THE KINGSTON AND BATH ROAD COMPANY (DEFENDANTS)..... } APPELLANTS;

AND

HANNAH MARY CAMPBELL (PLAINTIFF)..... } RESPONDENT.

1891
*Nov. 25,26.

1892
*May 2.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence—Liability of Road Co.—Collector of Tolls—Lessee.

C. brought an action against K. & B. Road Co. for injuries sustained from falling over a chain used to fasten the 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 usually 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 tolls for the 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. The jury found, 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 contains 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.

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* PRESENT:—Sir W. J. Ritchie C.J., and Strong, Taschereau, Gwynne and Patterson JJ.

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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, under the finding of the jury was liable for his acts.

APPEAL from a decision of the Court of Appeal for Ontario (1), affirming the judgment of the Divisional Court in favour of the plaintiff.

The facts of the case are sufficiently set out in the above head-note and in the judgment of Mr. Justice Gwynne.

The action was tried before a jury who answered the questions submitted to them adversely to the defendants. The questions with the answers of the jury were as follows :—

"1. Was the passage between the toll house and the toll gate at the time of the accident in a reasonable state of repair, and reasonably safe for foot passengers? No.

"2. If not, were the defendants guilty of negligence in not having it so? Yes.

"3. Did such negligence cause the injury to the plaintiff? Yes.

"4. Was the plaintiff at the time of the accident using ordinary care and caution? Yes.

"5. Was the gate and were its attachments the gate and attachments furnished by the defendant company to Ryder for the purpose of collecting toll? Yes.

"6. Was the manner in which the gate and its attachments were fastened at the time of the accident the manner in which Ryder was authorized by the defendant company to fasten them? Yes.

"7. What damage did the plaintiff sustain by reason of the negligence of the defendants? $500."

(1) 18 Ont. App. R. 286.

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The trial judge reserved a question of law as to the relation between the defendants and the toll collector and subsequently decided that such relation was that of master and servant, not that of lessor and lessee or landlord and tenant. Judgment was entered for the plaintiff for the damages found by the jury.

The Court of Appeal affirmed this judgment, two of the judges dissenting and holding that the toll collector was a lessee of the tolls. The defendants appealed.

Britton Q.C. for the appellants. There was no evidence of negligence sufficient to make the company liable. *Rounds* v. *Town of Stratford* (1); *Ray* v. *Village of Petrolia* (2); *Maxwell* v. *Township of Clarke* (3); *Bleakley* v. *Corporation of Prescott* (4); *Great Western Railway Co.* v. *Davies* (5).

The liability is no greater than if the accident had happened on a private way. *Tolhausen* v. *Davies* (6).

The plaintiff was not entitled to use this board walk as part of the highway. *Crisp* v. *Thomas* (7). And she was guilty of contributory negligence. *Burken* v. *Bilezikdji* (8).

Ryder was lessee of the tolls and defendants are not responsible for his acts. *Rich* v. *Basterfield* (9); *Jones* v. *Corporation of Liverpool* (10).

Lyon for the respondent. Appellants cannot rely on misdirection in the judge as to the question of relation between them and Ryder as they did not take the objection in the divisional court. *Furlong* v. *Reid* (11).

As to negligence see *Tucker* v. *Axbridge Highway Board* (12).

(1) 26 U.C.C. P. 11.
(2) 24 U.C.C. P. 73.
(3) 4 Ont. App. R. 460.
(4) 12 Ont. App. R. 637.
(5) 39 L.T.N.S. 475.
(6) 59 L.T.N.S. 436.
(7) 63 L.T. 756.
(8) 5 Times L.R. 673.
(9) 4 C.B. 783.
(10) 14 Q.B.D. 890.
(11) 12 Ont. P.R. 201.
(12) 5 Times L.R. 26.

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Ritchie C.J.

The chain was a nuisance for the maintenance of which appellants are liable. *Sandford* v. *Clarke* (1); *Todd* v. *Flight* (2).

Sir W. J. RITCHIE C.J.—I am of opinion that this appeal should be dismissed. I think there was ample evidence to show that the chain was not properly attached to the toll gate but was stretched across the sidewalk and that the plaintiff, without any contributory negligence, fell over this chain and sustained the injuries complained of. It was alleged that the toll-keeper was a lessee of the tolls under agreement with the defendants, and that the defendants were not liable for his negligence. But it appears that when he took possession, and for a long time previously thereto, the chain was there held in place by the stone just as it was when the accident in this case occurred. The trial judge held that he was there as a servant of the company; his decision was confirmed by both the courts below and was quite justified by the evidence.

STRONG J.—I am of opinion that this appeal should be dismissed with costs for the reasons given by the majority of the Court of Appeal.

TASCHEREAU J.—I would dismiss this appeal. I do not see that we would be justified in this case in interfering with the verdict of the jury which, in my opinion, is amply justified by the evidence and was approved of by the learned judge at the trial. I adopt Mr. Justice Osler's reasoning in the court below.

GWYNNE J.—The respondent brought an action against the above company and one Joseph Ryder for injuries sustained by her upon a road which is the pro-

(1) 21 Q.B.D. 398. (2) 9 C. B. N. S. 377.

perty of the above company, for which injuries it was contended that both the company and Ryder were liable. The plaintiff in the action alleged, as the fact is, that under the provisions of an act of the Parliament of the late province of Canada the above company are the owners of the road whereon the accident of which she complained happened, and that the defendant Ryder was their servant and as such collects the tolls at gate No. 1 on said road. She then alleged that on the night of the 15th of October, 1889, while lawfully travelling upon the said road she tripped and fell over a chain which the defendants carelessly and negligently had stretched across the said road, and that she sustained serious bodily injury. She then averred that the defendants unlawfully constructed and maintained a nuisance upon the said road whereby the plaintiff received serious bodily injury. She then averred that the defendant company, in disregard of the obligations imposed upon them by their act of incorporation, neglected to keep the said road in repair whereby she sustained injury as aforesaid, and she therefor claimed $5,000 damages.

The defendant company in their statement of defence pleaded that their road on the night in question was in a good and lawful state of repair; that the grievances in the claim mentioned were caused by the plaintiff's own negligence, improper conduct and want of ordinary care; that at the time of the happenings of the said alleged grievances in the statement of claim mentioned the defendant, Joseph Ryder, was the lessee of the tolls collectible at the said toll gate, and was entirely in the charge, management and control of the said toll gate as such lessee and not as the servant of the company, and that it was his duty as such lessee to manage and control the said gate and the chain by which it was fastened; and lastly

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the defendant company pleaded that at the time of the happening of the said alleged grievances in the statement of claim mentioned, the plaintiff was unlawfully in the place where it is alleged they happened, namely, upon a part of the company's property north of their toll gate there and lawfully reserved from the use of the public. The defendant Ryder suffered judgment by default to go against him, and the case came down for trial against the company before Armour C.J.

The plaintiff was called as a witness on her own behalf but she failed to give any clear account of how the accident happened ; it may be admitted, however, upon the evidence of her daughter who was with her, that when they approached the toll gate, which was closed and apparently fastened, her mother went a few feet—about four feet—ahead of her, and instead of going to the door of the gate house, which could easily have been done, and calling some one to open the gate she went round the gate post nearest the toll house, getting up for that purpose on a narrow plank walk which served as a stoop or approach to the door of the toll house, and immediately after getting round the gate post she jumped on to the macadamized road and in jumping tripped and fell. Now, directly opposite the gate post which she went round there is a bay window which projects across the narrow plank walk or stoop, and reaches to within about ten inches of the gate post. On the Kingston side of the gate, which was the side from which the plaintiff approached the gate, this narrow plank walk which served as a stoop or approach to the door of the toll house extended from the extremity of the house on the Kingston side of the gate to the projecting window 19 inches in width; then it narrowed until at the gate post it was only about 10 inches in width and a little further on the outermost point of the projecting window reached almost to the ex-

tremity of the plank walk, so that there was barely space for a person to pass round from one side of the gate to the other between the projecting window and the gate post where, from whatever cause proceeding, the plaintiff met with the accident which caused her the injuries complained of. The only cause assigned for the accident was a chain about one inch wide and half an inch thick by which the gate when closed was accustomed to be kept so. There were two ways in which this chain, which was not quite three feet long, was accustomed to be used by the lessee of the tolls and toll house. 1st. By a staple on the outside of the outer scantling on which the plank walk is constructed directly opposite the gate post with which the chain was connected; this was the mode and the only mode provided by the company for the purpose; 2nd. By laying the chain flush on the plank and extending it from the gate post across the plank towards the door of the toll house and placing a stone upon it. This was a plan adopted and occasionally made use of by the lessee for the time being, and there was no evidence that any officer of the company was aware of this manner of using and fastening the chain until after the accident. How the chain was fastened on the night of the accident did not directly appear for Ryder the lessee was from home and the gate was in charge of his wife, who said that as she had never heard or known of the accident until a fortnight after it was alleged to have occurred she could not say on which of the above two ways the chain was fastened on the particular night in question. As, however, the evidence was that if fastened to the staple in the way first above mentioned, the chain would not have lain on the plank walk at all, and that in such case the accident could not have been caused by the chain, and as the evidence also was that on the night in question

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the chain did lie on the plank walk, it may be admitted that upon that night the chain was fastened by the stone and not by the staple.

The evidence further showed that some time prior to the 1st of May, 1889, the company exposed for sale at auction the tolls of the gate in question for one year from the 1st May, 1889, and that Ryder, being the highest bidder of a lump sum, not named, payable in equal monthly instalments, for which he gave at the time endorsed notes, was put by the company into possession of the toll house as lessee thereof, and of the tolls to be collected at the gate for the term of one year from the said 1st day of May, 1889, and he continued to occupy as such lessee throughout the year but no written lease was executed to him. He had, however, the enjoyment of the possession of the house and of the right to collect the tolls leviable at the gate as lessee, and was recognized as such by the company for the full period of the year. It was further in evidence that he never asked for or received from the company any directions as to the manner in which he should fasten the gate. He exercised his own discretion as to that. At the close of the case the learned counsel for the company submitted that as against them there was no evidence sufficient to go to the jury. The learned Chief Justice declined to adopt this view and he submitted to the jury the following questions (1).

All of these questions the jury answered in a sense unfavourable to the defendants, and they assessed the damages sustained by the plaintiff at $500. Upon the answers of the jury to the above questions the learned chief justice, being of opinion that the relation existing between the company and Ryder was, as matter of law, not that of lessor and lessee and landlord and tenant but that of master and servant, and that the company were liable for whatever was done

(1) See p. 606.

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by Ryder in the course of his employment as such servant of the company, rendered judgment for the plaintiff. From this judgment the defendant company appealed to the Divisional Court of Queen's Bench for Ontario upon the grounds: 1st, that the findings of the jury were against law and evidence, and the weight of evidence, and that the company were not shown to have been guilty of any negligence, and that therefore there should be a new trial; or 2nd, that a nonsuit should be entered as to the defendant company or judgment entered in their favour, and the action against them dismissed on the grounds among others that they were not guilty of any negligence, and that the judgment rendered against them was contrary to law and evidence, and that the company were not liable in law for the alleged grievances of which the plaintiff complained, or for the manner in which the toll gate and chain were managed by their lessee Ryder. The Divisional Court refused to interfere with the judgment, holding that the findings of the jury upon the questions submitted to them were warranted by the evidence, and that the jury had in effect found, and that the evidence warranted the finding, that the company handed Ryder the chain and told him he might stretch it across the highway in a particular manner in order to keep the gate closed. They further were of opinion that the negligence causing the accident was the negligence of the company in supplying Ryder with improper means of closing the gate, and they were further of opinion that the suffering the chain to lie on the plank as described in the evidence constituted sufficient evidence of their not being in repair for which they were expressly by their act of incorporation made liable. Upon appeal to the Court of Appeal for Ontario the learned Chief Justice was of

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opinion that as nothing was said in the act under which the company became incorporated giving them in express terms power to lease they could not demise or lease their tolls, and therefore that he could not look upon Ryder as occupying any position higher than collector of tolls for the company; that the company were the parties in complete possession and charge of the tolls, toll houses and road, through Ryder as their servant, and therefore answerable for his neglect and omissions. The learned Chief Justice further added:

> It is clear that this passage (by which the plaintiff went round the gate post) was left by defendants for foot passengers at night. I think they were legally bound to see that it was kept in a reasonably safe state for that purpose.

Mr. Justice Burton, in what appears to me a very able judgment, came to the conclusion that in point of law the company could demise the toll house and tolls to Ryder, and that to his mind it was perfectly clear that Ryder was a lessee of the company; that the relation between him and the company was that of landlord and tenant and not of master and servant; and that for Ryder's acts of the nature complained of the company were not responsible; and he was of opinion that judgment ought to be ordered to be entered for them in the court below. He pointed out very clearly that *Hole* v. *Sittingbourne and Sheerness Railway Co.* (1) which had been relied upon by the Divisional Court of Queen's Bench, and cases of that class, had no application whatever to the present case. He was also of opinion that no case of want of repair was shown.

In this judgment Mr. Justice McLennan entirely concurred. Mr. Justice Osler, while apparently of opinion that the company had full power to create between themselves and Ryder the relation of land-

(1) 6 H. & N. 489.

lord and tenant, thought himself bound by the findings of the jury, as to which he thought there was some evidence, not much but in his opinion sufficient, to support the findings, and that this being so it mattered not whether Ryder was tenant or servant of the company. He thought the chain being laid where it was when under the stone did not constitute want of repair, but an obstruction of their road for which the company were responsible even if Ryder was their tenant and not their servant; and he thought that although it may have been erroneous in the learned Chief Justice who tried the case to hold that the relation between the company and Ryder was that of master and servant, a new trial was unnecessary for that upon the answers of the jury to the fifth and sixth questions he thought that the judgment should not be interfered with.

Upon this division of opinion in the Court of Appeal for Ontario the case comes before us. In the judgment of Justices Burton and McLennan I entirely concur, and also in that of Mr. Justice Osler in so far as he concurs with them in the opinion that the company had full power to lease their toll house and tolls to Ryder. As to their perfect power to do so I cannot entertain a doubt. By the 6th section of the act, chapter 159 R. S. O., it is declared that the company when registered as directed in the act may acquire and hold any lands, tenements and hereditaments useful and necessary for the purposes of the company, and may afterwards sell and convey the same. By the 29th section that all lands taken by the company for the purposes of their road, and purchased and paid for by the company, shall become the property of the company. By the 66th section that the road of the company may be sold under legal process against the company, and when

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sold the sale shall be deemed to pass the road itself with all rights, privileges and appurtenances to the purchaser, subject to all duties and obligations imposed by law on the company. Then these are the sections referred to by Justices Burton and Osler section 98 by which it is declared that nothing in the act contained shall affect the sale of tolls which any party is entitled to collect under any lease or contract executed before the 14th day of June, 1853 ; section 129 by which it is enacted that if any renter of tolls at any gate on any road takes a greater toll than is authorized by law, he shall forfeit the sum of $20 ; sec. 156 which enacts that the three preceding sections thereto shall apply to and be held binding upon any lessee of such road or any owners whether a joint stock company or otherwise. Then the clauses containing the provisions as to the tolls authorized to be collected constitute the sole restriction imposed by the act upon the rights and powers possessed and enjoyed by the company over property declared by the act to be vested in them, and the common law right therefore of leasing their own property, subject only to the provision as to the tolls authorized to be collected, is, as it appears to me, beyond all doubt vested in the company. The common law rule, it is true, was that to constitute a good lease it should be by deed executed under the corporate seal, and this is what *Bell* v. *Nixon* (1) decides. The question there arose under an act of Parliament which enacted :

> That all contracts and agreements to be made and entered into for the forming or letting of the tolls of any turnpike roads signed by the trustees or commissioners letting such tolls, or any two of them, or by their clerk or treasurer, &c.

shall be good and valid, &c., and the question was whether where two persons filled the office of clerk to

(1) 9 Bing. 393.

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the trustees a lease which was signed by one only was binding on the trustees. Tindal C. J. giving judgment there says:—

> I cannot think that where two persons are appointed to fill the office of clerk their principals can be bound in a contract by the signature of one only. By the common law there could be no lease in a case of this kind except under seal.

The case of *Hinckley* v. *Gildersleeve* (1), relied upon by the learned Chief Justice who tried this case, was wholly different from the present. There the corporation professed to demise to a lessee for the term of sixteen years their corporate rights and powers of constructing a canal and to authorize the lessee for the whole period of such term to collect certain tolls named in the lease, whereas the act did not authorize the corporation to establish or fix any rates of toll until they should complete the canal. They also by the lease professed to divest themselves of their corporate power of varying the rates of toll from time to time during the said term. Upon the execution of the lease the company ceased to elect directors, or to hold any meetings or to exercise in any manner any of their corporate powers. That was an attempt by the directors to divest the company during the term named in the demise of the whole of their corporate powers and franchises, and to vest such powers and franchises, including the right to construct the canal, in their lessee. The case therefore is wholly distinguishable from the present. The principle upon which the Court of Common Pleas for Ontario proceeded in *The Corporation of Ancaster* v. *Durrand* (2) is the identical principle upon which I found my opinion in the present case that the appellants had full power to demise their tolls to Ryder, namely, that the appellants by their act of incorporation

(1) 19 Gr. 213.

(2) 32 U. C. C. P. 563.

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have the property in and title to the road, toll houses, &c., &c., vested in them, as the municipal corporation had in *Ancaster* v. *Durrand* (1). The company appellants having then had full power by common law to demise their toll house, and their gate No. 1 and the tolls collectable thereat, it cannot now be doubted that, upon the authority of the *Mayor of Stafford* v. *Till* (2); *Wood* v. *Tate* (3); *Fishmongers Co.* v. *Robertson* (4); *Doe Pennington* v. *Taniere* (5); *Ecclesiastical Commissioners* v. *Merral* (6); *Wilson* v. *West Hartlepool Ry.* (7); *Mayor of Kidderminster* v. *Hardwick* (8); *Co. of Frontenac* v. *Chestnut* (9); *Corporation of Huron* v. *Kerr* (10); and many other cases, where one is by a corporation aggregate put into possession as Ryder was of the toll house and toll gate of the company, and of the receipt of the tolls collectible thereat, under a parol demise for a year, and has enjoyed such property and the benefit of the contract, the relation of landlord and tenant is created, and that this is recognized in law as an exception to the common law rule that a corporation aggregate can only demise by deed under the corporate seal is too well established to be now questioned. As therefore the manner in which the chain was used, which is alleged to have caused the injuries of which the plaintiff complains, was by undisputed evidence of Ryder himself shown to have been his act alone with which the appellants had nothing whatever to do, and as it was also established by undisputed evidence that the company were not aware of such mode of his using the chain until after the accident, I must concur in the judgment of the learned Judges Burton and McLennan that this action cannot be sustained

(1) 32 U. C. C. P. 563.
(2) 4 Bing. 75.
(3) 2 B. & P. (N. R.) 247.
(4) 5 M. & Gr. 131.
(5) 12 Q. B. 998.
(6) L. R. 4 Ex. 162.
(7) 11 Jur. N. S. 124.
(8) L. R. 9. Ex. 13.
(9) 9 U. C. Q. B. 365.
(10) 15 Gr. 265.

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against the appellants. But as Mr. Justice Osler seems to have felt himself bound to affirm the judgment in favour of the plaintiff upon the findings of the jury to the fifth and sixth questions, even if Ryder be regarded as the tenant of the appellants, I have perused the evidence with the utmost care and have estimated, as accurately as I could by the plan produced in evidence and made part of the appeal case, the very limited space between the gate post and the bay window of the toll house by which the plaintiff got round the gate to the place where the accident is alleged to have happened and I can find no evidence whatever which, even though Ryder should be regarded as the servant only of the appellants, is in my opinion sufficient to support and justify a judgment against them.

The first question submitted to the jury assumes as a fact established (in support of which I cannot find a particle of evidence) that the very limited space between the gate post, which the plaintiff got round, and the bay window, the outermost joint of which almost reached the extremity of the plank, was a passage way provided by the appellants by which foot-passengers might pass the gate without going through it. The wholly insufficient character of the limited space in question would, in itself, seem to be sufficient to indicate that it never could have been intended for such a purpose. However there is no evidence whatever that it was; on the contrary the plank spoken of in front of the toll house, which at its greatest width was only nineteen inches and was narrowed to about ten inches opposite the gate post, is spoken of in the evidence only as a stoop of the toll house—an appurtenance in fact of that house. The witness Saunder speaks of it as "a plank placed there as he understood as a kind of door step along the house, and the plaintiff's daughter who saw her mother fall just as she got round the gate post

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says that she thought "it was placed to be a door step" and this no doubt is just what it was and there is no evidence that it was, or was ever thought by any one to be, anything else; so that in truth the plea of the appellants that the plaintiff was unlawfully where the accident happened to her, namely, in a part of the appellants' property reserved by them from the use of the public, was proved. But it was said that if this limited space between the gate post and the bay window was not appropriated by the appellants for foot-passengers no other way was provided for that purpose; well it may be admitted that no other place than the space between the posts of the toll gate was provided. But the act under which the appellants enjoy their corporate rights does not impose on the appellants any obligation to provide any other space than that where the toll gate is across the travelled road for any persons whether on foot or otherwise using the road. The appellants or their tenant had a perfect right to keep the gate closed and no person whether on foot or otherwise has *any right in law* to pass by any other way than through the gate. When the gate is closed it is easy for a foot passenger as for any other person to call out for some person to come and open the gate. Nothing could have been easier on the night in question than for the plaintiff to have crossed the 19 inch plank and to have knocked at the door of the toll house which she passed before reaching the gate post. If there be any obligation on the appellants to provide for foot passengers a passage apart from the gateway, their not providing such a passage way cannot justify the appellants being held responsible for an injury received by the plaintiff in passing round the gate on the stoop of the toll house where no way was provided for that purpose, and by which there is no evidence whatever of her having been invited by any one to

pass. As to the 2nd question it is to be observed that there was no suggestion in the evidence of any ground of complaint against the appellants or Ryder as for negligence in causing the accident, save only in suffering the chain not longer than three feet nor wider than one inch nor thicker than half an inch lying flush on the plank between the gate post and the toll house. Now 1st, that plank not having been part of the appellants' property which they had appropriated to the use of the public the leaving the chain there is not a matter of which the plaintiff or any one can complain as constituting negligence; there was no foundation therefore for submitting that question to the jury. 2ndly, even if the plank had been part of the appellants' property which had been appropriated by them to the use of the public the suffering a chain of the dimensions of the chain in question to lie upon it did not, in my opinion, afford sufficient evidence, either of nuisance, obstruction or negligence, to be submitted to the jury as proof of negligence.

The third question has no application except on the assumption of negligence being established; the finding of the jury therefore upon this question amounts simply to a finding that as a matter of fact the chain lying on the plank caused the injury of which the plaintiff complains.

The fourth question also has no application except upon the assumption of negligence causing the injury having been established.

Now, as to the fifth question, there can be no doubt that the gate and its attachments were furnished by the appellants to Ryder for the purpose of his collecting toll but as lessee thereof and of the toll house, and whether he was in the relation of tenant or of servant to the appellants the finding of the jury that the gate and its attachments were furnished to him for the purpose

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of his collecting toll can afford no justification for a judgment against the appellants upon such findings.

Then as to the 6th question the answer of the jury is in direct conflict with all the evidence upon the subject in question. Indeed there seems no foundation for submitting such a question to the jury unless accompanied with a direction that upon the evidence on the subject it could be answered properly only in the negative. Ryder himself, in the plainest language, said that he never asked the appellants for any directions, and that he never received from them or any one any directions whatever as to how he should fasten the gate; that he acted in that matter wholly upon his own judgment; and there is besides the independent evidence of the officers of the company that until after the accident to the plaintiff they had no knowledge of Ryder ever using the chain in the manner it was alleged to have been used on the night in question, namely, by laying it across the plank and putting a stone on it. Assuming then Ryder to have been, as I think he certainly was, the appellants' tenant of the tolls, toll house and toll gate, with their appurtenances, I cannot see how the answers of the jury to the 5th and 6th questions, either singly or together, can support a judgment against the appellants; on the contrary, even assuming the relation between the appellants and Ryder to have been that of master and servant, and not of landlord and tenant, I am of opinion for the reasons I have given that there was no evidence whatever given in the case which justified the submission to the jury of the questions which were submitted or which justifies a judgment against the appellants upon the answers given to those questions. The plaintiff seems upon the evidence to have wholly brought upon herself the injury she sustained by her wrongfully at-

tempting to get round the gate post as she did, by a way never intended or adapted to be used in the manner it was used by her, and which was in fact a stoop or appurtenance to the tollhouse, and not at all set apart or appropriated by the appellants for use by the public. The appeal should, in my opinion, be allowed with costs, and judgment be ordered to be entered for the defendant company in the court below with costs.

PATTERSON J.—The toll gate when shut leaves no way for a foot passenger except the narrow bit of platform between the bow window of the toll house and the toll gate. The plaintiff was clearly invited to use that way, and had moreover a right to use it as a part of the public highway. In using it she tripped over a chain which fastened the gate, and was injured. The chain reached across the platform from the gate to the house where it was secured by a stone. It was a nuisance. The plaintiff clearly has a right of action. The question is whether the company is liable or only Ryder the toll collector.

I am of opinion for the reasons given in the court below by the learned Chief Justice and Mr. Justice Osler that the company is liable. It is not disputed that if the company, which must act by some individual, had hired a man at so much a month to collect the tolls it would have been responsible for his acts done in the course of that employment. The law on that point is too well settled to be disputed. But it appears that Ryder was not hired in that way. He was paying the company an agreed sum for the year by monthly instalments, and not otherwise accounting for the tolls. He is called lessee of the tolls. I do not quarrel with the name which is convenient enough as a designation of a man holding Ryder's relation to the company. The

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statute (1) uses the term "renter" in section 129, "renter and collector" in that section apparently meaning the man who pays a fixed sum, or rent, out of the tolls, and the man who is hired to collect the tolls. In section 137 the terms used are "toll gatherer" and "gate keeper," both terms applying indifferently to the renter and the collector. But the term "lessee," convenient though it may be, may easily be made too much of, as I think it is when the liability of the company for the conduct of the man who collects the tolls under the agreement that is called a lease is put on the same footing as that of a freeholder for the acts of his tenant for years. The statutory word "renter" is perhaps less liable to mislead. As far as it concerns the travelling public, as against whom certain rights and powers are conferred on the company with correlative duties, it is the same thing whether the toll gatherer or gate keeper is a renter or a collector. Is the company to be responsible for the acts of gate keeper Smith, who is paid his wages out of the tolls he collects and hands over to the directors, and not responsible for the acts of gate keeper Brown five miles down the road, who collects the tolls in precisely the same way and under the same statutable restrictions but pays a fixed sum to the company? The principle seems to me to be the same in both cases. The difference is in the mode of remunerating the gate keeper, but in each case he is, in my judgment, the company's gate keeper. The discussion respecting the power of a road company existing under the general act to make a lease of its powers and franchises is interesting but is, as it strikes me, scarcely called for by a transaction such as that which in this case is spoken of as a lease, but which seems to be merely an appointment to collect the tolls at one of the company's gates upon certain terms. But

(1) R. S. O. (1887) ch. 159.

even if Ryder should be regarded in the light of a tenant of property using it for the purposes and in the mode contemplated by his lease, I think that, as pointed out by Mr. Justice Osler, there is evidence to support the sixth finding of the jury. Ryder's tenancy began at the 1st of May in the year of the accident. He shows that for years before that it had been usual to fasten the chain in the same way, although the gate keeper could, by taking a little more trouble, have fastened it at the front of the platform where it would have done no harm. I think the evidence of previous user was admissible on the sixth question.

In my opinion the appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for appellants: *James Agnew.*

Solicitor for respondent: *Horatio V. Lyon.*