

ST. LOUIS & S. F. RY. CO. et al. v. HICKS (two cases).

(Circuit Court of Appeals, Eighth Circuit. March 1, 1897.)

Nos. 793, 794.

DEATH BY WRONGFUL ACT—EVIDENCE—INSTRUCTIONS.

In an action brought under the Arkansas statute, by an administrator, to recover the damages sustained by the next of kin by the killing of the intestate through defendant's negligence, it is not error to permit the plaintiff to prove the nature of the injuries causing the intestate's death, when the court specifically charges the jury that nothing can be allowed for the pain and suffering of the deceased, nor for the grief or distress of any one.

In Error to the Circuit Court of the United States for the Western District of Arkansas.

L. F. Parker and B. R. Davidson, for plaintiffs in error.

Oscar L. Miles, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. These cases were submitted in connection with the case of *Railway Co. v. Miles*, 79 Fed. 257, and upon the same printed record, inasmuch as the cases grew out of the same accident, and involve the same questions. In case No. 793, *Harrison Hicks*, as administrator of *William Spoon*, deceased, sued for compensation for pain and suffering sustained by his intestate, as the laws of Arkansas permitted him to do; while in case No. 794 the action was brought by the same administrator for damages sustained by the next of kin. In the latter case a single question is raised, which did not arise in the case of *Railway Co. v. Miles*, and was not considered in that case. In the course of the trial, counsel for the defendant company took an exception to the admission of certain testimony showing the nature of the injuries received by *William Spoon* which had resulted in his death. This proof was objected to on the ground that it was unnecessary to show the nature of the injuries received, inasmuch as the next of kin, for whose benefit the action was brought, could not recover in that suit for any pain or suffering which the deceased had endured as a result of the injuries. The exception thus taken has been argued in this court. The trial court permitted the plaintiff to prove the nature of the injuries sustained by the plaintiff's intestate, and that they had occasioned his death; but it charged the jury specifically that "nothing can be allowed for the pain and suffering of deceased, nor can anything be allowed for the grief or distress of any one." We think that such action on the part of the trial court was not erroneous, and will not justify a reversal of the case. The plaintiff had a right to show that the deceased had received injuries which resulted in his death. The most that can be said in support of the exception is that the court permitted a material fact to be proven in greater detail than was perhaps necessary. But, whatever possible harm was done in allowing the precise nature of the injuries to be shown, was remedied, we think, by the instruction above quoted. It must be presumed that the jury obeyed the instruction of the court,

and that the defendant was not prejudiced, although it was unnecessary to show the exact nature of the injuries. The judgment of the circuit court in each of the cases must be affirmed.

BUNKER HILL & S. MINING & CONCENTRATING CO. v. SCHMELLING.

(Circuit Court of Appeals, Ninth Circuit. February 23, 1897.)

1. MASTER AND SERVANT—UNSAFE PREMISES—FELLOW SERVANTS—INSTRUCTIONS TO JURY.

In an action against a mining company for personal injuries, caused by the fall upon the plaintiff of a mass of ore, which it was alleged had not been properly shored up by the shift boss in charge of the gang with which plaintiff was working, whom the defendant claimed to be a fellow servant of the plaintiff, the court charged the jury that it was the duty of the defendant to provide the plaintiff with a reasonably safe place to work in, and that this duty could not be devolved upon an agent. In another part of the charge the court expressly and fully instructed the jury that the carelessness of fellow servants was one of the risks assumed by the plaintiff, and that, if the accident could be traced to the negligence of a fellow servant of the plaintiff, the defendant was not liable. *Held*, that the doctrine applicable to fellow servants was not withdrawn from the jury.

2. ADMISSIBILITY OF EVIDENCE—DIAGRAM OF PLACE.

It is not error to admit, in connection with the testimony of a witness, a diagram of the place where facts testified to by him occurred, which diagram has been made from the witness' direction, and which he swears is correct.

3. TRIAL IN CIVIL CASES—SEALED VERDICT.

In civil cases the court may, in its discretion, without regard to the consent or objection of the parties, authorize a jury to agree upon, seal, and bring in and present to the court a sealed verdict.

In Error to the Circuit Court of the United States for the District of Idaho.

W. B. Heyburn and John Garber, for plaintiff in error.

Albert Allen, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. This was an action for damages growing out of personal injuries sustained by the defendant in error, who was plaintiff in the court below, alleged to have been sustained by him by reason of the negligence of the plaintiff in error, who was defendant below. The plaintiff was employed as a laborer in the defendant's Bunker Hill Mine, and at the time of the accident was engaged in shoveling ore in the Williams stope of that mine, alleged in the complaint to consist of a large chamber about 200 feet in length, about 100 feet in width, and from a few feet to 30 or 40 feet in height. The complaint alleged that on the 16th day of February, 1894, the defendant had a large number of men, including the plaintiff, employed in extracting ore from the Williams stope, by reason of which it was the duty of the defendant to keep and maintain the stope in good and safe condition; that on and prior to