

structed by a superintending employé, unless it should be held that proof of negligence on the part of such an employé would not sustain an allegation of injury caused by a "defect," and that, under the circumstances supposed, the complaint must be based on the words of the provision in the following sub-section of the Act. In the absence of any direct authority on the point, all that can be said is that, in any case where it may be uncertain whether the master can be held liable simply on the ground of the existence of a defect, it would be well to insert an alternative court averring negligence in the exercise of superintendence.

13. Duty of servant to report defects.—(c) Statutory and common law doctrines compared.—There is the high authority of Lord Watson for the doctrine that this provision puts the servant in a more favourable position than he occupied under the common law (a), and his view has been adopted by the Supreme Court of Canada (b). But with all deference to this very distinguished

(a) See *Smith v. Baker* [1891] A.C. 325, where, in the course of his comments on the clause, he remarked: "I think the object and effect of the enactment are to relieve the employer of liability for injuries occasioned by defects which were neither known to him nor to his delegates down to the time when the injury was done. At common law his ignorance would not have barred the workman's claim, as he was bound to see that his machinery and works were free from defect, and so far the provision operates in favour of the employer."

(b) *Webster v. Foley* (1892) 21 S.C.R. 580. It is perhaps not amiss to introduce here a few remarks as to the singularly unsatisfactory character of the expositions of principles in this case, more particularly when it is considered with reference to the special findings which are set out in the record. The answers of the jury to three of the questions propounded by the trial judge were to this effect: (1) That the plaintiff had complained of the defect to the person who appeared to be the proper person to receive a complaint; (2) that the defendant did not know of the defect; (3) that the member of the defendant firm who was himself acting as manager ought to have been cognizant of the defect.

In view of the first of these findings it is not apparent why the effect of the failure of the servant to notify the master of the defect should have been regarded as a material question in the case. There is no intimation that the evidence was insufficient to warrant the conclusion arrived at by the jury, nor that the notification was inadequate to charge the master with knowledge, for the reason that it was made to a mere fellow-servant. So far as the report shews, it may have been made to the manager of the concern, who as already stated, was one of the partners in the defendant firm. But, even if we assume that this finding could not be treated as an element in the case for some reason, evidential or doctrinal, which is not disclosed, there still remains the difficulty that the jury also declared that this managing partner "ought to have been cognizant" of the defect. That this finding was, so far as the defendant's liability was concerned, equivalent to a finding, is indisputable, both on principle and authority. See *Mellors v. Shaw* (1861) 1 R. & S. 437, where Blackburn, J., remarked during the argument of counsel that an allegation that an instrumentality was known by the defendant to be in an unsafe condition is established by proof that he "ought to have known" that it was in that condition. Other English cases which declare or assume that liability on the Master's part is negatived by his ignorance of the defect only where it appears that such ignorance was excusable are, *Weems v.*