

the true construction of the statute, the absence of the power of control merely affects the extent of that responsibility (*h*).

The Ontario case in which the master was held not to be liable under the statute for the want of a fence on a public street which was used as an approach to the master's place of business (*i*) seems to have been improperly referred to the analogy of the other cases cited in this section. The true ground upon which a servant is precluded from maintaining an action against his master

(*h*) Some of the unsatisfactory consequences of the doctrine that the statute does not apply to cases where there is no power of control are pointed out in the dissenting opinion of Knowlton, J., in *Engle v. New York & C. R. Co.* (1893) 160 Mass. 260.—“The employé finds a track of this kind used like other side tracks belonging to the corporation, adapted to the convenient transaction of its freight-ing business. Ordinarily he has no means of knowing whether the track is owned and maintained by the railroad corporation or by the manufacturer whose freight is brought over it. All he can see or know is that it is connected with and used in the business of the corporation in delivering freight. Whether an additional price is paid for the transportation of its cars or of the cars of other railroads over that track, he does not know, nor is it important for him to know. It is a place specially fitted for the work of his employer, on which his employer sets him at work, and in which the employer presumably has rights for the time being. It ought to make no difference under the statute how the employer procures the ways, works, or machinery connected with and used in his business, or by what kind of title he holds them. So long as they are connected with his business and used in it, it is his duty to have them safe, so that his employés may not be unnecessarily exposed to danger. If another owns and furnishes them, and agrees to keep them safe, it is his duty, as between him and his employé, to see that the owner properly does what he agrees to do. It is a general rule of the common law that a railroad corporation is liable for an injury to a passenger, or for loss of freight arising from a defect in a track of another corporation over which it runs its cars, as if it owned the track. As between the two corporations, the only duty to maintain the track in repair under their contract may be upon the owner of the road, but as between the first mentioned corporation and a passenger or owner of freight, it is the duty of the carrier to have the track safe, whether it owns it or hires it. The duty of a railroad corporation to furnish for its employés safe tracks, cars, locomotive engines, and other machinery, tools, and appliances with which its business is to be carried on, is similar in kind to its duty to passengers in these respects, although the degree of care required is less. In either case, its duty is the same when the tracks, cars, and engines are hired, or used under a license from others, as when they are owned by the employer. The doctrine contended for by the defendant, as I understand it, comes to this. If a manufacturer, instead of owning the ways, works, and machinery necessary to be used in his business, arranges with another person who owns a manufacturing establishment to furnish it for his use and to keep it constantly in good condition, and if one of his employés is instantly killed by a defect negligently suffered to be in the ways, works or machinery which he is using under his arrangement, he will not be liable under the statute, because the statute for he is a stranger to the manufacturing business carried on there, and the person killed is not his employé. Neither the employer nor the owner of the establishment will be liable at the common law, for the common law permits no recovery for a death resulting from negligence. The widow and children of the deceased employé will therefore be left remediless. It seems to me that such a construction of the statute tends to defeat the purpose of the Legislature.”

(*i*) See note (d) supra.