

where the sand was being taken, the wall of the pit rose to a considerable height, 30 or 40 feet. Sand had been loosened from the wall by Gaby and was lying on the floor of the pit ready to be removed. While the plaintiff was placing it in his wagon, a lump of clay or frozen sand, "the size of his head," fell from the bank and struck his leg, breaking it.

This action was brought against both Stothers and Gaby, the plaintiff alleging that the pit was in an unsafe and dangerous condition, which he (the plaintiff) was ignorant, and that the defendants knew or ought to have known of the danger and ought to have taken steps to guard the plaintiff or warn him.

The jury found that the defendant Stothers was negligent in "failing to see that the pit was not kept in safe condition," and that the defendant Gaby was negligent in "failing to remove the projections of clay." This question was also put: "Was there any special danger at the sand bank known to the defendants or either of them which was not equally known to the plaintiff—if so, what was it?" And they answered, "Yes, by knowing the pit best."

Upon these findings judgment was entered against both defendants for \$800, the damages assessed.

The appeal was heard by MEREDITH, C.J.C.P., TEETZEL and MIDDLETON, JJ.

R. S. Robertson, for the defendants.

C. Millar, for the plaintiff.

The judgment of the Court was delivered by MIDDLETON, J. (after setting out the facts as above):—There is no reason given for the falling of the lump of clay or sand other than the suggestion that, the day having been warm and damp, the bank may have thawed sufficiently to loosen it.

The plaintiff knew the pit well; he had drawn sand from it two or three years, on an average twice a day. He knew well the danger of sand falling from the bank. He did not think the pit was dangerous when he went in, and knew that the fall of sand or clay might happen in any sand pit at this time of the year, and that the only precaution he could suggest; i.e., having the bank more sloping, had not been adopted. The pit was then in its usual condition, and, although he "thought it was kind of dangerous-looking all the time," he also "thought it was the same as it was other times, and took the same chances." There is nothing