

The most that can safely be predicated upon this testimony is that the company temporarily suspended a part of its customary business prior to July, 1892, continuing other branches theretofore conducted, until a receiver was appointed, a year later, occupying and keeping open its place of business with no outward appearance of change, employing and paying its usual officers as theretofore. I do not believe that this was such a suspension of business as the statute contemplates. Such a situation does not seem to be within either the terms or the spirit of the statute, which I think contemplates an absolute abandonment of the corporate business; a situation that might be seen and understood by creditors, and therefore justly be regarded as notice to them. The case of *Sterne v. Atherton* [Kan. App.] 51 Pac. 791, cited by the defendant, is readily distinguished from the case before me. There the corporate business had been fully abandoned, and the only question was about the applicability of the statute to such a state of facts. In answer to the argument that it was unreasonable to hold the creditors to notice of the abandonment, the court pointed out that the circumstances brought the case within the terms of the statute, and that the argument was, therefore, one which the legislature alone could regard. This was true; the situation was unequivocal, and open to the observation of creditors, who thus had such notice as it afforded. To treat this statute as applicable to the case before me, where the business was continued as before described, and appearances were unchanged, would seem to be unreasonable and unjust. This view of the question of fact submitted, renders an examination of the several legal questions raised unnecessary.

As respects the rule entered for a new trial—on the ground of after discovered evidence—it is sufficient to say that I am not satisfied that this evidence could not as readily have been discovered before as after the trial; and furthermore that I do not believe the facts invoked constitute a bar to the suit.

The rules for judgment notwithstanding the verdict and for a new trial, are both discharged.

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#### RABE v. CONSOLIDATED ICE CO.

(Circuit Court, N. D. New York. February 2, 1899.)

##### MASTER AND SERVANT—NEGLIGENCE—PLEADING.

A complaint which, by fair intendment, alleges that plaintiff, while in the employ of defendant, received injuries through the failure of defendant to guard a dangerous set screw, which caught and mangled plaintiff's arm while he was in the discharge of his duties, in ignorance of the existence of the screw, is sufficient on demurrer.

John S. Wolfe, for plaintiff.

William H. Rand, Jr., for defendant.

COXE, District Judge. This is an action to recover damages for an injury alleged to have been received by the plaintiff through the negligence of the defendant. The defendant demurs on the ground that the complaint does not state a cause of action. The

complaint will be deemed to contain every fact which by fair intentment can be implied from its allegations. The complaint bears evidence of being hastily drawn. It contains averments which might better have been omitted and omits averments which, it would seem, might better have been stated. Notwithstanding this it is thought that the complaint can be construed to state a cause of action. It may be interpreted as alleging that the plaintiff while in the employ of the defendant received injuries through the failure of defendant to guard a dangerous set screw, the existence of which was unknown to the plaintiff, which caught and mangled the plaintiff's arm while he was in the discharge of his duties in its immediate vicinity.

The question is an interesting one, and by no means free from doubt, but it is thought wiser not to determine it upon demurrer but upon the facts as they appear at the trial. In addition to the cases cited in the briefs, the attention of counsel is called to the following: *Southern Pac. Co. v. Lafferty*, 6 C. C. A. 474, 57 Fed. 536; *Car Co. v. Harkins*, 5 C. C. A. 326, 55 Fed. 932; *Railway Co. v. Kellogg*, 94 U. S. 469. The demurrer is overruled. The defendant may answer within 20 days.

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**BUTLER v. FAYERWEATHER et al.**

(Circuit Court of Appeals, Second Circuit. January 5, 1899.)

No. 115.

**1. WRIT OF ERROR—FINAL ORDERS—COMMITMENT FOR CONTEMPT.**

An order in an equity cause committing a witness, not a party to the suit, for contempt in refusing to testify, is final, and reviewable on a writ of error sued out by the witness before final decree in the cause.

**2. FEDERAL COURTS—FOLLOWING STATE PRACTICE—EVIDENCE.**

Under Rev. St. U. S. § 858, providing that the laws of the state in which the court is held are the rules of decision for the courts of the United States as to the competency of witnesses, Code Civ. Proc. N. Y. §§ 835, 836, in effect prohibiting the disclosure of instructions given by a testator to an attorney employed to draw the will, is binding on federal courts sitting in New York.

**3. WITNESSES—ATTORNEYS—PRIVILEGED COMMUNICATIONS.**

Code Civ. Proc. N. Y. §§ 835, 836, provide that an attorney shall not disclose a communication made to him by a client, or the advice thereon, in the course of his professional employment, unless the privilege is "expressly waived upon the trial" by the client, but that he may testify "in the probate of a will \* \* \* as to its preparation and execution," if he is one of the subscribing witnesses. *Held*, that an attorney who has prepared a codicil alleged to have been executed and published by the client, and afterwards destroyed by a third person, cannot be required to disclose its contents, and whether it was signed in presence of attesting witnesses so as to constitute a publication, the attorney not having attested the codicil.

**4. SAME—FRAUD.**

The fact that the codicil was destroyed fraudulently, and by an executor named in a subsequent codicil, does not alter the case.

**5. SAME—EXTRANEOUS EVIDENCE OF COMMUNICATIONS.**

Nor is it material that witnesses other than the attorney were present when the codicil is alleged to have been executed and published, though they heard all that took place, and were aware of the contents of the instrument.