

May 2, 1892.

Ontario.]

KINGSTON AND, BATH ROAD CO. v. CAMPBELL.

Negligence—Liability of Road Company—Collector of tolls—Lessee.

C. brought an action against the Kingston and Bath Road Company for injuries sustained from falling over a chain used to fasten a toll-gate on the company's road. On the trial the following facts were proved. The toll-house extended to the edge of the highway, and in front of it was a short board walk. The gate was attached to a post on the opposite side of the road, and was fastened at night by a chain which was generally carried across the board walk and held by a large stone against the house. The board walk was generally used by foot passengers, and C. walking on it at night tripped over the chain and fell, sustaining the injuries for which the action was brought.

The toll collector was made a defendant to the action but did not enter a defence. It was shown that he had made an agreement with the company to pay a fixed sum for the privilege of collecting the tolls for a year, and was not to account for the receipts. The company claimed that he was lessee of the tolls and that they were not responsible for his acts. It was proved, however, that in using the chain to fasten the gate as he did he was only following the practice that had existed for some years previously and doing as he had been directed by the company. The statute under which the company was incorporated contained no express authority for leasing the tolls, but uses the term "renter" in one section. and in another speaks of a "lease or contract" for collecting the tolls.

The company claimed, also, that C. had no right to use the board walk in walking along the highway, and her being there was contributory negligence on her part, which relieved them from liability for the accident.

Held, affirming the decision of the Court of Appeal, Gwynne, J., dissenting, that C. had a right to use the board walk as part of the public highway, and was, moreover, invited by the company to use it, and there was, therefore, no contributory negligence; that whether the toll collector was servant of the company or lessee of the tolls, the company was liable for his acts, and even if they would not be liable in case he was regarded as lessee, the previous improper use of the chain would make them so.

Britton, Q.C., for the appellants.

Lyon for the respondent.