

The judgment of the Court was delivered by

LONGLEY, J.:—The defendants own and work a plaster quarry in the county of Hants. The seams of plaster are covered with mud and soil which have to be removed before the ore can be recovered. This is done by a steam shovel which removes this layer of soil above the seam of plaster and transfers it to cars which remove it. As the soil is removed the bed of plaster makes a platform on which the men may work.

The plaintiff was an employee of the company, and on the 17th day of March, 1909, was sent with another man named Phillips to work on the face of the bank—chiefly to bore a hole in the soil to place explosives which would break the hardness of the soil and render it easier for the shovel to act upon. These men were located near where the shovel worked. They were instructed when sent to this work, “to always keep away from the bank when the machine (the shovel) was in operation.” These men continued to work at making a hole and putting in the explosive up to about nine o'clock in the morning. The steam shovel was not at work. The procedure is that the steam shovel operates to fill the train of cars which removes the dirt and rock, and then the train carries its load to its destination and returns when the shovel resumes work. At about 9 a.m. the cars returned and the shovel prepared to resume operations. Before, however, the machinery was put in motion, due warning was given to these two men working on the face. The warning was “come out boys” or “look out boys.” The plaintiff says he did not hear this warning but Phillips did and paid no attention to it at first. Then the machinery began to work and a second warning was given which plaintiff admits he heard. It takes about 55 or 60 seconds from the time the shovel begins to scrape up its load until it has reached the top of the bank, about 18 feet, and there was abundance of time from this second warning for both plaintiff and Phillips to leave. Indeed two or three seconds would be ample to traverse the thirty feet necessary to safety. Neither of them moved on the second warning. They were working by the side of the face but not at the spot the shovel was working. But when the shovel had done its work and was eighteen feet up it swung on a crane over the place where the two men were working. As it was ten or twelve feet above their heads there was no absolute danger