

In Massachusetts the servant's right to maintain an action under such circumstances has been uniformly denied (*l*).

(*c*) *Instrumentalities not yet brought into use or disused*.—The words of the statute are declared to be applicable only to ways, etc., which are "existing and completed," and not to those which are partly finished and not yet used for the purposes of the employer's business (*m*). Nor does any action lie for defects in a machine which has been discarded, as unfit for use, and is, at the time it causes the injury, being removed from the premises (*n*).

unusually large well hole in the staircase of a building under construction, through which a brick fell on the plaintiff from an upper story. *Conzay v. Clemence* (Q.B.D. 1885) 2 Times L.R. 80. In another a contractor for the brickwork on an unfinished house was held not liable for injuries caused by the collapse of a staircase erected shortly before by another contractor as the permanent staircase of the house, as he was entitled to rely on the sufficiency of the structure without examination. *McInully v. Primrose* (1897) 24 Sc. Sess. Cas. (4th Ser.) 442.

(*l*) It is held that contractors by setting a servant to work on the premises of a third person where there are movable steps leading into a cellar, going down which the servant was injured, cannot be said to adopt the steps as a way used in their business. *Regina v. Donovan* (1893) 159 Mass. 1, 33 N.E. 702. Effect of case, as stated in *Lynch v. Allyn*, *infra*.—Injury was caused by the steps falling. So a servant of a contractor engaged in grading the land of a third person cannot recover on the theory that the liability of a bank of earth to fall, when undermined, unless it is properly shored up, is a "defect" within the statute, the descriptive words being applicable to "ways, &c., of a permanent character, such as are connected with or used in an employer's business." *Lynch v. Allyn* (1893) 160 Mass. 248, 35 N.E. 550. So it is held that a building in process of construction is not "ways, works or machinery connected with or used in the business" of a subcontractor helping to build it, so as to render a hole cut in the floor by another subcontractor a defect in "ways, works and machinery." *Beique v. Hosmer* (1897) 169 Mass. 541, 48 N.E. 338. So a plumber is not liable to an employé injured by the fall of ladders and stagings leading from one floor to another of a building in process of construction, where he neither constructed, managed, nor controlled such ladders and stagings. *Riley v. Tucker* (Mass. 1901) 60 N.E. 484. In *Lynch v. Allyn*, *supra*, the court remarked that there is a conflict between *Brannigan v. Robinson*, *supra*, and *Howe v. Finch*, *supra*. But this is not necessarily so. It is quite possible, without any inconsistency, to take the view that a wall is a part of the works of the person who has it under his control for the purpose of erecting it, and at the same time not a portion of the works of the person who intends to use it in his business when it is completed. It would be going too far to say that an instrumentality can never be a part of the works of two separate employers at the same time, but the mere statement of the situation presented by cases of this type shows that the user by the owner of the structure and the user by the contractor for its erection are successive, and mutually exclusive. It is, therefore, possible, to say the least, that the legal quality of the structure may be different according as regard be had to the servants of the owner or to the servants of the contractor.

(*m*) *Howe v. Finch* (1886) 17 Q.B.D. 187. [Where a wall in course of erection fell on a plumber in the defendants' employ].

(*n*) *Thompson v. City Glass &c. Co.* (K.B. 1901) 17 Times L.R. 504. [A portion of the machine fell on the plaintiff]. The case was deemed to be the converse of *Howe v. Finch*, *supra*.