

is, however, not apparent why the right of rejection which undoubtedly exists in this instance as well as in the former should not create a similar obligation. The distinction taken and its rationale are, it is submitted, unsatisfactory. In Massachusetts it is no longer of importance since the passage of the Act mentioned in sec. 10, note (d), post.

In one case the principle is applied that a "defect" within the meaning of these statutes exists, where the physical conditions resulting from a use to which the servant's employer permits a stranger to put his premises are of such a nature that negligence would have been a warrantable inference if they had been created by the act of the employer himself or his agent (gg).

As the decisions holding a master not to be liable for an injury due to a defect in an instrumentality belonging to another person may be regarded as being essentially merely declarations that the wrong party was being sued, there would, at first sight, seem to be no serious practical objection to such an application of the general principle that responsibility is a juridical incident of the power of control and does not exist apart from such power. But the extremely nebulous condition of the law defining the nature and extent of a stranger's liability to the servants of one with whom he has business relations, involving the use of, or contact with, his property (h), renders it wholly unwarrantable to assume that, in all the cases in which the defendant will be absolved for the reason that he had no control over the defective instrumentality, the plaintiff will be able to maintain an action against the actual owner of that instrumentality. It is manifest, therefore, that the employment of this test to determine the applicability of these statutes will sometimes result in leaving the injured servant entirely remediless. Under these circumstances, the doctrine that the possession or non-possession of the power of control is the

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carrying on the work which is to be done. The use of other words may not make the meaning clearer, but it would seem that there must be a defect in something which can in some sense be said to be provided by the employer."

(gg) *New York &c. R. Co. v. O'Leary* (1899) 93 Fed. 737, 35 C.C.A. 562, where a railway company which permitted a guy to be stretched by a third person across its tracks, at a point where the volume of business required great diligence and care as to the condition of the track was held liable for an injury to an employé, caused by failure to see that the guy is placed at a particular height to avoid such injury, [construing the Massachusetts statute].

(h) See the articles by the present writer in *THE CANADA LAW JOURNAL*, vol. 36, pp. 178, et seq., and in 46 L.R.A. pp. 33, et seq.