

jurist, it seems open to doubt whether this theory is correct. There is, it is true, no English decision which in terms lays down the rule that a servant who learns of a defect is bound to communicate his knowledge to his master, and that his failure to give such information constitutes a breach of a specific duty which of itself is enough to prevent his recovering for any injury which he may thereafter receive owing to the existence of the defect. But the reason for the lack of direct authority on the point is sufficiently obvious. In all the cases decided under common law doctrines up to the time when Lord Watson delivered this opinion, the circumstances were necessarily such as to bring them within the scope of the principle, that the servant's action was absolutely barred, whenever it was shown that he went on working with a full appreciation of a risk resulting from the master's negligence. The

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*Mathieson* (1861) 4 Macq. H.L. 215 (p. 222); *Feltham v. England* (1866) L.R. 2 Q.B. 33; *Patterson v. Wallace* (1854) 1 Mcq. H.L. 748; *Roberts v. Smith* (1857) 2 H. & N. 213; *Webb v. Rennie* (1865) 4 F. & F. 608. For the American decisions to the same effect see note by present writer in 41 L.R.A., pp. 44, et seq. In view of this doctrine the finding in question manifestly puts the master in the same position as if notice of the defect had actually been given by the servant, and rendered it a mere matter of supererogation to inquire whether or not he was relieved from liability by the servant's failure to give notice. The defendant firm was plainly answerable on the simple ground that one of its members had been personally negligent in not remedying a defect of which he had constructive knowledge. See *Mellors v. Shaw* (1861) 1 B. & S. 437; *Ashworth v. Stanwix* (1861) 3 El. & El. 701.

Thus far we have been discussing the case in the assumption that the court, in deciding that a judgment for the plaintiff should not be set aside for the mere reason that the defendant "had no notice" of the defect, used the phrase in the sense of "had received no notification from the servant." This is the construction put upon the decision in the reporter's head-note, and the reliance placed by Strong, J., upon the passage from Lord Watson's opinion, where this is undoubtedly the import of the words, shews that the court intended at all events, to assert the doctrine that the servant did not forfeit his right of action by not giving notice of a defect which was known to him. But it may be desirable to advert in passing to the ambiguity of phrase "had no notice," which so far as the words themselves are concerned may also be taken to mean "had no actual knowledge." The significance of this fact when considered with reference to the substance of the findings above referred to is obvious. Such a construction of the phrase would render Mr. Justice Strong's remarks applicable to the second of those findings, and upon this circumstance, taken in connection with the further circumstance, already commented upon, that the findings as to the complaint made by the servant, and the master's possession of constructive knowledge of the defect, a plausible argument might be based, that the court also intended to stand sponsor for the doctrine that it is the existence or absence of actual knowledge that determines whether the master is or is not liable. Such a doctrine, as is very plainly shewn by the English cases cited above, would be erroneous. But the inquiry is not worth pursuing in the present connection. We have merely drawn attention to the point, as being one of the obscure aspects of a case which, to say the very least, is neither a model of lucid statement nor a favourable exemplification of the manner in which a court of review should deal with the special findings of a jury in actions of this sort.