which fence, for some whimsical reason that the plaintiff has not seen fit to allege or disclose, the plaintiff wanted to remove and was arbitrarily removing at the time of the alleged assault on June 5, 1919, and which fence, moreover, was placed there without a word of complaint on his part; that, finally, this fence was at the time the personal property of the occupants of the farm at the time and if the plaintiff had succeeded in accomplishing his evil purpose of tearing down the whole or any part thereof, and carrying any portion of it away, such plaintiff would have been guilty of larceny. Therefore, we say that Hale Paul was free from fault and was in a place where he had a right to be.

Furthermore, Hale Paul used the only reasonable means at hand to defend his person and his property and certainly used no more force than was necessary to defend himself against the threatened injury that he believed was about to be inflicted upon him. This phase of the case has been so ably presented by my colleague in his argument that I need only mention it here.

If the plaintiff really thought that he was entitled to have this fence removed, why did he not seek an appropriate remedy in equity or seek his actual damages in law? The courts have even been open to him for such purpose. He had no right to take the law in his own hands and then be heard to complain if his own

forceful, unlawful means were met by other means, perhaps forceful, but certainly no more so than was actually necessary under the circumstances. Perhaps he knew himself to be in the wrong. Perhaps he had consulted an honest lawyer and that lawyer had told him that it is the general rule of law that when a landowner consents expressly or by implication to the placing of an addition on his land, without an express agreement as to whether it shall become a part of the realty or remain personalty, an agreement will be implied that it is to continue personal property. In any event he showed by the very violent manner in which he dealt with the fence that he realized that it was not a fixture but was severable. He seemed to forget, however, that the right to remove this fence or to refrain from removing the same, rested with his tenants who had put up the fence.

Perhaps you are saying to yourselves, "Oh, well, what have all these propositions to do with the case?"

Gentlemen, I am merely endeavoring in my humble way to present to you the case of the defendant William

Paul and the case of the defendant Hale Paul and convince you, as I have long ago become convinced, that this whole suit is the result of malice. You had the opportunity and duty to watch and compare the demeanor and candor of the plaintiff and the defendants in the court room. You have had every opportunity to note the apparent lack of any of those symptoms or traces of paralysis in the plaintiff from the moment that he left the witness stand. You have had the chance to see before you in his every littleness this plaintiff who threatened to "get even" with these defendants because they saw fit to resist force with force. Doubtless you have already formed an opinion in your own minds which of the witnesses were telling the truth. The learned court will instruct you that you may consider the demeanor of each and every witness on the stand along with all other facts and circumstances in the case. We believe that you will view this case as men and that you will deal justice as men. We know that any act of either defendant was fully justified at the time and we ask of you only simple justice.