

it was the defendant's duty to maintain and keep in repair the guard bank, no notice can be necessary to sustain an action for damages resulting from neglect of such duty."

So that it appears that the point which is controlling here was not necessarily for consideration there; and the circumstance that the facts of that case did not require that the agency of nuisance should be distinguished from the nuisance committed by the use of the agency no doubt accounts for the frequent, but not universal, employment in the opinion of the word "nuisance" to designate the instrumentality by means of which the wrong is effected, as well as to denote the wrong itself,—the injurious use. That this indiscriminate application of the word "nuisance" was not, however, made in deliberate disregard of its distinctive appropriateness in cases where the wrong is committed by use, is evidenced by the remark before quoted,—that "it is not the erection of a dam, but the holding back of the water upon the plaintiff's land, that constitutes the nuisance."

In conclusion, we do not doubt that, not only in England but in the United States as well, and especially in the state of New Jersey, the rule of Penruddock's Case is firmly established; and we are satisfied that it has not undergone any modification nor been subjected to any qualification which renders it inapplicable to the present case. We are therefore of opinion that in refusing to apply it upon the trial, there was error; and solely upon this ground the judgment of the circuit court is reversed.

LONDON & SAN FRANCISCO BANK, Limited, v. PARKE & LACY
MACHINERY CO. (BUDKE MANUF'G CO. Intervener).

(Circuit Court, D. Oregon. November 28, 1894.)

No. 2,153.

SET-OFF—LIEN—PERSONAL DEBT.

The B. Co. consigned goods to the P. & L. Co. upon an agreement that the P. & L. Co. should pay freight thereon, and, upon sale of the goods, account to the B. Co. for the price at which they were consigned. A receiver of the property of the P. & L. Co., having been appointed, took possession, among other things, of certain goods consigned under this agreement, on which the P. & L. Co. had paid \$234.66 in freight. At the time the freight was paid the P. & L. Co. owed the B. Co. \$2,000 on other consignments. *Held*, that the goods should be delivered by the receiver to the B. Co., and that if the B. Co. was under an obligation to pay the freight, as a condition precedent to its right of possession, it might be set off against the debt due the B. Co.

This was a suit by the London & San Francisco Bank, Limited, against the Parke & Lacy Machine Company. The Budke Manufacturing Company claimed a lien on certain goods held by the receiver, and prayed for an order for the delivery of the same.

Charles H. Woodward, for intervenor, Budke Manuf'g Co.
Wirt Minor, for receiver of the Parke & Lacy Machinery Co.

BELLINGER, District Judge. The petition of the Budke Manufacturing Company prays for the delivery to them of certain goods consigned by them to the Parke & Lacy Company, and now in the hands of the receiver. The goods were consigned to the Parke & Lacy Company upon the understanding that the consignee should pay all freight and storage charges, and, upon sale of the goods, should account to the consignor for the price at which they were consigned. The consignee paid freight to the amount of \$234.66 upon the goods in question, which the receiver contends must be paid by the consignor before delivery can be had. At the time this freight was paid, the Parke & Lacy Company had in its hands, belonging to the Budke Company, over \$2,000, proceeds of sales of other consigned goods, which sum has not been paid, and on account of which the latter company asks a set-off to the freight charges paid by the Parke & Lacy Company. The receiver contends that, inasmuch as the freight paid by the consignee company is not a debt of the consignor company, the right of set-off does not exist, and that, therefore, the Budke Company must pay him the amount so paid as freight by the Parke & Lacy Company before delivery of the consigned property can be had, notwithstanding the fact that the latter company is indebted to such consignor in a sum much larger than the freight claim. In other words, the contention is that, because Parke & Lacy could not have maintained an action against the Budke Company to recover a personal judgment for the freight advanced, the Budke Company cannot set off a debt due them from Parke & Lacy against the claim of the latter upon the goods of the Budke Company for freight. The payment of freight charges, which are a lien upon goods, by the owner, is not a voluntary payment. It is a debt which the owner must pay to protect his property, and, being thus obligated, he may discharge the lien with what is due him from the lienholder. The question of liability of the Budke Company to a personal judgment does not affect their right to apply their money in Parke & Lacy's hands in discharge of the latter's lien upon the former's goods. The debt of goods pledged is the debt of the owner, when he takes possession of the goods; and without this the owner may waive his personal exemption from liability, if he sees fit to do so. Neither the Parke & Lacy Company nor the receiver is prejudiced by the Budke Company's assumption of payment of this lien. The arrangement by which Parke & Lacy were to look to the goods for advances of freight was not for their benefit, but for the benefit of the consignor company, whose right to assume payment cannot be denied, and whose assumption of payment does not prejudice the company to whom payment is made. I doubt whether the Parke & Lacy Company or the receiver is entitled to have this freight paid, as a condition to the delivery of the goods to the consignors; the conditions upon which the consignment was made not having been complied with by the consignee, and it not appearing, so far, that there is any equitable ground upon which such payment can be demanded from them, as a condition precedent to their right of possession. The prayer of the petition of the Budke Company is granted.

NORTH AMERICAN ACC. ASS'N v. WOODSON.

(Circuit Court of Appeals, Seventh Circuit. November 27, 1894.)

No. 187.

1. EVIDENCE—RES GESTAE.

Upon the trial of an action against an insurance company upon a policy insuring one K. against injury or death caused solely by external violence and accidental means, a witness testified that he and K. had been making some repairs to a gutter on K.'s house, using a ladder for the purpose; that after completing the same, and returning to the house, K. went out for the purpose of testing this work by putting water into the gutter, leaving the witness in the house; that he heard a grating sound on the side of the house, sounding like the fall of the ladder, and, through the window, saw K. on the ground, pale and half bent over; that he went to him, and K. said, "I fell from that ladder," and, a few minutes afterwards, "I fell right on my neck and shoulders." *Held*, that K.'s declarations of the cause of the accident were properly admitted as part of the *res gestae*.

2. EXPERTS—HYPOTHETICAL QUESTION.

It is reversible error to admit the answers of expert witnesses to hypothetical questions which assume the existence of facts of which no evidence is offered.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

This was an action by Archilaus M. Woodson, executor of C. C. Kemper, deceased, against the North American Accident Association, upon a policy of insurance. On trial in the circuit court, the plaintiff had a verdict, and judgment was entered in his favor. Defendant brings error.

W. H. Barnum, A. B. St. John, S. A. French, and D. W. C. Merriam, for plaintiff in error.

W. M. Jones, D. V. Samuels, and W. I. Culver, for defendant in error.

Before WOODS and JENKINS, Circuit Judges, and BUNN, District Judge.

BUNN, District Judge. This is an action brought by the defendant in error, a citizen of Missouri, against the North American Accident Association, a corporation organized under the laws of Illinois, and a citizen of that state, doing business and having its office at the city of Chicago, upon a policy of insurance dated October 6, 1891, issued by said association, insuring C. C. Kemper, then a citizen of Edgerton, Mo., now deceased, against the effects of bodily injury caused solely by external violence and accidental means. The policy, after providing for insurance against injuries of a temporary character, contains this provision:

"(6) Or, if such injury alone shall result in the death of the insured within ninety days thereafter, the association will pay \$5,000 to his estate, if surviving, or, in the event of prior death, to the legal representatives of the insured members, according to the by-laws."

The declaration charges that during the continuance of the policy, on the 23d day of April, 1892, Kemper sustained bodily injury, of