

that court, and the appellant's remedy for the correction of any error in the ruling thereon being by appeal to the court exercising appellate and supervisory jurisdiction over the court that denied the motion.

When the bill in this case was filed the court granted a temporary injunction against enforcing the judgment at law. This injunction was afterwards dissolved, and the bill dismissed, and a judgment rendered in favor of the appellees for the damages sustained by reason of the issuance of the injunction. Much of the brief filed on behalf of the appellant is taken up with discussing the alleged error of the court below in rendering judgment for the damages on the dissolution of the injunction, but this alleged error is not found in the assignment of errors, and cannot, therefore, be noticed. The only errors assigned are (1) that the court erred in dissolving the injunction; and (2) that it erred in sustaining the demurrer to the bill. These two assignments are, in effect, one. If the demurrer to the bill was properly sustained, the temporary injunction issued in the case was, of course, properly dissolved. The decree of the United States court in the Indian Territory is affirmed.

MITCHELL v. NORTHERN PAC. R. CO.

(Circuit Court, D. Minnesota, Fifth Division. October 31, 1895.)

MASTER AND SERVANT—RAILROAD EMPLOYEES—NEGLIGENCE OF FELLOW SERVANTS.

A car cleaner, while at work inside a coach on a side track, was injured by another coach being kicked against it at an unusual and dangerous rate of speed. *Held*, that he was exposed to the hazards and dangers of railroading, and could recover under the doctrine laid down in *Pearson v. Railroad Co.*, 49 N. W. 302, 47 Minn. 9.

This was an action by Charles Mitchell against the Northern Pacific Railroad Company to recover damages for personal injuries.

William R. Spencer, for plaintiff.

J. H. Mitchell, J. L. Washburn, and J. C. Bullitt, for defendant.

NELSON, District Judge. By consent of parties, this case was submitted to a referee to report findings of fact and conclusions of law; and, upon confirmation thereof by the court, judgment to be entered accordingly. The referee reported, in substance, that plaintiff, on the 25th day of February, 1893, was employed as a car cleaner for defendant at Staples, Minn., and, while so engaged inside a passenger coach on a side track, another coach was kicked in against it at a dangerous and unusual rate of speed by a switching crew, consisting of a locomotive engineer, fireman, foreman, and helpers; that, by reason thereof, plaintiff was injured, without negligence on his part; and damages were awarded him in the sum of \$1,500.

Exceptions were filed to the report by defendant's counsel, and, upon due consideration of the case, I am of opinion that there is sufficient evidence to warrant the findings of fact and conclusions of

law arrived at by the referee, and the amount awarded is not excessive. The report of the referee is therefore confirmed, and judgment will be entered accordingly.

The general rule, in the absence of a controlling statute, is that an employé, in the performance of certain specified duties, assumes all the natural and ordinary risks and hazards incident thereto, and those arising from the negligence or carelessness of his fellow servants are no exception. Mitchell and those composing the switching crew were fellow servants, and defendant would not be liable unless plaintiff comes within the provisions of the statute of Minnesota modifying the common-law rule, which reads as follows:

"Every railroad corporation owning or operating a railroad in this state shall be liable for all damages sustained by any agent or servant thereof, by reason of the negligence of any other agent or servant thereof, without contributory negligence on his part, when sustained within this state."

This statute has been construed to apply, not to all railroad employés, but only to those exposed to and injured by the dangers peculiar to the use and operation of railroads. *Pearson v. Railroad Co.*, 49 N. W. 302, 47 Minn. 9, and cases cited.

The question, then, is, does the plaintiff come within this rule? It has been held that a car repairer or section man injured by the act of a fellow servant in carelessly and negligently running him down with a car can recover for such injury, as being exposed to the hazards and dangers incident to railroading; and I see no reason why this plaintiff, under the circumstances, was not exposed in like manner. I hold that the plaintiff is within the terms of the Minnesota statute, and therefore can recover in this action.

ODD FELLOWS FRATERNAL ACCIDENT ASS'N OF AMERICA v.
EARL.

(Circuit Court of Appeals, Seventh Circuit. October 16, 1895.)

No. 215.

ACCIDENT INSURANCE—NOTICE TO INSURER.

The O. F. Acc. Ass'n issued to one E. an "accident certificate," by which it agreed to pay to him, or to a beneficiary, named therein, certain sums of money as compensation for injuries or death resulting from bodily injury, effected through external, violent, and accidental means, causing an external visible mark upon the body. It was provided that, for such injury, effected during the life of the certificate, which should immediately disable E. from pursuing his occupation, a weekly indemnity should be paid, for certain specified mutilations certain sums should be paid, and, if death should result from such injuries alone, within 90 days from the date of the accident, \$5,000 should be paid to the beneficiary. It was also provided that written notice should be given to the insurer, within 10 days of the date of the accident and injury for which claim should be made, stating the circumstances of the accident and nature of the injury, that there should be no claim to indemnity for disability unless disability occurred within 30 days from the date of the accident, of which the insurer should have had notice within the 10 days, nor any claim to death benefits unless death resulted within 90 days from the accident, of which accident the insurer should have had notice within 10 days. While the certificate was in force, E. stepped on