

in remaining. The shovel would pass well above their heads, and the only real danger was from the falling of stones or pieces of dirt from the shovel. Phillips says frankly, in his evidence, that he had concluded to chance it, but looking up at the shovel when it began to sway in their direction he noticed a lump of dirt hanging from the shovel. He immediately said to plaintiff who was standing beside him, "Come out, there is a lump dragging out of the dipper." Phillips went out and says there was no difficulty as to getting out in time. The plaintiff did not get out as Phillips did, though there is not a line of evidence to indicate any intelligent reason why he could not have gone out as quickly and as easily as Phillips. The result was that a lump of this dirt fell and struck plaintiff on the shoulders causing him some injury and much pain, from which he has happily recovered.

Plaintiff brought action against defendants for negligence. The cause was tried before Drysdale, J., and a jury. certain questions were submitted by the trial Judge to the jury and his instructions have not been brought in question. The questions submitted were as follows:—

"1. Q. Were the personal injuries sustained by the plaintiff caused by the negligence of William Malcolm? A. Yes.

And if so what did such negligence consist of? A. Reason, by not holding back the operation of the shovel until plaintiff was out of danger.

"2. Q. Could plaintiff with ordinary care have avoided the accident. A. No."

The jury awarded plaintiff \$500 damages.

The defendants have appealed against these findings, and the judgment entered under them. The chief grounds relied on are absence of any proof of negligence on the part of defendants and contributory negligence on the part of plaintiff.

I accept, without any hesitation, the principles of law laid down by the learned counsel for the plaintiff as to the circumstances under which the findings of a jury may be set aside. These are lucidly set forth in *Windsor Hotel Co. v. O'Dell*, 39 S. C. C. 337, by Davies, J., "The question before me is not whether the verdict is in our opinion a right or just one under the evidence, but simply whether it is one which a jury could under all the circumstances, fairly find. While if acting as a jurymen I might not have agreed with the conclusion reached by the majority of the jury. I am not sitting