what constituted a fellow servant of the plaintiff. But the court, in its charge to the jury, did in express terms instruct the jury that among the risks assumed by the servant is the risk of carelessness on the part of fellow servants. "The master is not responsible," said the court, "in any instance, for the accidents to a laborer which occurred from the carelessness of another fellow servant. He is responsible for those acts of some other employé who is a vice principal of a master, or who is his direct agent; but he is not responsible for the accidents that result to him from the carelessness of a co-laborer. So that in this case, if this accident could be traced to the direct carelessness, not of an agent or superior servant, but to some fellow servant and co-laborer, then the plaintiff would have to assume that himself. Those, now, are among the risks that a laborer assumes in entering into employment,—that is, unforeseen accidents that cannot be guarded against, cannot be provided for; and, as I said, the accidents that may result from carelessness of a co-laborer. If this accident resulted from any such causes as I have stated, the plaintiff cannot recover, etc." It cannot be properly held, therefore, that the doctrine applicable to fellow servants was withdrawn from the consideration of the jury by the instruction that the duty of the defendant, admitted in his answer, to furnish the plaintiff with a safe place in which to work, could not be delegated to an agent.

It is also contended that the court below erred in admitting expert testimony in respect to the condition of the roof of the mine. The record, however, does not contain any such objection and exception as presents the question.

Another point made on behalf of the plaintiff in error is that the court, against the objection and exception of the plaintiff in error, admitted in evidence a diagram of the stope where the accident occurred, made by one Easton upon the representations of the witness Powers and others as to its appearance after the accident. Powers testified that it was a fair representation of the workings in the stope immediately after the accident, and the court admitted it, in connection with his testimony only as his version of the workings, which the jury might consider for what it was worth. In this we see no error.

The only other point which need be specially noticed is the action of the court below in authorizing the jury, upon agreeing upon a verdict during the night, to thereupon seal it, and return it to the court upon its opening the following morning; the jury meanwhile separating. To that course the defendant not only did not consent, but objected, and to the action of the court in the respect stated reserved an exception and objected to the receiving of the verdict so agreed upon, sealed, and brought into court; the jury having meanwhile separated. The cases holding that this may be done by consent of the parties are very numerous. Many of them will be found cited in the notes to pages 414–416, 28 Am. & Eng. Enc. Law. And, as will be there seen, it has been held by some courts that, in the absence of statutory prohibition, the practice is admissible in the discretion of the presiding judge, with-

out regard to the consent of the parties, even in criminal cases. This is contrary to the general rule, but the tendency of modern decisions undoubtedly has been, as said in Com. v. Carrington, 116 Mass. 37, "to relax the strictness of the ancient practice which required jurors to be kept together from the time they were impaneled until they returned their verdict, or were finally discharged by the court." Whatever the proper rule may be in criminal cases, we think it may, in civil cases, be safely left to the sound discretion of the court, without regard to the consent or objections of the parties, to authorize a jury to agree upon, seal, and bring in and present to the court a sealed verdict. In such a case the verdict is to be put in writing before the jury separate, is thereupon sealed, and, when brought into court, is affirmed by the jury before it is received by the court. The judgment is affirmed.

NORTHERN PAC. R. CO. v. LYNCH.

(Circuit Court of Appeals, Ninth Circuit. February 8, 1897.)

1. REVIEW ON ERROR—INSTRUCTIONS—NEGLIGENCE.
   While, in a simple case, involving only the issues of negligence of the defendant and contributory negligence of the plaintiff, it is better for the court to give a few terse and pointed instructions upon what constitutes the one and the other, yet if the instructions given are unnecessarily voluminous, and unnecessarily and improperly multiplied upon the same points, it is not permissible to select particular clauses, and consider them apart from their context, but the instructions must be taken as a whole, and if, so taken, the jury have been fairly instructed, no error can be justly affirmed.
2. NEGLIGENCE—INSTRUCTIONS.
   The instructions given in this case upon the questions of negligence and contributory negligence considered, and found unobjectionable.

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

Cullen & Toole, for plaintiff in error.

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

ROSS, Circuit Judge. This was an action for damages for personal injuries sustained by the defendant in error by reason of a collision with one of the railroad company's trains in Montana at a point where the railroad track was crossed by a public highway. The case was here once before, and is reported in 16 C. C. A. 151, 69 Fed. 86. It is conceded that the facts as now presented are substantially the same as those presented on the former hearing. The defendant in error, who was the plaintiff in the court below, lived near the place of the accident, and was familiar with the crossing and with the running of the trains. The country was open and flat, and the accident occurred upon a clear and quiet day. The plaintiff had been to a blacksmith shop, going by the public road, and had crossed the railroad track in doing so. He returned by the same road, which for some distance ran parallel to the railroad track, and, when he