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NOTICE TO, OR KNOWLEDGE OF, AN AGENT*

§ 1. IN GENERAL.—The question frequently arises whether the principal may be affected not only by the agent's acts and contracts, but also by the knowledge which he may possess, or the notice which may come to him, respecting the subject matter of the agency, and which would have affected the principal had it come to him while he was acting in person. The question has arisen in a great variety of forms, but the answer has been substantially uniform, and is commonly found stated in the language of the following section. Many reasons have been assigned, but they are all predicated upon the injustice which would result if the principal should be permitted to put forward an agent to transact business for him and at the same time escape the consequences which would have ensued from knowledge of conditions or notice of the rights and interests of others had the principal transacted the business in person. "Policy and the safety of the public," it was said in a leading case,¹ "forbids a person to deny knowledge while he is so dealing as to keep himself ignorant, or so that he may keep himself ignorant, and yet all the while let his agent know, and himself perhaps profit by that knowledge. In such a case it would be most iniquitous and most dangerous, and give shelter and encouragement to all kinds of fraud, were the law not to consider the knowledge of one as common to both, whether it be so in fact or not."

Stating this conclusion, first, in its most general form—

§ 2. GENERAL RULE—NOTICE TO THE AGENT IS NOTICE TO THE PRINCIPAL.—It is the general rule, settled by an unbroken current of authority, that notice to, or knowledge of, an agent while acting within the scope of his authority and in reference to a matter over which his authority extends, is notice to, or knowledge of, the principal.²

*Adapted from material collected for a new edition of the writer's treatise on Agency. It is only fair to say that the form and substance are still more or less tentative.

¹ Lord Chancellor Brougham, in *Kennedy v. Green*, 3 Myl. & K. 699.

² *In re Payne & Co.*, 73 L. J. Ch. 849 [1904], 2 Ch. 608, 91 L. T. 777, 11 Manson 437; *Kennedy v. Green*, 3 Mylne & Keen 699; *Dresser v. Norwood*, 17 C. B. (N. S.) 466; *Le Neve v. Le Neve*, Ambl. 436; *Sheldon v. Cox*, 2 Eden, 224; *Ashley v. Baillie*, 2 Ves. 370; *Maddox v. Maddox*, 1 Ves. 61; *Downes v. Power*, 2 Ball & B. 491; *Nixon v. Hamilton*, 2 Dr. & W. 364, 1 Ir. Eq. R. 46; *Toulmin v. Steere*, 3 Mer. 210, 17 R. R. 67; *In re Hennessy*, 2 Dr. & War. 555, 5 Ir. Eq. R. 259; *Jennings v. Moore*, 2 Vern. 609 (ratification); *Preston v. Tubbin*, 1 Vern. 287; *Espin v. Pemberton*, 3 DeG. & J. 547, 28 L. J. Ch. 311; *Brotherton v. Hatt*, 2 Vern. 574; *Boursot v. Savage*, 35 L. J. Ch. 627, L. R. 2 Eq. 134; *Frail v. Ellis*, 16 Beav. 350, 22 L. J. Ch. 467; *Tweeddale v. Tweeddale*, 23 Beav. 341; *Fuller v. Bennett*, 2 Hare 394, 12 L. J. Ch. 355; *Atterbury v. Wallis*, 8 DeG. M. & G. 454, 25 L. J. Ch. 792; *Kettlewell v. Watson*, 51 L. J. Ch. 281, 21

§ 3. ———. ILLUSTRATIONS.—The cases in which this rule has been applied are too numerous for specific statement, but the following cases will serve as illustrations of the application of the

Ch. Div. 685, 46 L. T. 83; *Majoribanks v. Hovenden*, Dru. 11, 6 Ir. Eq. R. 238; *Spaight v. Cowne*, 1 Hem. & M. 359; *Rolland v. Hart*, 40 L. J. Ch. 701, L. R. 6 Ch. 678, 25 L. T. 191; *Dickerson v. Matheson*, 50 Fed. 73; *Chicago St. P. M. & O. Co. v. Belliwith*, 83 Fed. 437, 28 C. C. A. 358; *Hoffmann v. Mayand*, 93 Fed. 171, 35 C. C. A. 256; *Union, etc., Ins. Co. v. Robinson*, 148 Fed. 358, 78 C. C. A. 268; *Reed v. Munn*, 148 Fed. 737; *McCalmont v. Lanning*, 154 Fed. 353; *Brown v. Cranberry Iron Co.*, 72 Fed. 96, 18 C. C. A. 444; *Alger v. Keith*, 105 Fed. 105, 44 C. C. A. 371; *Stanley v. Schwalby*, 162 U. S. 255, 16 S. Ct. 754; *Armstrong v. Ashley*, 204 U. S. 272, 27 S. Ct. Rep. 270; *Russell v. Peavy*, 131 Ala. 563, 32 So. 492; *Kelly v. Burke*, 132 Ala. 235, 31 So. 512; *Lea v. Iron Belt. Merc. Co.*, — Ala. —, 42 So. 415; *Traders Ins. Co. v. Letcher*, 143 Ala. 204, 39 So. 271; *Wheeler v. McGuire*, 86 Ala. 398, 5 So. 190; *Bessemer Land Co. v. Jenkins*, 111 Ala. 135, 18 So. 565; *Carter v. Grey*, 79 Ark. 273, 96 S. W. 377; *Allison v. Falconer*, 75 Ark. 343, 87 S. W. 639; *Skillern v. Baker*, 82 Ark. 86, 100 S. W. 764; *Hunter v. Watson*, 12 Cal. 377, 73 Am. Dec. 543; *Chapman v. Hughes*, 134 Cal. 641, 60 Pac. 974; *Pac. Lumber Co. v. Wilson*, — Cal. —, 92 Pac. 654; *Farmers, etc., Bank v. Payne*, 25 Conn. 444, 68 Am. Dec. 362; *Johnson v. Tribble*, 27 App. D. C. 281; *Decree 22 App. D. C. 368*, affirmed *Armstrong v. Ashley*, 27 S. Ct. 270, 204 U. S. 272; *Saulsbury v. Wimberly*, 60 Ga. 78; *Thompson v. Overstreet*, 80 Ga. 767, 6 S. E. 690; *Githens v. Murray*, 92 Ga. 748, 18 S. E. 975; *Strickland v. Vance*, 99 Ga. 531, 27 S. E. 152; *People's Savings Bank v. Smith*, 114 Ga. 185, 39 S. E. 920; *Collins v. Crews*, — Ga. —, 59 S. E. 727; *Pursley v. Stabley*, 122 Ga. 362, 50 S. E. 139; *Burton v. Perry*, 146 Ill. 71, 34 N. E. 60; *Fischer v. Touhy*, 186 Ill. 143, 53 N. E. 801; *Booker v. Booker*, 208 Ill. 529, 70 N. E. 709; *Cowan v. Curran*, 216 Ill. 598, 75 N. E. 322; *Lowden v. Wilson*, 233 Ill. 340, 84 N. E. 245; *Merchants Nat. Bank v. Nichols*, 223 Ill. 41, 79 N. E. 38; *Sterling Bridge Co. v. Baker*, 75 Ill. 139; *Sheppard v. Wood*, 78 Ill. App. 428; *Mackay-Nisbit Co. v. Kuhlman*, 119 Ill. App. 144; *Shumacher v. Wolf*, 125 Ill. App. 81; *Merchants Nat. Bank v. Nichols & Shepherd*, 123 Ill. App. 430, affirmed 223 Ill. 41, 79 N. E. 38; *Marion Mfg. Co. v. Harding*, 155 Ind. 648, 58 N. E. 194; *Field v. Campbell*, 164 Ind. 389, 72 N. E. 260; *Miller v. Pfeiffer*, 168 Ind. 219, 80 N. E. 409; *Baldwin v. St. Louis K. & N. W. Ry. Co.*, 75 Ia. 297, 39 N. W. 507; *McMaken v. Niles*, 91 Ia. 628, 60 N. W. 199; *Mason v. Simplot*, 119 Ia. 94, 93 N. W. 75; *Campbell v. Park*, 128 Ia. 181, 101 N. W. 861; *Ware v. Heiss*, 133 Ia. 285, 110 N. W. 594; *First Nat. Bank v. Gunhus*, 133 Ia. 409, 110 N. W. 611; *Lowler v. Day*, 58 Ia. 252; *Condon v. Barnum*, — Ia. —, 106 N. W. 514; *Merritt v. Huber*, — Ia. —, 114 N. W. 627; *Van Buren County v. Am. Surety Co.*, — Ia. —, 115 N. W. 24; *Roach v. Karr*, 18 Kan. 529; *Hardten v. State*, 32 Kan. 637, 5 Pac. 212; *Bramblett v. Henderson* (Ky.), 41 S. W. 575; *Day v. Exchange Bank of Kentucky*, 25 Ky. Law Rep. 1449, 78 S. W. 132; *Sebald v. Citizens Bank* (Ky.), 105 S. W. 130; *Connolley v. Beckett* (Ky.), 105 S. W. 446; *Miller v. Jones* (Ky.), 107 S. W. 783; *German Ins. Co. v. Goodfriend*, 30 Ky. Law Rep. 218, 97 S. W. 1098; *Schwind v. Boyce*, 94 Md. 510, 51 Atl. 45; *Maryland Trust Co. v. Nat. Mec. Bank*, 102 Md. 608, 63 Atl. 70; *Jaquith v. Davenport*, 191 Mass. 415, 78 N. E. 93; *Russell v. Swezey*, 22 Mich. 235; *Sandford v. Nyman*, 23 Mich. 326; *Peoria Ins. Co. v. Hall*, 12 Mich. 202; *Laylor v. Young*, 56 Mich. 285; *Campau v. Konan*, 39 Mich. 362; *Thompson v. Village of Mecosta*, 141 Mich. 175, 104 N. W. 694; *Brown v. Harris*, 139 Mich. 372, 102 N. W. 960; *Tilleny v. Wolverton*, 50 Minn. 419, 52 N. W. 909; *St. Paul & M. Trust Co. v. Howell*, 59 Minn. 295, 61 N. W. 141; *Jefferson v. Leithauser*, 60 Minn. 251, 62 N. W. 277; *Kelley v. Citizens Mut. Assn.*, 96 Minn. 477, 105 N. W. 675; *Robertson Lumber Co. v. Anderson*, 96 Minn. 527, 105 N. W. 972; *Reynolds v. Ingersoll*, 11 Smedes & M. (Miss.) 249, 49 Am. Dec. 57; *Ross v. Houston*, 25 Miss. 591, 59 Am. Dec. 231; *Ill. Cent. R. Co. v. Bryant*, 70 Miss. 665, 12 So. 592; *Equitable Sureties Co. v. Shippard*, 78 Miss. 217, 28 So. 842; *Hedrick v. Beeler*, 110 Mo. 91, 19 S. W. 492; *Hickman v. Green*, 123 Mo. 165, 22 S. W. 455, affirmed 27 S. W. 440;

rule. Thus, where an agent acts for his principal in the purchase of property notice to the agent of unrecorded deeds³ or mortgages, or of liens upon⁴ or equities⁵ against the property, or of defects or infirmities in the title,⁶ will be imputed to the principal. So where an agent acts for his principal in the loaning of money the principal will be affected by the knowledge of the agent that money ostensibly

Priddy v. MacKenzie, 205 Mo. 181, 103 S. W. 968; *King v. Rowlett*, 120 Mo. App. 120, 96 S. W. 493; *Coombs v. Barker*, 31 Mont. 526, 79 Pac. 1; *Farmers and Merchants Ins. Co. v. Wiard*, 59 Neb. 451, 81 N. W. 312; *Modern Woodmen of America v. Colman*, 68 Neb. 660, 94 N. W. 814; *Pringle v. Mod. Woodmen of America*, — Neb., 107 N. W. 756; *Henry v. Omaha Packing Co.*, — Neb., 115 N. W. 777; *Brookhouse v. Union Pub. Co.*, 73 N. H. 368, 62 Atl. 219, 111 Am. St. Rep. 623, 2 L. R. A. (N. S.) 993; *Warren v. Hayes*, — N. H., 68 Atl. 193; *Decree (Ch. 1905)* 69-N. J. Eq. 580, 61 Atl. 159, affirmed *Boice v. Conover*, N. J. Eq., 65 Atl. 191; *Vulcan Detinning Co. v. American Can Co.*, 70 N. J. Eq. 588, 62 Atl. 881, 67 Atl. 339; *Clement v. Young-Shea Amusement Co.*, 70 N. J. Eq. 677, 67 Atl. 82; *Weisser v. Denison*, 10 N. Y. 68, 61 Am. Dec. 731; *Consolidated Fruit Jar Co. v. Wisner*, 93 N. Y. S. 128, 193 App. Div. 453; *Badger v. Cook*, 101 N. Y. S. 1067, 17 App. Div. 328; *Brooklyn Distil. Co. v. Standard Distil. Co.*, 105 N. Y. S. 264, 120 App. Div. 237; *Gregg v. Baldwin*, 9 N. D. 515, 84 N. W. 373; *Aetna Indemnity Co. v. Schroeder*, 12 N. D. 110, 95 N. W. 436; *Barnes v. McClinton*, 3 Pen. & Watts (Penn.) 67, 23 Am. Dec. 62; *Cook v. American Tubing Co.*, 28 R. I. 41, 65 Atl. 641; *Salinas v. Turner*, 33 S. C. 231, 11 S. E. 702; *American Freehold Land Mortgage Co. of London v. Felder*, 44 S. C. 478, 22 S. E. 598; *Wardlaw v. Troy Oil Mill*, 74 S. C. 368; 54 S. E. 658; *Blowers v. Southern Ry.*, 74 S. C. 221, 54 S. E. 368; *Sparkman v. Sup. Council American Leg. of Honor*, 57 S. C. 16, 35 S. E. 391; *Gibbes Machinery Co. v. Roper*, 77 S. C. 39, 57 S. E. 667; *Woodfolk v. Blount*, 3 Hay. (Tenn.) 147, 9 Am. Dec. 736; *Nashville, etc., R. R. Co. v. Elliott*, 1 Coldw. (Tenn.) 611, 78 Am. Dec. 506; *U. S. v. Schwaby*, 87 Tex. 604, 30 S. W. 435; *Grayson County Nat. Bank*, — Tex. Civ. App., 91 S. W. 807; *Flynt v. Taylor*, — Tex. Civ. App., 91 S. W. 864; *Morrill v. Bosley*, — Tex. Civ. App., 88 S. W. 519; *Security Mut. Life Ins. Co. v. Calvert*, — Tex. Civ. App., 100 S. W. 1033; *Foote v. Utah Commercial & Savings Bank*, 17 Utah 283, 54 Pac. 104; *Backman v. Wright*, 27 Vt. 187, 65 Am. Dec. 187; *Corliss v. Smith*, 53 Vt. 532; *Mack Mfg. Co. v. Smoot*, 102 Va. 724, 47 S. E. 859; *Foreman v. German Alliance Ins. Co.*, 104 Va. 694, 52 S. E. 337; *Traders & Trucksters Bank v. Black*, — Va., 60 S. E. 743; *Lynch v. Kineth*, 36 Wash. 368, 78 Pac. 923; *Haynes v. Gay*, 37 Wash. 230, 79 Pac. 794; *Allen v. Treat*, — Wash., 94 Pac. 102; *Elliott v. Knights of Modern Mac.*, 46 Wash. 320, 89 Pac. 929; *Knott v. Tidyman*, 86 Wis. 164, 56 N. W. 632; *Peterson v. Elmholt*, 130 Wis. 1, 109 N. W. 76. [This list does not purport to be complete.]

³ *McMaken v. Niles*, 91 Iowa 628, 60 N. W. 199; so of a recorded mortgage. *Field v. Campbell*, 146 Ind. 389, 72 N. E. 260.

⁴ *Schwind v. Boyce*, 94 Md. 510, 51 Atl. 45; *Fischer v. Touhy*, 186 Ill. 143, 57 N. E. 801.

⁵ *Knott v. Tidyman*, 86 Wis. 164, 56 N. W. 632; *Hendrick v. Beeler*, 110 Mo. 91, 19 S. W. 492; *Coombs v. Barker*, 31 Mont. 526, 79 Pac. 1; *Huff v. Farwell*, 67 Ia. 298, 25 N. W. 252.

⁶ *Stanley v. Schwabey*, 162 U. S. 255, 16 S. Ct. 754; *Brown v. Cranberry Iron & Coal Co.*, 72 Fed. 96, 18 C. C. A. 444; *Bramblett v. Henderson (Ky.)*, 41 S. W. 575; *Hickman v. Green*, 123 Mo. 165, 22 S. W. 455, affirmed 27 S. W. 440; so insurance agents' notice of incumbrances on the property. *Farmers & Mer. Ins. Co. v. Wiard*, 59 Neb. 451, 81 N. W. 312.

loaned to the wife was not really loaned to her or for her use.⁷ So where an agent authorized to purchase notes had notice that they were tainted with usury;⁸ so where an agent authorized to receive money had notice that it was being withdrawn from a trust fund.⁹ So where an agent buying stock from a bank had notice of its impaired condition;¹⁰ where an agent doing business with a firm had notice of the withdrawal of a partner;¹¹ where an agent authorized to sell liquor had notice of the mental incapacity of the vendee;¹² where an agent in full charge of the sale of land had notice that a sub-agent was one of the purchasers;¹³ where a general sales agent had notice of defects in machinery sold by him;¹⁴ where an agent in charge of a lumber yard had notice of a defect in the piling;¹⁵ where a real estate agent had notice that the lessee was making necessary improvements;¹⁶ where a regular financial agent had notice of the assignment of a claim;¹⁷ where an agent had notice that the exportation of certain goods was prohibited;¹⁸ where an agent had notice that a team of horses were in the habit of running away;¹⁹ that a dog was vicious.²⁰ So knowledge of the attorney as to the character of the document signed by his client is imputed to the client.²¹ So where an agent had sufficient authority to institute an action based on his own knowledge the principal was held to have notice of all the facts under which the agent acted;²² so where a sales agent had notice that the purchaser intended to use the article in violation of the law.²³

⁷ *American Land Mortgage Co. of London v. Felder*, 44 S. C. 478, 22 S. E. 598; *Salinas v. Turner*, 33 S. C. 231, 11 S. E. 702; *Strickland v. Vance*, 99 Ga. 531, 27 S. E. 152; *Russell v. Peavy*, 131 Ala. 563, 32 So. 492; so knowledge of the cashier of a bank in regard to borrower's security. *Foote v. Utah Com. & Sav. Bank*, 17 Utah 283, 54 Pac. 104.

⁸ *Haynes v. Gay*, 37 Wash. 230, 79 Pac. 794; *Sheppard v. Wood*, 78 Ill. App. 428.

⁹ *Manson v. Simplot*, 119 Ia. 94, 93 N. W. 75; *Chapman v. Hughes*, 134 Cal. 641, 60 Pac. 974.

¹⁰ *Day v. Exchange Bank of Kentucky*, 25 Ky. Law Rep. 1449, 78 S. W. 132.

¹¹ *Githens v. Murray*, 92 Ga. 748, 18 S. E. 975.

¹² *Kelly v. Burke*, 132 Ala. 235, 31 So. 512.

¹³ *Tillery v. Wolverton*, 50 Minn. 419, 52 N. W. 909.

¹⁴ *Marion Mfg. Co. v. Harding*, 155 Ind. 648, 58 N. E. 194.

¹⁵ *Baldwin v. St. Louis K. & N. W. Ry. Co.*, 75 Ia. 297, 39 N. W. 507.

¹⁶ *Jefferson v. Leithauser*, 60 Minn. 251, 62 N. W. 277.

¹⁷ *Illinois Cent. Ry. Co. v. Bryant*, 70 Miss. 665, 12 So. 592.

¹⁸ *Dickerson v. Matheson*, 50 Fed. 73, affirmed 57 Fed. 524, 6 C. C. A. 466.

¹⁹ *Lynch v. Kineth*, 36 Wash. 368, 78 Pac. 923.

²⁰ *Baldwin v. Casella*, 26 L. T. Rep. N. S. 707; compare *Stiles v. Cardiff Steam Nav. Co.*, 10 L. T. Rep. N. S. 844, 33 L. J. 310, Q. B.; see also *Brice v. Bauer*, 108 N. Y. 428, 2 Am. St. Rep. 454.

²¹ *Chicago, St. P. M. & O. Ry. Co. v. Belliwith*, 83 Fed. 437, 28 C. C. A. 358.

²² *Campau v. Konan*, 39 Mich. 362.

²³ *Suit v. Woodhall*, 113 Mass. 391.

§ 4. ———. THE THEORY OF THE RULE.—Two general theories prevail as to the foundation upon which this rule is based, and the results of these respective theories are not entirely alike. The first finds the reason of the rule in the legal identity of the agent with the principal during the continuance of the agency—in the fact that the agent, while, keeping within the scope of his authority, is, as to the matters embraced within it, for the time being the principal himself, or, at all events, the *alter ego* of the principal—the principal's other self. Whatever notice or knowledge, then, reaches the agent during this time and under these circumstances, in law reaches the principal, whether it does so in fact or not. It is the legitimate and necessary result of this view, therefore, that only such notice or knowledge as comes to the agent, while he is agent, is thus binding upon the principal.²⁴

The other theory is based upon the rule that it is the duty of the agent to disclose to his principal all notice or knowledge which he may possess and which is necessary for the principal's protection or guidance. This duty the law presumes the agent to have performed, and, therefore, imputes to the principal whatever notice or knowledge the agent then possessed, whether he has in fact dis-

²⁴ "The agent stands in place of the principal, and notice therefore to the agent is notice to the principal; but he cannot stand in the place of the principal until the relation of principal and agent is constituted, and as to all the information which he previously acquired, the principal is a mere stranger." Sir JOHN LEACH in *Mountford v. Scott*, 3 Madd. 40. "It is only during the agency that the agent represents and stands in the shoes of the principal. Notice to him, then, is notice to the principal. Notice to him twenty-four hours before the relation commenced is no more notice than twenty-four hours after it has ceased would be." SHARWOOD, J., in *Houseman v. Girard*, etc., Building Assn., 81 Pa. 256.

[But in *Gunster v. Scranton*, etc., Co., 181 Pa. 327, 37 Atl. 550, the rule is said to be based upon the duty to communicate the information to the principal.]

Somewhat of double ground was taken by the Supreme Court of Michigan: "The reason upon which the doctrine of notice to the agent being held notice to the principal rests, is that the agent is substituted in the place of, and represents, the principal in the particular transaction, and therefore while acting in such matters he takes the place of the principal, and the latter is bound by the agent's act in the light of the knowledge then possessed by the agent." MARSTON, C.J., in *Advertiser & Tribune Co. v. Detroit*, 43 Mich. 116.

In *Boursot v. Savage*, L. R. 2 Eq. 134, KINDERSLEY, V.C., said: "It is a moot question upon what principle this doctrine rests. It has been held by some that it rests on this:—that the probability is so strong that the solicitor would tell his client what he knows himself, that it amounts to an irresistible presumption that he did tell him; and so you must presume actual knowledge on the part of the client. I confess my own impression is that the principle on which the doctrine rests is this: that my solicitor is *alter ego*; he is myself; I stand in precisely the same situation as he does in the transaction, and therefore his knowledge is my knowledge; and it would be a monstrous injustice that I should have the advantage of what he knows without the disadvantage. But whatever be the principle upon which the doctrine rests, the doctrine itself is unquestionable."

closed it or not.²⁵ According to this view it is immaterial when the agent obtained the information, if he then possessed it.

The courts have not, however, always recognized these differ-

²⁵ "The general rule that a principal is bound by the knowledge of his agent is based on the principle of law, that it is the agent's duty to communicate to his principal the knowledge which he has respecting the subject-matter of negotiation, and the presumption that he will perform that duty." BRADLEY, J., in *The Distilled Spirits*, 11 Wall. (U. S.) at p. 367.

In *New Jersey* a somewhat different theory apparently prevails. In the case of *Sooy v. State*, 41 N. J. L. 394, in speaking of the presumption that the agent will communicate to his principal the knowledge which he has respecting the subject-matter of the agency it was said by Dixon, J., speaking for the court: "But I do not see why there should be such a legal presumption. It is ordinarily contrary to the fact and to the possibilities of the case. It may frequently promote injustice, by placing on the principal burdens which he never thought of assuming, and which the person dealing with him did not intend to impose. It may put the principal in a worse position, and the other party in a better position, than they would have held if negotiating together immediately. The more just principle would seem to be one that aimed to award to each the burdens and benefits which would have arisen if the business had been transacted by both in person. Such a result would follow if the rule to be adopted were that wherever the principal, if acting in the matter for himself, would have received the notice, the knowledge of his agent shall be chargeable to him. This would ordinarily restrict the binding force of the agent's knowledge to those cases where it was acquired in the transaction of his principal's affairs; but it would also include the case (which was that of *Hart v. Farmers and Mechanics Bank*, 33 Vt. 252), where the party relying upon the notice refrained from giving the agent express notice, because he knew that the agent was already aware of the facts, and also the case (which was that of *Dresser v. Norwood*, 17 C. B. [N. S.] 466), where the third party contracted with the agent on the basis of the facts known to the latter. In both these cases it was fair to assume that express notice would have been given if it had not been known to be unnecessary. But if the principal, or an agent ignorant at the time of his employment of the fact with notice of which it is sought to charge the principal, would not have been apprised of that fact, I do not perceive why third parties should acquire any unexpected rights against the principal from the mere knowledge of an agent not communicated to him, even supposing the agent's duty to his principal required the disclosure to him of that knowledge." See also *Willard v. Denise*, 50 N. J. Eq. 483, 26 Atl. 29, 35 Am. St. Rep. 788; *Vulcan Detinning Co. v. American Can Co.*, — N. J. L. —, 67 Atl. 339; *Lanning v. Johnson*, — N. J. L. —, 69 Atl. 490.

In the last case, which is the most recent one in *New Jersey* upon the subject, the court, speaking of *Sooy v. State*, *supra*, said: "The underlying rule upon which this decision was rested is stated in the opinion to be that the knowledge of the agent is chargeable upon the principal only when the principal, if acting for himself, would have received notice of the matters known to the agent. In the late case of *Vulcan Detinning Co. v. American Can Co.* (N. J. Err. & App.), 67 Atl. 339, the same court affirmed the rule laid down in *Sooy v. State*, and held that the defendant company was chargeable with knowledge of facts acquired by its president while a director of the complainant company only so far as it would itself have acquired such knowledge by dealing directly, or through another agent, with the complainant company concerning the subject-matter of the controversy. At the same time it expressly repudiated the doctrine laid down by us in the earlier case of *Willard v. Denise*, 50 N. J. Eq. 482, 26 Atl. 29, 35 Am. St. Rep. 788, viz., that where information is casually obtained by an agent of a corporation, and the corporation afterward acts through such agent in a matter where the information possessed by him is pertinent, the knowledge of the agent will be imputed to the principal."

ences, nor have their decisions in all cases been consistent with the theory adopted.

§ 5. —. REQUIREMENT OF PRESENT KNOWLEDGE.—It is indispensable to this rule imputing to the principal knowledge which the agent acquired before the creation of the agency, that it shall still be present in the agent's mind when he becomes charged with the duty of acting with reference to the matter to which the knowledge relates.²⁶ A principal may be affected by knowledge which

²⁶ "Knowledge of an agent acquired previous to the agency, but appearing to be actually present in his mind during the agency and while acting for his principal in the particular transaction or matter, will, as respects such transaction or matter, be deemed notice to his principal and will bind him as fully as if originally acquired by him." *Lebanon Savings Bank v. Hollenbeck*, 29 Minn. 322.

"We think," said POLLOCK, C.B., "that in a commercial transaction of this description, where the agent of the buyer purchases, on behalf of his principal, goods of the factor of the seller, the agent having present to his mind, at the time of the purchase, knowledge that the goods he is buying are not the goods of the factor though sold in the factor's name, the knowledge of the agent, however acquired, is the knowledge of the principal." *Dresser v. Norwood*, 17 C. B. (N. S.) 466.

Of this case Mr. Justice BRADLEY says: "So that in England the doctrine now seems to be established that if the agent, at the time of effecting a purchase, has knowledge of any prior lien, trust or fraud affecting the property, no matter when he acquired such knowledge, his principal is affected thereby. If he acquire the knowledge when he effects the purchase, no question can arise as to his having it at that time; if he acquired it previous to the purchase, the presumption that he still retains it and has it present to his mind will depend on the lapse of time and other circumstances. Knowledge communicated to the principal himself, he is bound to recollect, but he is not bound by knowledge communicated to his agent unless it is present to the agent's mind at the time of effecting the purchase. Clear and satisfactory proof that it was so present seems to be the only restriction required by the English rule as now understood. With the qualification that the agent is at liberty to communicate his knowledge to his principal, it appears to us to be a sound view of the subject." *The Distilled Spirits*, 11 Wall. (U. S.) 367.

"We think, all things considered," said PETERS, J., "the safer and better rule to be that the knowledge of an agent, obtained prior to his employment as agent, will be an implied or imputed notice to the principal, under certain limitations and conditions, which are these: The knowledge must be present to the mind of the agent when acting for the principal—so fully in his mind that it could not have been at the time forgotten by him; the knowledge or notice must be of a matter so material to the transaction as to make it the agent's duty to communicate the fact to his principal, and the agent must himself have no personal interest in the matter which would lead him to conceal his knowledge from his principal, but must be at liberty to communicate it." *Fairfield Savings Bank v. Chase*, 72 Me. 226, 39 Am. Rep. 319.

Knowledge or notice will not bind if it does not appear to have been retained. *Yerger v. Barz*, 56 Ia. 77, 8 N. W. 769.

To the same effect: *Brothers v. Bank of Kaukauna*, 84 Wis. 381, 54 N. W. 786; *Wilson v. Minn. Farmers Ins. Assn.*, 36 Minn. 112, 30 N. W. 401; *Gregg v. Baldwin*, 9 N. D. 515, 84 N. W. 373.

In *Constant v. University of Rochester*, 111 N. Y. 604, 19 N. E. 631, 7 Am. St. Rep. 769, 2 L. R. A. 734, where an agent who acted for the defendant in taking a mortgage, the agent, being an attorney in active practice, had eleven months before acted for the plaintiffs in taking a mortgage upon the same premises which was not recorded, it was held that in the absence of clear and satisfactory showing that the agent remem-

he himself once had, but has now forgotten. He may also be affected by knowledge which his agent acquired during the agency, but has since forgotten. But he cannot be affected by information which one who is now his agent once had, but had forgotten before he became agent and before there were any facts to make it significant or any duty to report it or remember it or to govern one's conduct with reference to it. The agent's recollection must be not simply hazy and indefinite, but as definite and precise as would be required if now coming to the agent for the first time.²⁷ It must also be present to his mind so nearly at least in relation to the actual transaction which it affects as to impose upon the agent the obvious duty to communicate it in reference to that transaction; it is sometimes said that it must be "present to his mind at the very time of the transaction in question."²⁸ The question is a question of fact,²⁹ and the burden of proving that the agent had such recollection is held

bered the existence of the plaintiffs' mortgage when he acted for the defendant, no notice of the existence of the first mortgage could be imputed to defendant. To the same effect is *Slattery v. Schwannecke*, 118 N. Y. 543, 23 N. E. 922.

In *Equitable Securities Co. v. Sheppard*, 78 Miss. 217, 28 So. 842, where the same sort of question was involved, but more than six years had elapsed between the acts, it was said that no court could assume, in the absence of clear and satisfactory proof, that the first act was present to the agent's mind.

In *Badger v. Cook*, 117 App. Div. 328, 101 N. Y. Sup. 1067, where a person had acted as agent in a transaction involving the ownership of cattle, and it appeared that while the cattle were still calves and before he became agent he had received notice of certain facts respecting their ownership, it was held that this notice could not be imputed to his principal unless it was shown by clear and satisfactory proof that he actually remembered it at the time of the transaction in question.

In a number of cases information acquired apparently before the commencement of the agency has been held to be binding upon the principal, no question being raised as to whether the agent in fact remembered it or not; but they were all cases wherein the events constituted practically one continuous transaction, and there was probably no room for question that the agent actually remembered. See *Henry v. Omaha Packing Co.*, — Neb. —, 115 N. W. 777; *Walker v. Grand Rapids Flouring Mill Co.*, 70 Wis. 92, 35 N. W. 332; *Brothers v. Bank of Kaukauna*, 84 Wis. 381, 54 N. W. 786; *White v. King*, 53 Ala. 162; *Dunklin v. Harvey*, 56 Ala. 177; *Wiley, Banks & Co. v. Knight*, 27 Ala. 336; *Miller v. Jones (Ky.)*, 107 S. W. 783.

²⁷ See *Burton v. Perry*, 146 Ill. 71, 34 N. E. 60; *Roderick v. McMeekin*, 204 Ill. 625, 68 N. E. 473; *Snyder v. Partridge*, 138 Ill. 173, 29 N. E. 851.

²⁸ This is the language of *Constant v. University of Rochester*, 111 N. Y. 604, 19 N. E. 631, 7 Am. St. R. 769, 2 L. R. A. 734; *Slattery v. Schwannecke*, 118 N. Y. 543, 23 N. E. 922.

²⁹ *Gregg v. Baldwin*, 9 N. D. 515, 84 N. W. 373. That knowledge was in the agent's mind may be shown by circumstances as well as by direct evidence. *Foreman v. German Ins. Assn.*, 104 Va. 694, 52 S. E. 337.

The party alleging notice is entitled to proof by any competent evidence that the agent had notice, but he must also be prepared to follow it with proof that it was present in the agent's mind at the time of the transaction in question. *Brown v. Cranberry Iron Co.*, 18 C. C. A. 444, 72 Fed. 96.

to be upon the party alleging it, and not upon the principal to show that the agent did not have it.³⁰

§ 6. ———. There may, however, doubtless be cases in which the information was received so immediately before the transaction as to warrant the presumption that it could not have been forgotten. "It may fall to be considered," said Lord ELDON, "whether one transaction might not follow so close upon the other as to render it impossible to give a man credit for having forgotten it. I should be unwilling to go so far as to say that, if an attorney has notice of a transaction in the morning, he shall be held in a court of equity to have forgotten it in the evening; it must in all cases depend upon the circumstances."³¹

§ 7. ———. NOTICE ACQUIRED DURING AGENCY.—So far as that notice or knowledge which is acquired during the agency is concerned, the result under either theory is obviously the same.

Such notice or knowledge is chargeable to the principal in the same manner, and with the same effect, as though it had been communicated to or acquired by him in person.

As has been pointed out, it is, of course, entirely immaterial that

³⁰ *Constant v. University of Rochester*, 111 N. Y. 604, 19 N. E. 631, 7 Am. St. Rep. 769, 2 L. R. A. 734; *Denton v. Ontario Bank*, 150 N. Y. 126, 44 N. E. 781; *Equitable Securities Co. v. Sheppard*, 78 Miss. 217, 28 So. 842; *Morrison v. Bausemer*, 32 Gratt. (Va.) 225; *Johnson v. Nat. Exch. Bank*, 33 Gratt. (Va.) 473; *Foreman v. German Ins. Assn.*, 104 Va. 694, 52 S. E. 337; *Brown v. Cranberry Iron Co.*, 18 C. C. A. 444, 72 Fed. 96; *Red River Val. Land & Inv. Co. v. Smith*, 7 N. D. 236, 74 N. W. 194.

Not only is the burden of proof upon the party alleging recollection, but in *Constant v. University*, *supra*, it is said that the burden is on the plaintiff to prove "clearly and beyond question" that the agent remembered; that the proof must be "clear and satisfactory," and that language is repeated in many New York cases. The same language is used in *Equitable Securities Co. v. Sheppard*, *supra*. In *Morrison v. Bausemer*, *supra*, it is said that there must be "very strong evidence."

In *Equitable Securities Co. v. Sheppard*, *supra*, the court goes so far as to say that it "appears that the courts will presume forgetfulness until overcome by evidence unless the occurrence was so recent as to make it incredible."

³¹ In *Mountford v. Scott*, 1 Turn. & Russ. 274.

In *Brothers v. Bank of Kaukauna*, 84 Wis. 381, 54 N. W. 786, 36 Am. St. Rep. 932, it is said "if the agent acquires his information as recently as to make it incredible that he should have forgotten it, his principal will be bound, although not acquired while transacting the business of the principal."

To same effect see *McDonald v. Fire Assn. of Phila.*, 93 Wis. 348, 67 N. W. 719; *Red River Val. Land & Inv. Co. v. Smith*, 7 N. D. 236, 74 N. W. 194.

In *McClelland v. Saul*, 113 Ia. 208, 84 N. W. 1034, it is said that "it will be presumed that the agent retains the knowledge for a reasonable time." By this it is assumed that the court means nothing more than is meant by the quotation above from the Wisconsin court.

Knowledge acquired not only during the continuance of the agency, but also that possessed by the agent so shortly before as necessarily to give rise to the inference that it remained fixed in his memory when the employment began, binds the principal. *Chouteau v. Allen*, 70 Mo. 290.

the agent has not in fact communicated his information to the principal. If the agent fails to do his duty in this respect, and the principal suffers injury thereby, he has his remedy against the agent.

§ 8. ———. KNOWLEDGE ACQUIRED PRIOR TO AGENCY.—With reference to knowledge acquired before the agency began, however, there is more difficulty, and the two theories lead to different results. The theory based upon the legal identity of the parties, as has been seen, limits the application of the rule to such notice or knowledge as was acquired during the agency. This was at first adopted by the English courts,³² and has since been followed by the courts of many of the United States.³³ The other theory, however, based upon the duty of the agent to disclose to his principal all knowledge and information actually possessed by the agent in relation to the subject-matter of the agency, no matter when acquired, and therefore charging the principal with it, has since been firmly established by the English courts,³⁴ and has been adopted by the supreme court of the United States,³⁵ and by many of the states.³⁶

³² *Preston v. Tubbin*, 1 Vern. 287; *Brotherton v. Hatt*, 2 Vern. 574; *Fitzgerald v. Fauconberge*, *Fitz Gibbon*, 207; *Lowther v. Carlton*, 2 Atk. 242; *Warrick v. Warrick*, 3 Atk. 294; *Worsley v. Scarborough*, 3 Atk. 392; *Le Neve v. Le Neve*, 3 Atk. 648; *Mountford v. Scott*, 3 Madd. 26, s. c. on appeal, 1 Turn. & Russ. 279; *Hiern v. Mill*, 13 Ves. Jr. 120.

³³ "It is well settled," said SHARSWOOD, C.J., "that the principal is only to be affected by knowledge acquired in the course of the business in which the agent was employed." *Houseman v. Girard*, etc., Assn., 81 Pa. St. 256 [citing *Hood v. Fahnestock*, 8 Watts. (Pa.) 489; *Bracken v. Miller*, 4 Watts. & Serg. (Pa.) 110; *Martin v. Jackson*, 3 Casey (27 Pa. St.) 508, 67 Am. Dec. 489].

See also: *Wetzel v. Linnard*, 15 Pa. Sup. Ct. Rep. 503; *Langenheim v. Anschutz-Bradberry Co.*, 2 Pa. Sup. Ct. 285; *Bangor*, etc., *Ry Co. v. American Slate Co.*, 203 Pa. St. v.

See also the recent case declaring this the rule in Pennsylvania, although it is held otherwise by the United States supreme court, *Satterfield v. Malone*, 35 Fed. Rep. 445.

To the same effect are: *Willis v. Vallette*, 4 Metc. (Ky.) 186; *Howard Ins. Co. v. Halsey*, 8 N. Y. 271; *McCormick v. Wheeler*, 36 Ill. 114, 85 Am. Dec. 388; *Mundine v. Pitts*, 14 Ala. 84; *Pepper v. George*, 51 Ala. 190; *McCormack v. Joseph*, 83 Ala. 401; *Wheeler v. McGuire*, 86 Ala. 398, 5 So. 190; *Goodbar v. Daniel*, 88 Ala. 583, 7 So. 254, 16 Am. St. Rep. 76; [But see *Lea v. Iron Belt Merc. Co.*, 147 Ala. 421, 42 So. 415, 119 Am. St. Rep. 93]; *Williams v. Tatnall*, 29 Ill. 553; *Congar v. Railroad Co.*, 24 Wis. 157; *Pringle v. Dunn*, 37 Wis. 449, 19 Am. Rep. 772; *Pritchett v. Sessions*, 10 Rich. (S. C.) L. 293; *Barnes v. McClinton*, 3 Pen. & Watts. (Pa.) 67, 23 Am. Dec. 62; *Weiser v. Denison*, 10 N. Y. 68, 61 Am. Dec. 731; *Farmers*, etc., *Bank v. Payne*, 25 Conn. 444, 68 Am. Dec. 362; *Bank of United States v. Davis*, 2 Hill (N. Y.) 451; *Hayward v. National Ins. Co.*, 52 Mo. 181, 14 Am. Rep. 400; *Blumenthal v. Brainerd*, 38 Vt. 402, 91 Am. Dec. 349; *Second Nat. Bank v. Curren*, 36 Ia. 555; *Day v. Wamsley*, 33 Ind. 145; *Sooy v. State*, 41 N. J. L. 394; *Atchison*, etc., *R. R. Co. v. Benton*, 42 Kan. 698; *Bierce v. Red Bluff Hotel Co.*, 31 Cal. 160; *Kauffman v. Robey*, 60 Tex. 308, 48 Am. Rep. 266.

³⁴ *Dresser v. Norwood*, 17 Com. Bench (N. S.) 466; *Rolland v. Hart*, L. R. 6 Ch. App. 678.

³⁵ *The Distilled Spirits*, 11 Wall. (U. S.) 367.

This theory, however, recognizes certain exceptions which are clearly founded upon and consistent with it. Thus the agent could not reasonably be expected to disclose information which, though once possessed by him, had been, in fact, forgotten. So the law would not compel him to disclose what it was his legal duty to conceal. So the agent could not be deemed to have disclosed that information which, from his relations to the subject-matter, or his previous conduct, it is certain he would not disclose. Subject to these exceptions, it is believed that this theory is supported by the better reason and by a clear preponderance of authority.

§ 9. ———. WHAT IS MEANT BY NOTICE ACQUIRED "DURING THE AGENCY" OR "PRIOR TO AGENCY."—When it is said that notice received by the agent "during the agency" is imputed to the principal it is necessary to consider when the agency in this respect is to be deemed to begin. When the agency relates to a single non-continuing transaction it would be clear that the notice to be imputed to the principal under this rule must relate to that transaction and come to the agent after he has undertaken to act with reference to it. Where the agent is employed for a continuing period, but is to act with reference to a series of disconnected and unrelated transactions, the notice which is to affect the principal with reference to any such transactions must ordinarily, to be deemed to be notice acquired during the agency, be notice which came to the agent after he had undertaken to act with reference to that transaction. "But where the agency is continuous and concerned with a business made up of a long series of transactions of a like nature, of the same general character, it will," it is said in one case,³⁷ "be held that knowledge acquired as agent in that business, in any one or more of the transactions, making up from time to time the whole business of the principal, is notice to the agent and to the principal, which will affect the latter in any other of those transactions in which that agent was engaged, in which that knowledge is material." Some consideration of the latter rule is neces-

³⁶ *Schwind v. Boyce*, 94 Md. 510, 51 Atl. 45; *Trentor v. Pothen*, 46 Minn. 298, 49 N. W. 129, 24 Am. St. Rep. 225; *Hunter v. Watson*, 12 Cal. 377, 73 Am. Dec. 543; *Bierce v. Red Bluff Hotel*, 31 Cal. 160; *Hart v. Bank*, 23 Vt. 252; *Whitten v. Jenkins*, 34 Ga. 305; *Day v. Wamsley*, 33 Ind. 147; *Cummings v. Harsabraugh*, 14 La. Ann. 711; *Hovey v. Blanchard*, 13 N. H. 148; *Bank v. Campbell*, 4 Hump. (Tenn.) 396; *Campau v. Konan*, 39 Mich. 362; *Chouteau v. Allen*, 70 Mo. 290; *Lebanon Savings Bank v. Hollenbeck*, 29 Minn. 322; *Abell v. Howe*, 43 Vt. 403; *Yeager v. Barz*, 56 Ia. 77; *Fairfield Savings Bank v. Chase*, 72 Me. 226, 39 Am. Rep. 319; *Suit v. Woodhall*, 113 Mass. 391; *Shafer v. Phoenix Ins. Co.*, 53 Wis. 361; *Wilson v. Minnesota, etc., Ins. Assn.*, 36 Minn. 112, 1 Am. St. Rep. 659, and the many other cases cited in the following notes.

³⁷ *Holden v. New York & Erie Bank*, 72 N. Y. 286.

sary. Suppose an agent is employed for a period to buy cattle for his principal. While so employed he receives information concerning the cattle of A. At that time it is not his duty and he does not expect then or ever to buy the cattle of A, for his principal, and he does not know and has no reason to believe that the principal then or ever expects to buy the cattle of A, either in person or through some other agent.³⁸ If, notwithstanding this, the principal should, either in person or through some other agent, buy the cattle of A, would he be affected with notice of the information which his agent had so received? It is assumed that he would not be. If, however, the purchase of A's cattle was an act which it was expected this agent would perform and which he afterwards did perform, the notice would doubtless bind the principal, even though it was received before the agent had actually entered upon the negotiation of that particular purchase. And so even though the agent, as first supposed above, had, at the time he received the notice, no duty or expectation of buying the cattle of A, yet if he afterwards did buy them, with the information still in mind, the notice would be imputed in those states at least in which notice is imputed if actually remembered, though acquired previously, even though it were held not to be imputable under the rule above quoted, as notice acquired during the agency.

§ 10. ———. THE RESULTING RULE.—After this much of consideration it is, perhaps, now desirable and possible to frame a rule which will be fuller and more accurate than the general statement with which the discussion began. Stated with the qualifications which have been thus suggested, the rule deducible from these authorities may be said to be the following:

The law imputes to the principal, and charges him with, all notice or knowledge relating to the subject-matter of the agency which the agent acquires or obtains while acting as such agent and within the scope of his authority, or which he may previously have acquired, and which he then had in mind,³⁹ or which he had acquired so recently as to reasonably warrant the assumption that he still retained it;⁴⁰ Provided, however, that such notice or knowledge will not be imputed: (1) Where it is such as it is the agent's duty not to disclose;⁴¹ (2) Where the agent's relations

³⁸ Thus in *Atchison, etc., R. Co. v. Benton*, 42 Kan. 698, 22 Pac. 698, it was held that notice to the general attorney of a railway company of a certain claim given while no suit was pending in respect to it, before the matter had been referred to him in any way, and while he had no duty in respect to it or any reason to attach importance to it, was not notice to the company.

³⁹ See *ante*, § 5.

⁴⁰ See *ante*, § 6.

⁴¹ See *post*, § 11.

to the subject-matter, or his previous conduct, render it certain that he will not disclose it,⁴² and, (3) Where the person claiming the benefit of the notice, or those whom he represents, colluded with the agent to cheat or defraud the principal.⁴³

This rule does not depend, in either case, upon the fact that the agent *has* disclosed the knowledge or information to his principal; subject to the exceptions named, the law conclusively presumes that he has done so, and charges the principal accordingly.⁴⁴

The several qualifications upon the rule must now receive more detailed consideration.

§ II. ———. THE FIRST EXCEPTION—PRIVILEGED COMMUNICATIONS.—The first of the exceptions referred to in the statement of the rule, namely, that relating to knowledge which it is the agent's duty to some other principal not to disclose, is well settled, both in England and in this country. It is most frequently applied to the case of attorneys⁴⁵ and others, upon whom

⁴² See *post*, § 12.

⁴³ See *post*, § 22.

⁴⁴ See *The Distilled Spirits*, 11 Wall. (U. S.) 367; *Dresser v. Norwood*, 17 C. B. (N. S.) 466, and many other cases cited in subsequent sections.

⁴⁵ NOTICE TO ATTORNEY.—The general question of notice to attorneys will be considered in the chapter devoted to attorneys. A distinction may be made between the attorney's employment as a *lawyer* and as an *agent*, though the distinction is not always observed. The question here arises where he is employed as an agent. It is held in many cases that notice to an attorney, while engaged in the performance of the business of his principal, is notice to the principal: *Price v. Carney*, 75 Ala. 546; *Bierce v. Red Bluff Hotel Co.*, 31 Cal. 160; *Sweeney v. Pratt*, 70 Conn. 274, 39 Atl. 182, 66 Am. St. Rep. 101; *Brown v. Oattis*, 55 Ga. 416; *Haas v. Sternbach*, 156 Ill. 44, 41 N. E. 51; *Blake v. Clary*, 83 Me. 154, 21 Atl. 841; *Shartzler v. Mountain Lake Park Assn.*, 86 Md. 335, 37 Atl. 786; *Mayor v. Whittington*, 78 Md. 231, 27 Atl. 984; *Bates v. Johnson*, 79 Minn. 354, 82 N. W. 649; *Edwards v. Hillier*, 70 Miss. 803, 13 So. 692; *Bank of Commerce v. Hoeber*, 88 Mo. 37, 57 Am. Rep. 359; *Peeples v. Warren*, 51 S. C. 560, 29 S. E. 659; *Riordan v. Britton*, 69 Tex. 918, 7 S. W. 50, 5 Am. St. Rep. 37; *Hyman v. Barmon*, 6 Wash. 516, 33 Pac. 1076; *Rogers v. Palmer*, 102 U. S. 263.

It has, however, been held generally in many cases that knowledge acquired by an attorney while acting for one client will not affect a subsequent client: *Hood v. Fahnestock*, 8 Watts (Pa.) 489, 34 Am. Dec. 489; *Willis v. Vallette*, 4 Metc. (Ky.) 186; *McCormick v. Wheeler*, 36 Ill. 114, 85 Am. Dec. 388; *Herrington v. McCollum*, 73 Ill. 476; *McCormick v. Anderson*, 83 Ala. 401, 3 So. 796; *Pepper v. George*, 51 Ala. 190; *Terrell v. Bank*, 12 Ala. 502; *Chapman v. Hughes*, 134 Cal. 641, 60 Pac. 974; *Wittenbrock v. Parker*, 102 Cal. 93, 36 Pac. 374, 41 Am. St. Rep. 172, 24 L. R. A. 197; *Bierce v. Red Bluff Hotel Co.*, 31 Cal. 160; *Martin v. Jackson*, 27 Pa. St. 504, 67 Am. Dec. 489; *Allen v. McCalla*, 25 Ia. 464, 96 Am. Dec. 56; *Santa Fe R. R. v. Benton*, 42 Kan. 698, 22 Pac. 698; *Haven v. Snow*, 14 Pick. (Mass.) 28; *Lowther v. Carlton*, 2 Atk. 242; *Worsley v. Scarborough*, 3 Id. 392; *Warrick v. Warrick*, 3 Id. 294; *Campbell v. Benjamin*, 69 Ill. 244; *Warner v. Hall*, 53 Mich. 370, 19 N. W. 40; *Fidelity Trust Co. v. Baker*, 60 N. J. Eq. 170, 47 Atl. 6; *Tucker v. Tilton*, 55 N. H. 223; *Arrington v. Arrington*, 114 N. C. 151, 19 S. E. 351; *Neilsen v. Weber*, 107 Tenn. 161, 64 S. W. 20; *Denton v. Ontario Co. Nat. Bank*, 150 N. Y. 126, 44 N. E. 781; *Steinmeyer v. Steinmeyer*, 55 S. C. 9, 33 S. E. 15; *Meuley v. Zeigler*, 23 Tex. 88; *Pacific Mfg. Co. v. Brown*, 8 Wash. 347, 36 Pac. 273; *Melms v. Pabst Brewing Co.*, 93 Wis. 153, 66 N. W. 518, 57 Am. St. Rep. 899.

rests the duty of maintaining a professional secrecy. This secrecy the law will not permit, much less require, to be violated. As is well said by Mr. Justice BRADLEY, "When it is not the agent's duty to communicate such knowledge, when it would be unlawful for him to do so, as, for example, when it has been acquired confidentially as attorney for a former client in a prior transaction, the reason of the rule ceases, and in such a case an agent would not be expected to do that which would involve the betrayal of professional confidence, and his principal ought not to be bound by his agent's secret and confidential information."⁴⁶

§ 12. ———. THE SECOND EXCEPTION—AGENT ACTING ADVERSELY TO PRINCIPAL.—The rule imputing notice is usually based, as has been seen, upon the theory that it is the duty of the agent to communicate to his principal the knowledge possessed by him relating to the subject-matter of the agency, material to the principal's protection and interests, and the presumption that he has performed this duty. This presumption, however, it is said, will not prevail where it is certainly to be expected that the agent will not perform his duty, as where the agent, though nominally acting as such, is in reality acting in his own or another's interest, and adversely to that of his principal.⁴⁷ Much less will it be entertained

[Many of these cases can be reconciled upon the ground already pointed out, namely, that the theory of legal identification, which is adopted in several states as the foundation for imputing notice, confines the effect of the notice to the time when such identification exists, namely, the period when the agent is actually representing the principal. Other of the cases seem to have adopted the rule, without much consideration, as one peculiar to attorneys. Still other of them, such as *Wittenbrock v. Parker*, *supra*, may be distinguished upon the ground that there was no evidence that the attorney at the time actually remembered the information; or, like *Tucker v. Tilton*, *Fidelity Trust Co. v. Baker*, *Arrington v. Arrington*, *supra*, upon the ground that the notice formerly received had no real relation to the service which he was now called upon to perform.]

And so it has been held that knowledge acquired by an attorney while acting for one client will not affect another client for whom he is acting in another matter at the same time: *Ford v. French*, 72 Mo. 250. But if notice acquired before the agency is to be imputed in any case, and if the attorney really acts not as a *lawyer*, but as an *agent*, no reason is seen why he should stand upon a different ground than other agents, and the better rule is believed to be that in either case such notice binds the principal unless acquired under such circumstances as to make it privileged: *Abell v. Howe*, 43 Vt. 403; *Hunter v. Watson*, 12 Cal. 377, 73 Am. Dec. 543; *Hart v. Bank*, 33 Vt. 252; *The Distilled Spirits*, 11 Wall. (U. S.) at p. 367.

⁴⁶ *The Distilled Spirits*, 11 Wall. (U. S.) 367; *Melms v. Pabst Brewing Co.*, 93 Wis. 153, 66 N. W. 518, 57 Am. St. Rep. 899; *Sebold v. Citizens Bank (Ky.)*, 105 S. W. 130.

⁴⁷ "While the knowledge of an agent is ordinarily to be imputed to the principal, it would appear now to be well established that there is an exception to the construction or imputation of notice from the agent to the principal in case of such conduct by the agent as raises a clear presumption that he would not communicate the fact in controversy, as where the communication of such a fact would necessarily prevent the consummation of a fraudulent scheme which the agent was engaged in perpetrat-

where the agent is openly and avowedly acting for himself and not as agent.⁴⁸ In such cases the presumption is that the agent

ing." *DEVENS, J.*, in *Innerarity v. Merchants' National Bank*, 139 Mass. 332, 1 N. E. 282, 52 Am. Rep. 710 [citing *Kennedy v. Green*, 3 Myl. & Keene 699; *Cave v. Cave*, 15 Ch. Div. 639; *In re European Bank*, 5 Ch. Ap. 358; *In re Marseilles Extension Ry.*, L. R. 7 Ch. Ap. 161 (1 Eng. Rep. [Moak] 490); *Atlantic National Bank v. Harris*, 118 Mass. 147; *Loring v. Brodie*, 134 Mass. 453].

To same effect: *Allen v. South Boston R. Co.*, 150 Mass. 200, 22 N. E. 917; *Corcoran v. Snow Cattle Co.*, 151 Mass. 74, 23 N. E. 727; *Brown v. Harris*, 139 Mich. 372, 102 N. W. 960; *Van Buren Co. v. American Surety Co.*, — Ia. —, 115 N. W. 24; *Sebald v. Citizens' Bank (Ky.)*, 105 S. W. 130; *Traders, etc., Bank v. Black*, — Va. —, 60 S. E. 743; *Jungk v. Reed*, 12 Utah 196, 42 Pac. 292; *First Nat. Bank v. Foote*, 12 Utah 157, 42 Pac. 205; *Union Cent. L. Ins. Co. v. Robinson (C. C. A.)*, 148 Fed. 358; *Thompson-Houston Co. v. Capitol Elec. Co.*, 12 C. C. A. 643, 65 Fed. 341; *Reed v. Munn (C. C. A.)*, 148 Fed. 737; *Bank of Overton v. Thompson (C. C. A.)*, 118 Fed. 798; *Investment Co. v. Ganzer*, 66 Fed. 216, 13 C. C. A. 402; *Hudson v. Randolph*, 66 Fed. 216, C. C. A.; *Waite v. Santa Cruz (C. C. A.)*, 89 Fed. 619; *Hart v. Bier (C. C. A.)*, 74 Fed. 592; *Camden Safe Deposit Co. v. Lord*, 67 N. J. Eq. 489, 58 Atl. 607; *Henry v. Allen*, 151 N. Y. 1, 45 N. E. 355, 36 L. R. A. 658; *Gunster v. Scranton Illuminating, etc., Co.*, 181 Pa. 327, 37 Atl. 550, 59 Am. St. Rep. 650; *Houghton v. Todd*, 58 Neb. 360, 78 N. W. 634; *Hummel v. Bank of Monroe*, 75 Ia. 689, 37 N. W. 954; *Cole v. Getzinger*, 96 Wis. 559, 71 N. W. 75; *American Surety Co. v. Pauly*, 170 U. S. 133, 18 Sup. Ct. Rep. 552; *Aetna Indem. Co. v. Schroeder*, 12 N. Dak. 110, 95 N. W. 436; *Pursley v. Stahley*, 122 Ga. 362, 50 S. E. 139; *Cowan v. Curran*, 216 Ill. 598, 75 N. E. 322; *Merchants' Nat. Bank v. Nichols & Co.*, 223 Ill. 41, 79 N. E. 38; *In re Plankinton Bank*, 87 Wis. 378, 58 N. W. 784; *Rock Springs Nat. Bank v. Luman*, 5 Wyo. 159, 38 Pac. 678; *Knobelach v. Germania Savings Bank*, 50 S. Car. 259, 27 S. E. 962. [This list does not purport to be exhaustive.]

Kennedy v. Green, 3 Myl. & Keene, 699 (cited above) is a leading case upon this subject. There Mrs. Kennedy, the plaintiff, had a trusted solicitor, one Bostock, Bostock procured from her an assignment of a mortgage. In addition, by fraudulent practices, he procured a receipt from her for the consideration, which had not been paid to her. There were many unusual and suspicious features in the arrangement and appearance of this assignment. Taking the assignment to the defendant in interest, one Kirby, who had employed Bostock as his solicitor in this transaction, he sold the assignment to him, and, instead of paying the money so obtained to Mrs. Kennedy, embezzled it. Mrs. Kennedy thereupon brought an action against Green, the solicitor's assignee in bankruptcy, and Mr. Kirby, praying that the assignment of the mortgage might be declared void, and that the premises be reassigned to her. The Master of the Rolls granted the relief prayed for, upon the ground that knowledge of Bostock's fraud was to be imputed to his client Kirby, and also upon the ground that the appearance of the deeds of assignment was such as to put a prudent man upon inquiry. Upon appeal the decision was affirmed upon the second ground, the Lord Chancellor being of the opinion that Kirby was not to be charged with actual

⁴⁹ Speaking of the general rule, in *Frenkel v. Hudson*, 82 Ala. 158, 60 Am. Rep. 736, *SOMERVILLE, J.*, says: "It has no application, however, to a case where the agent acts for himself, in his own interest, and adversely to that of the principal. His adversary character and antagonistic interests take him out of the operation of the general rule, for two reasons: *first*, that he will very likely, in such case, act for himself, rather than for his principal; and, *secondly*, he will not be likely to communicate to the principal a fact which he is interested in concealing. It would be both unjust and unreasonable to impute notice by mere construction under such circumstances, and such is the established rule of law on this subject." [Citing *Terrell v. Branch Bank of Mobile*, 12 Ala. 502; *Lucas v. Bank of Darien*, 2 Stew. (Ala.) 321; *Wickersham v. Chicago Zinc Co.*, 18 Kan. 481, 26 Am. Rep. 784; *Angell and Ames on Corp.*, §§ 308, 309; *Story on Agency*, § 140.]

will conceal any fact which might be detrimental to his own interests, rather than that he will disclose it.

The case most frequently arising is that in which the agent is secretly engaged in prosecuting some fraudulent or illegal enterprise the success of which would be impaired or defeated by the disclosure to his principal of the notice or knowledge now sought to be imputed.⁴⁹ The application of the rule is not, however, con-

notice of the fraud, which, though known to his solicitor, who was the perpetrator of the fraud, it was equally certain that the solicitor would conceal.

In *Dillaway v. Butler*, 135 Mass. 479, A, to whom B was indebted, advised C to lend money to B on the security of a mortgage on personal property, and acted as C's agent in completing the transaction. With the money thus obtained B paid A the debt he owed him. Both A and B acted in fraud of a statute of the state, but C had no knowledge of the fraud. It was held that the knowledge of A was not in law imputable to C, although A had acted for C in the negotiation.

In *Findley v. Cowles*, 93 Ia. 389, 61 N. W. 998, a bank cashier was also president of a corporation whose stock was valueless. He deposited \$10,000 of this stock in the bank and took credit for it. The auditor of state objected and compelled him to furnish in its stead the note of his father, the defendant, for that amount. He did so, but later withdrew the note, marked it "Paid," and again put the stock in the bank, without the knowledge of any other officer of the bank. The signer of the note seeks to avoid payment on the ground that the bank's agent had withdrawn it. The court held that as the cashier, in the entire transaction, was working for his own interest and adversely to the bank, it was not bound by his withdrawing the note.

In *Shepard & Morse Lbr. Co. v. Eldridge*, 171 Mass. 516, 51 N. E. 9, the plaintiff sued the defendant on two checks, which had been sent by defendant to plaintiff, and the endorsement of plaintiff was forged by one of his clerks, who got the money on it. The defendant resisted payment of the checks again, on several grounds, one of which was that the knowledge of previous forged endorsements should have been imputed to plaintiff so as to hold him to have authorized it. The court held that as the clerk was himself involved in the fraud, knowledge of it could not be imputed to his principal. See also *Indian Head Nat. Bank v. Clark*, 166 Mass. 217, 44 N. E. 139.

A very similar situation was similarly decided in *United Security Co. v. Central Nat. Bank*, 185 Pa. St. 586, 40 Atl. 97.

In *Houghton v. Todd*, 58 Neb. 360, 78 N. W. 634, one Dundas was agent of plaintiff and partner of defendant. He ordered goods of plaintiff in his firm's name, when he intended them for another party, and used the firm's name merely for security. In a suit against the other partner, the court held that Dundas's knowledge of the facts could not be imputed to his principal, the plaintiff, and that the plaintiff could recover.

Obviously, as between the principal and his agent, the latter cannot claim that the principal must be deemed to have constructive notice of the agent's fraudulent acts which the agent was in fact diligently concealing from him: *Sankey v. Alexander*, Ir. Rep. 9 Eq. 259.

⁴⁹ A great many questions may be suggested, of which the following are a few illustrations: Suppose that X, who is agent for both A and B, steals money from B. B discovers it and demands restitution. X now steals money from A and brings it to B, who is actually ignorant of its source, and pays it to B in discharge of the obligation. Would B be chargeable with X's knowledge of the source from which the money was derived?

Suppose in the case above suggested that B had not discovered the loss, and X, in order that he should not discover it, stole money from A and put it with B's money so as to make good the deficiency. In such a case, would B be charged with X's knowledge as to the source from which the money came?

finéd to cases of such actual fraud, but will extend, as has been stated, to cases in which the agent is temporarily acting on his own account and adversely to his principal.

This exception has been applied in a great number and in a great variety of cases. In many of them it seems to have been applied quite arbitrarily and without much consideration of the reasons involved. Many conflicting results have necessarily ensued, and have led to the necessity of a more careful investigation into the reason and scope of this exception.

§ 13. ———. It is not enough to prevent the application of the general rule that an agent to whom notice comes shall, however wickedly or fraudulently, fail to communicate it to his principal: the agent must also have some interest or motive of his own, adverse to his principal's interests, which prompts him to conceal his knowledge and which practically destroys the agency relation.⁵⁰

§ 14. ———. Inasmuch as an agent, with the full knowledge and consent of his principal, may also act for himself or for the adverse party, notice acquired while acting for the adverse party with the principal's knowledge and consent will be imputed to the principal.⁵¹

§ 15. ———. REASONS FOR THE EXCEPTION.—The reasons given for the exception are not always the same. That most commonly given and relied upon is the one already stated, namely, that there is, from the circumstances, a presumption that the agent will not perform his duty. Another reason which has been suggested is that inasmuch as the pretended agent is, by the hypothesis, really acting on his own account, he does not receive the notice as agent and while acting within the scope of his authority.⁵²

Suppose again in either case that X, instead of using A's money, had used a promissory note in the name of A, executed under an authority from A, which would justify the making of such a note for a proper purpose.

Suppose that X, who contemplates abstracting B's money, should endeavor to create an apparent credit to himself upon B's books by making use of notes or money which he had abstracted from A.

Suppose that X, who means to apply A's money upon dealings which X expects to have with C, transfers A's money first to B and then from B to C, using B as a mere unconscious conduit for the transfer of the money.

⁵⁰ *Armstrong v. Ashley*, 204 U. S. 272; *Boursot v. Savage*, L. R. 2 Eq. 134.

⁵¹ *Pine Mt. Iron Co. v. Bailey*, C. C. A., 94 Fed. 258.

⁵² Thus in *In re Plankinton Bank*, 87 Wis. 378, 58 N. W. 784, it is said: "Where an officer or agent of the corporation himself deals with the corporation, it will not be charged with notice of the information which he possesses relating to the transaction, and which he does not disclose, for the reason that in such case he does not represent the corporation, but is acting for himself, and ceases, *pro hac vice*, to act as an agent of the corporation. The corporation, in such case, is in reality the adverse party, and the officer does not act for it as its agent at all."

So in *Pursley v. Stahley*, 122 Ga. 362, 50 S. E. 139, it is said: "But when the agent departs from the scope of the agency, and begins to act for himself and not

Another, which is very similar, is that inasmuch as he is really acting in pursuance of a fraudulent design and committing an independent fraud, his whole act, including the notice, is beyond the scope of his employment and therefore neither the act nor the knowledge relating to it, as matter of law, can be imputed to his principal.⁵³

§ 16. —. FURTHER OF THESE REASONS.—A serious difficulty in the way of the adoption of the reason first assigned is found in the fact that it is not ordinarily a satisfactory theory for exempting the principal to presume that his agent will not do, or has not done, his duty. That suggestion usually and properly meets with very little favor. A more satisfactory reason would be to say, as has been suggested, that the assumed agent is not really acting as agent at all and therefore the general rule imputing knowledge has no application. Where the agent is openly and avowedly acting adversely there is little difficulty in reaching this conclusion. And even where he is not openly acting adversely but has secretly such an adverse interest that he would not be permitted to become or remain an agent without his principal's full and intelligent consent, it would seem that the same result should ensue and that he should be treated as practically not an agent of the principal whose interests he is, for the promotion of his own ends, secretly betraying or ignoring. If this be done, however, what is the result? Either that the principal was in that transaction not represented by an agent at all and therefore, so far as it

for the principal; when his private interest is allowed to outweigh his duty as a representative; when to communicate the information would prevent the accomplishment of his fraudulent scheme, he becomes an opposite party, not an agent. The reason for the rule then ceases. Where, therefore, the agent who is an intermediary is guilty of independent fraud for his own benefit, the law does not impute to the principal notice of such fraud."

⁵³ In *Allen v. South Boston Railroad*, 150 Mass. 200, 22 N. E. 917, it was said: "The general rule is that notice to an agent, while acting for his principal, of facts affecting the character of the transaction, is constructive notice to the principal. There is an exception to this rule when the agent is engaged in committing an independent fraudulent act on his own account, and the facts to be imputed relate to this fraudulent act. It is sometimes said that it cannot be presumed that an agent will communicate to his principal acts of fraud which he has committed on his own account in transacting the business of his principal, and that the doctrine of imputed knowledge rests upon a presumption that an agent will communicate to his principal whatever he knows concerning the business he is engaged in transacting as agent. It may be doubted whether the rule and the exception rest on any such reasons. It has been suggested that the true reason for the exception is that an independent fraud committed by an agent on his own account is beyond the scope of his employment, and therefore knowledge of it, as matter of law, cannot be imputed to the principal, and the principal cannot be held responsible for it. On this view, such a fraud bears some analogy to a tort wilfully committed by a servant for his own purposes, and not as a means of performing the business intrusted to him by his master. Whatever the reason may be, the exception is well established."

depends upon agency, there was no act, unless the principal later with knowledge elects to stand by it; or that the assumed agent dealt in this transaction as an independent party, giving to the principal the same rights and the same obligations which he would have if he were dealing with any other independent party. Where the principal did not, in fact, know anything about the transaction at the time and the whole matter was confined to the hands of the agent alone, the latter alternative seems too contrary to the facts to be readily accepted.

§ 17. —. If it be said that there was no act, because there was no agent, then any contract or transfer involved in it must be of no effect, and if anything has come to the principal's possession by reason of the act, it must be surrendered if the act be repudiated.⁵⁴ Inasmuch as the principal may consent to being represented by an interested agent, and may do so after the act as well as before, he may well, if he attempts with knowledge to obtain or retain benefits flowing from the act, be held to have approved it with all its incidents.⁵⁵

⁵⁴ In *Morris v. Georgia Loan, Savings & Banking Co.*, 109 Ga. 12, 34 S. E. 378, 46 L. R. A. 506, the cashier of the bank was individually interested in a note which he knew to be without consideration. He discounted it to the bank, and the bank claims now to be a *bona fide* holder, without notice of the defense. The court, however, held it must stand charged with the notice of the cashier if it ratified his act and claimed to own the note so discounted by it. The court distinguished the principle recognized where an officer of a corporation is the adverse party, and said: "But the principle involved in those cases cannot be fully applicable to a case where one party, having knowledge of the invalidity of a paper of which he is the ostensible owner, discounts it in a bank of which he is the duly authorized agent, and is himself the only actor for the bank and by his act enables the bank to collect and retain the proceeds of such paper against the rights of the true owner. In such a transaction he is either the agent of the bank to discount the paper, or he is not. If he is not, then the discounting was illegal, and the owner is entitled to it or its proceeds. If he is the agent of the bank, and the facts insisted on here existed, his action would be a fraud upon the rights of the owner, of which the bank cannot take advantage." The court then adopts the excerpt from *First Nat. Bank v. New Milford*, 36 Conn. 93, quoted in the following note.

⁵⁵ In the case of the *Bank of New Milford v. Town of New Milford*, 36 Conn. 93, the cashier of the plaintiff was town treasurer of the defendant. He was in sole charge of the bank, and had embezzled some of its funds. To cover up this deficit he executed a note of the town and deposited it in the bank. The bank later sued on the note, and the town sought to charge the bank with notice of the fact that the note was not given for the benefit of the town, but for the treasurer's individual use. The court held that if it accepts the note through the cashier it must accept, with the act, the knowledge of its agent. The court said: "He [the cashier] as agent of the bank had full knowledge, therefore, of the fraud; and now the bank, if they ratify his contract and confirm his agency, must accept his knowledge and be bound by it, precisely as if the loan had been made and the knowledge had by the board of directors."

In *Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 268, 17 N. E. 496, there was one individual acting as the common treasurer of both corporations. It had been the custom of these two mills to borrow from each other freely. The treasurer

§ 18. —. But there may be cases in which, though it should be admitted that no act of agency resulted, the principal would still be entitled to stand upon the footing of a transferee

had stolen from the plaintiff, and to cover the theft had given checks of the defendant which the plaintiff had entered on its books. The plaintiff is now suing on the book account, which includes these checks. The question arising as to the knowledge of the plaintiff of the circumstances, the court distinguished the case where the corporation is represented by some other officer than the defaulter, and held that in this case, where the embezzling official is the only representative, connected with the transaction, of the corporation sought to be charged with notice, notice would be imputed. On this distinction the court said: "Such want of knowledge cannot in the view of the law exist, where the party in the particular transaction is represented solely by one who has knowledge." And of the general principle of imputation of notice the court said: "It [the plaintiff] must be deemed to have known what he knew; and it cannot retain the benefit of his act without accepting the consequences of his knowledge. The plaintiff cannot obtain greater rights from his act than if it did the thing itself, knowing what he knew."

And again: "If an agent misuses funds of his principal which are in his hands, * * * that is not an act of agency. * * * An embezzler does not represent his principal while in the act of stealing from him."

In *Holden v. New York and Erie Bank*, 72 N. Y. 286, it appeared that a trustee of a fund, under a will, was also president and sole managing officer of the defendant bank. Knowing the insolvent condition of the bank and the greatly impaired value, or worthlessness, of the stock, he invested the trust fund in his individual shareholdings, deposited the trust money received therefor in the bank, and with it paid debts he owed the bank. The court held that the bank took this money with notice of the fraudulent misappropriation of trust funds, imputed to it from the knowledge of its managing officer. The court said: "The knowledge of Ganson as an individual or an executor was not imputable to the bank merely because he was its president, but because when it acted through him as president, in any transaction where that knowledge was material and applicable, it acted through an agent who at that very time had knowledge of facts which gave a character to the transaction * * * and whose duty it was to make that knowledge known to his principal." And, having such knowledge, it was the bank's "duty to those interested in that money to refuse to take it upon deposit to his individual account."

See also *Fishkill Savings Institute v. Bostwick*, 19 Hun (N. Y.) 354.

In *Fouche v. Merchants Nat. Bank*, 110 Ga. 827, 36 S. E. 256, the plaintiff sued for unpaid subscription on some stock it held of the Rome Electric Light Company. The stock was endorsed across the face, "Full-paid and non-assessable," and the defendant seeks to avoid liability on the ground that it had no knowledge of the fact that it was unpaid. The bank had acquired title to the stock from its president, who sold it to the bank, he knowing it was unpaid. The president alone represented the bank in the transaction. The court held that the bank, if it retained the stock, ratified the act of its agent, the president, and by such ratification was charged with all the knowledge of the agent pertaining thereto. The court said, on this point: "This transaction was ratified by the bank in its retaining the stock, having the same entered on the books, its name enrolled upon the books of the company in which the stock was held, as one of its stockholders, and in availing itself of the privileges of such a stockholder. We do not see how it could claim the advantages and privileges of this possession and ownership without becoming chargeable with notice of the burdens it had likewise assumed, of which it had knowledge, through its president, when it thus became the owner of this property."

See also *Singleton v. Bank*, 113 Ga. 527, 38 S. E. 947.

In *The First National Bank of Monmouth v. Dunbar*, 118 Ill. 625, 9 N. E. 186, the appellee had on special deposit with the appellant four bonds negotiable by delivery; the appellant's cashier, to cover up an embezzlement from the bank, abstracted

from the agent, or from the other principal whom he represented, and be entitled to protection to the same extent as any purchaser for value without notice. In such a case, there being really no agency relation, notice could not be imputed upon that ground, and, if the principal had no notice which would bind him otherwise, he would be protected.⁵⁶ This result would not seem to be pos-

these bonds and turned them into the general fund of the bank, which later failed. The owner of the bonds sues the bank in trover. The court held the action would lie, merely stating that the bank could not acquire legal title to the bonds because the notice of its agent in receiving the bonds,—the cashier,—was its notice. The case can be sustained on the ground that the bank acquired no right to the bonds except through the act of its cashier. If the cashier was authorized to receive these bonds, his notice is its notice. If he was not so authorized, the bank must ratify or repudiate his act. If it repudiates it, then it has never had any claim to them; if it ratifies the act, it must be charged with all knowledge its agent had. The case also comes within the exception to the general exception suggested by the editors of the Case Note appended to *Brookhouse v. Union Publishing Co.*, 2 L. R. A. (N. S.) 993.

In *Warren v. Dixon*. — N. H. —, 68 Atl. 193, the plaintiff had been defrauded of some land, on which the defendant afterward acquired, in good faith and for value, a mortgage. The defendant sent J. B. Dixon, an agent, who knew of the fraud on plaintiff, to collect the mortgage. The agent procured a conveyance of the land to defendant in satisfaction of her mortgage, but, in so doing, was in reality acting in the interests of the defendant's mortgagor. The plaintiff seeks to compel her to hold the legal title impressed with notice of the fraud on him. The defendant denies the agency of her representative, as he acted for the mortgagor, and she apparently claims nothing by the deed to her, but falls back on her mortgage which was honestly acquired. As to whether she is estopped to deny his agency for her, the court says: "Although the plaintiff cannot maintain this action by merely showing that J. B. Dixon was in Mrs. Dixon's employ when the conveyance was made, she cannot set that conveyance up to defeat the plaintiff's right to redeem the property from her. The reason is, not that she is charged with J. B. Dixon's knowledge, but because a person cannot claim the benefit of so much of his agent's unauthorized act as is beneficial to him and repudiate the remainder. If he accepts any benefit from it after he knows and appreciates what his agent has done, he will be estopped to deny that the agent was acting for him. In other words, such conduct constitutes a ratification of the agent's act."

⁵⁶ Thus in *Thompson-Houston Electric Co. v. Capitol Electric Co.*, 65 Fed. 341, it appeared that one D., who was the agent of Mrs. R. to loan her money upon securities and who had received money from her for that purpose, which it was his duty to account to her for from time to time, was also the secretary, treasurer and general manager of a certain corporation. He owed this corporation upon a note, and the note was secured by a deposit with the corporation of certain bonds which belonged to D. This note and bonds were in his custody among the other papers of the corporation. In order to settle his account with Mrs. R. he induced an irresponsible person to give him a note. He then abstracted the bonds from the papers of the corporation, attached them to the note so procured as though they had been given to secure it, and delivered the note and the bonds to Mrs. R. in settlement of his account with her. Mrs. R. received them in good faith and without actual notice of the claim of the corporation to the bonds. In an action to determine the title to them, it was contended that Mrs. R. must be charged with the knowledge which D. had respecting the rights of the corporation, and that therefore she could not hold the bonds as against it. It was held that his knowledge would not be imputed to her, and the exception now under discussion to the general rule was relied upon. But more specifically the court said: "When he abstracted the bonds he was not taking them for Mrs. R.; he was taking them for himself, so that he might use them to obtain money from Mrs. R. He was not abstracting them for the benefit of Mrs. R. any

sible, however, in cases in which the agent was the sole actor on both sides.

§ 19. —. In many cases the matter seems to resolve itself

more than for the benefit of any stranger to whom he might have sold them for value. In delivering these bonds to Mrs. R., D. was actually dealing with her as a purchaser from him and not as her agent." And, by another judge: "In the present case I do not think D. was acting as agent of either of the supposed principals, but, having possession of the bonds entrusted to him by the company, made the manual abstraction and tradition of them which brought them to the hands of an innocent holder." *Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 268, *supra*, was distinguished.

So in *Henry v. Allen*, 151 N. Y. 1, 45 N. E. 355, 36 L. R. A. 658, it appeared that plaintiff had delivered to one M., his agent, money to be deposited in defendant's bank, on plaintiff's account, with instructions to obtain from defendants their check or certificate to the order of M., and by M. endorsed to plaintiff. M. wrongfully deposited the money in the bank on his own account and by fraudulent representations and promises that he would use them only for a certain purpose, he induced defendants to give him their negotiable checks for the money, made out to his own order. These he endorsed and delivered to the plaintiff in apparent performance of his obligation to plaintiff, and the latter received them in absolute good faith and in ignorance of the representations which M. had made. Afterwards defendants permitted M. to check out all the money on his own account, in ignorance of the transfer of the checks to plaintiff or of his interest in the money. In an action by plaintiff to recover the amount of these checks from the defendants, defendants contended that the plaintiff must be charged with the knowledge M. had of the arrangement under which the checks were issued. The court, however, held that this would not be done, stating the exception in its usual form, but saying also: "When an agent abandons the object of his agency and acts for himself by committing a fraud for his own exclusive benefit, he ceases to act within the scope of his employment, and to that extent ceases to act as agent." They also held that plaintiff had practically parted with his money to M. partly in reliance upon these checks, and he was therefore entitled to stand in the attitude of a purchaser of them from defendants for value.

So in *Allen v. South Boston Ry. Co.*, 150 Mass. 200, 22 N. E. 917, 15 Am. St. 185, 5 L. R. A. 716, it appeared that one R. was treasurer of the defendant corporation and also a stock-broker. In his capacity as stock-broker he undertook to sell certain shares of the company's stock to one of the plaintiffs. He had no such stock, but in order to perform his contract with her he fraudulently filled out a blank certificate of stock, which was in his possession, signed by the president and himself, and delivered it to her, she being actually ignorant of the fraud. In an action by her against the corporation it was contended by the latter that the knowledge of R. as to the fraudulent nature of this certificate should be imputed to her. The court held that the notice would not be imputed, saying that she stood in the attitude of a purchaser from him, and also that if it be claimed that he was her agent, yet when he undertook to perpetrate an independent fraud for his own benefit he ceased to be her agent.

So in *Clark v. Marshall*, 62 N. H. 498, one M. was the general manager of a corporation. While such he conveyed certain premises of his own to the corporation, having then, as it was charged, an intention to thereby defraud his creditors. It was contended that this knowledge of his purpose must be imputed to the corporation so that the latter could not be a *bona fide* purchaser. It was held that such notice would not be imputed, because where "an agent has a personal interest antagonistic to that of his principal, in the subject matter of the contract, as in the case of the sale or transfer of his property to the latter, his relation is changed, and as to that transaction he is acting, not for his principal, but for himself."

Contra.—In *Hummell v. The Bank of Monroe*, 75 Ia. 689, 37 N. W. 954, one Anderson was cashier of the defendant bank, to which he was considerably indebted.

into the familiar but always difficult question of which of two innocent parties should bear the loss. This may often be settled by the application of the maxim that he should bear it by whose act it was made possible.⁵⁷ In other cases the only solution seems to be to leave it where it has fallen, since there is no reason or justification for shifting it to the other party.⁵⁸

By fraudulent representations he procured from the plaintiff an accommodation note. In violation of his promise to the plaintiff he negotiated this note to the Des Moines bank, receiving therefor a draft, which he cashed at his own bank, and therewith paid his indebtedness and received non-negotiable cashier's checks for the residue. The plaintiff seeks to pursue the entire fund into defendant's hands, on the ground that the notice of their cashier being imputed to it, it had knowledge of the fraud by which the money was procured. The court refused to charge it with such notice and held it was only liable for such sum as remained to Anderson's credit when the bank was actually notified of the fraud. It was held that the doctrine of ratification did not apply to the case. The conclusion in this case cannot be sustained except by force of the strict application of the exception to the rule of notice as it is ordinarily stated. The bank acquired the drafts in question only through the act of its cashier. If it repudiated that act it could not retain the draft. It would not seem that the bank could stand in the attitude of a purchaser from the cashier as an independent person because he did not deal with the bank as an independent person, and the bank was not represented in the transaction by any other agent.

See also *Camden Safe Deposit Co. v. Lord*, 67 N. J. Eq. 489, 56 Atl. 607.

⁵⁷ In *Smith v. Boyd*, 162 Mo. 146, 62 S. W. 439, two separate mortgages, both duly recorded, securing notes, were outstanding upon the same land. The second of these had really been given in substitution for the first, and with the understanding that the first should be cancelled and discharged. This, however, was not done, but the holder transferred the second note and mortgage to Smith, falsely assuring him that it was a first note and mortgage. Smith afterward foreclosed his mortgage and bid in the land, not yet being actually apprised of the existence of the first mortgage, although it was duly recorded. Later proceedings were instituted to foreclose the first mortgage, and Boyd entered into negotiations through one King for the purchase of the land at or after the foreclosure sale. An abstract was procured, which showed the existence of the mortgage to Smith and its foreclosure, but Boyd was advised that the first mortgage, called the Tyler mortgage, would take precedence over the title held by Smith, and he entered into a contract with King, by which he agreed to take the land from King, either upon a deed from King or upon the deed made at the foreclosure sale, and King bought the property at the foreclosure sale and had the deed made to Boyd. Boyd had no knowledge of the fact that the mortgage under which he claimed had really been satisfied by the execution of the mortgage under which Smith claimed and that it should have been discharged of record, but King knew all these facts. Smith brought this action to cancel the conveyance to Boyd, claiming that King was Boyd's agent in the purchase, and that King's knowledge would be imputed to Boyd. The court held that even if King could be regarded as Boyd's agent, King's knowledge could not be imputed to Boyd, as he was acting adversely. The court also held that King was not really an agent, but a seller, and therefore the ordinary rule imputing the agent's knowledge would not be implied, and finally also held that inasmuch as Smith had constructive knowledge of the existence of the first mortgage, from the fact of its being recorded, and did nothing for a considerable period to correct the record, and inasmuch as Boyd relied upon the record priority of the mortgage under which he purchased, Smith must bear the loss, even though actually as innocent as Boyd, upon the principle that it was his act or failure to act that had made the loss possible.

⁵⁸ In *Gunster, Assignee of The Scranton Bank, v. The Scranton Illuminating, etc., Co.*, 181 Pa. 327, 37 Atl. 550, 59 Am. St. Rep. 650, one Jessup was vice-president of the plaintiff bank, and its principal manager, and, in the transaction in question, its

§ 20. —. In a few cases it has been said that the principal could not be held because he really had not participated in the transaction,—that he had at most been a mere unconscious party or a mere conduit, and that therefore no responsibility could be attached to him.⁵⁰

sole representative. He was also treasurer of the defendant corporation, and as such treasurer drew the notes of such company to the bank, which the bank discounted and gave the defendant company credit for the proceeds. Jessup then, by check of the company, drew this fund from the bank and appropriated it to his own use. The company defends in a suit to collect the notes, claiming that the bank knew of the fraudulent inception of them, because Jessup, its cashier, knew of it. But the court refused to charge the bank with such knowledge, and, after discussing that question, says: "But we do not regard knowledge as the pivotal point of the case. Upon that point both parties would stand equal. Both might by mere inference be charged with knowledge, as the fraud was committed by an agent with authority to act for both, but in fact neither had or in the nature of things could have any knowledge at all, and neither was under any obligation to presume that its agent would be guilty of fraud. The real question is, in what capacity did Jessup commit the fraud? And it is clear that it was as treasurer of the appellee. It was as treasurer he presented the notes for discount, and as treasurer he drew the checks for the proceeds. Both acts were within his authority as treasurer and would have been lawful if they had been honest, but he drew the money on drafts which were the property of the company, and when he embezzled the money it was the money of the company. The bank had no part in his act, and gained nothing by it. The fraud had its inception and its consummation in acts done in his capacity of treasurer of the defendant company, and it should bear the loss."

⁵⁰ In *Bank of Overton v. Thompson*, 118 Fed. 798, the cashier of the bank, one Hardinger, and the complainant were jointly interested in some cattle. The cashier sold them and received therefor from the buyer a draft and some credit slips. These he deposited with the bank to his individual credit, and afterward checked out on his personal check the entire amount, using it all himself and making no settlement with the complainant. In all the transactions he was the sole representative of the bank, no other person connected therewith having any knowledge of the complainant's interest in the funds. The complainant seeks to hold the bank as constructive trustee, alleging that it knew, through its cashier, when it received the funds, that they belonged to the complainant. The court held that the bank could not be so held, but seemed to put the case on another ground, wherein the question of notice would not arise, commenting in the following language: "In the present case, Hardinger, for his own purposes, and without the knowledge of anyone else connected with the defendant bank, deposited the proceeds of the sale of the cattle, as his own money, in defendant bank, and, while the facts remained wholly unknown to anyone connected with the bank but himself, by his own act he withdrew the same money from the bank. As depositor, both in making and withdrawing the deposit, his interests were adversary to the bank. If he was engaged in defrauding the complainant, the presumption is that he would not disclose to the bank his fraud, or complainant's interest in the fund, and the evidence of the actual fact corresponds to this presumption. The bank had no knowledge of any interest of complainant in the fund, and was under no obligation to him. The complainant, by authorizing Hardinger to sell the cattle, authorized him to receive the money for them and to care for it. In caring for it, he placed it temporarily in defendant bank, but retained, as he properly might, the control over it, and afterwards resumed, as he had a right to, the possession of it. If it was a trust fund, Hardinger was the complainant's trustee. He might put it in a bank, and remove it at his discretion to another bank, or put it in his pocket."

In *Brookhouse v. Union Publishing Co.*, 73 N. H. 368, 62 Atl. 219, 111 Am. St. Rep. 623, 2 L. R. A. (N. S.) 993, one Moore was the guardian of the plaintiff. He was also the treasurer of the defendant corporation, and used it for his private banking purposes, depositing money with its general funds and crediting his account, and

§ 21. —. APPLICABILITY OF EXCEPTION TO CORPORATE AGENTS.—The exception to the general rule applies ordinarily to the agents of corporations as well as of natural persons. A doubt, however, has been suggested "whether this exception can apply to directors, presidents and other such managing officers of a corporation, through whom alone the corporation *can* act;"⁶⁰ but this distinction has not been generally approved,⁶¹ and no sound reason is perceived why such a distinction should be made.

A different distinction has also been suggested, namely, that the exception in question will not apply where the agent, "though he acts for himself or for a third person, is the *sole* representative of the corporation in the transaction in question."⁶² This distinction, however, like the preceding one, seems not to get to the root of the matter. It is, of course, true that a corporation can only act through some agent, and where it acts through a single agent knowledge must come through him if it comes at all. But it seems to beg the question to say that it *must* come at all, and especially to say that it must come in every case in which the corporation is represented solely by the agent who had the knowledge. Another distinction, though well settled, namely, that knowledge will not be imputed where the principal was represented by another agent in the transaction in question,⁶³ seems not to furnish justification for the distinction thus suggested.

charging his account as he withdrew it. He withdrew from his guardian bank account money, for which he received drafts payable to himself as guardian, or order. These he endorsed and directed the assistant treasurer to deposit to his credit. For his personal purposes he afterward checked out the money. In this action by the ward, she seeks to charge the defendant with notice of the fraudulent character of the transaction. The court holds that the defendant was an innocent conduit, through which the guardian temporarily passed the money, and that it could not be charged therefor. The court said: "In the case at bar the defendant does not set up any claim to the funds in dispute. The funds have passed beyond its reach without being of any advantage to it." And again: "The defendant was not really the principal of Moore in respect to the deposits and withdrawals of the plaintiff's money in and from its bank account; it was his agent. The transactions were solely on his account and for his benefit. The defendant received no substantial benefit from them. The only authority conferred upon Moore by it which he used was the authority to use its bank account for his private purposes. In drawing checks, he fulfilled its obligation to himself. He was really acting for himself."

⁶⁰ Pomeroy's Equity Jurisprudence, § 675, note. Mr. Pomeroy refers to *Holden v. N. Y. and Erie Bank*, 72 N. Y. 286, and *First Nat. Bank v. Town of New Milford*, 36 Conn. 93. [See these cases stated in note to § 17 *supra*.]

⁶¹ See, for example, *Brookhouse v. Union Publishing Co.*, 73 N. H. 368, 62 Atl. 219, 111 Am. St. Rep. 623, 2 L. R. A. (N. S.) 993.

⁶² This distinction is worked out with much care and fullness of citations in a note by the editors, appended to the case of *Brookhouse v. Union Publishing Co.*, in 2 L. R. A. (N. S.) 993, *supra*. It is also approved in the late case of *Cook v. American Tubing & Webbing Co.*, 28 R. I. —, 65 Atl. 641, 9 L. R. A. (N. S.) 193.

⁶³ See *post*, § 30.

§ 22. ———. THE THIRD EXCEPTION—COLLUSION OF PARTY CLAIMING BENEFIT OF NOTICE.—The rule which imputes to the principal the knowledge of his agent is, as has been seen, commonly based upon the legal presumption that the agent has done his duty by communicating it to his principal,—a presumption which, it is said, is demanded by a sound public policy for the protection of those who deal with the agent. Obviously no policy requires that such a presumption shall be made for the protection of a person who has conspired with the agent to defraud the principal and who now seeks the benefit of a presumption that a duty has been performed which he himself was interested in having violated. Thus in a leading case in New York, where this question was involved, the court said: "If a person colludes with an agent to cheat the principal, the latter is not responsible for the acts or knowledge of the agent. The rule which charges the principal with what the agent knows is for the protection of innocent third persons, and not those who use the agent to further their own frauds upon the principal."⁶⁴

§ 23. ———. WHAT NOTICE INCLUDES—ACTUAL AND CONSTRUCTIVE NOTICE.—The notice which will affect the principal may be the direct and unequivocal information of the fact, or it may, in certain cases, be inferred from the existence of other facts. The former is sometimes termed actual notice, and the latter constructive notice. The distinction, however, is not of any great practical importance, and perhaps, strictly, the latter is to be deemed as much actual notice as the former. In either event, it is well settled that the principal may be bound by the one as fully as by the other. The rule as to what will constitute constructive notice may be said to be that wherever a party has knowledge of any fact sufficient to put a prudent man upon an inquiry which, if prosecuted with ordinary diligence, would lead to actual notice, he will be charged with the knowledge which might have been acquired by such diligence.⁶⁵ The presumption that he would have acquired such

⁶⁴ *National Life Ins. Co. v. Minch*, 53 N. Y. 144.

See also, to same effect: *Morrill v. Bosley*, 88 S. W. 519 (Texas Civ. App.); *Elliott v. Maccabees*, 46 Wash. 320, 89 Pac. Rep. 929; *Traders, etc., Bank v. Black*, — Va. —, 60 S. E. 743; *Van Buren County v. American Surety Co.*, — Ia. —, 115 N. W. 24; *Hickman v. Green*, 123 Mo. 165, 22 S. W. 455; *Cooper v. Ford*, 29 Tex. Civ. App. 253, 69 S. W. 487; *Benedict v. Arnoux*, 154 N. Y. 715, 49 N. E. 326; *Brooklyn Distilling Co. v. Standard Distilling & Distributing Co.*, 105 N. Y. Supp. 264; *Traber v. Hicks*, 131 Mo. 180, 32 S. W. 1145; *Cowan v. Curran*, 216 Ill. 598, 75 N. E. 322. The Georgia Civil Code declares the same principle. Ga. Civ. Code, § 3028.

⁶⁵ *Williamson v. Brown*, 15 N. Y. 354; *Baker v. Bliss*, 39 Id. 70; *Cambridge Valley Bank v. Delano*, 48 Id. 326; *Hood v. Fahnestock*, 1 Pa. St. 479, 44 Am. Dec. 147; *Chapman v. Glassell*, 13 Ala. 50, 48 Am. Dec. 41.

knowledge is not, however, indisputable, and it is always open to the party to show that he used such diligence without avail.⁶⁶

Within this rule constructive notice to the agent which would, if followed with reasonable diligence, have led to further information, would doubtless charge the principal with notice of the information which might have been so obtained.⁶⁷

§ 24. —. Whether the principal can be charged with constructive notice by reason of what the agent knew, but which would not be constructive notice to the agent, would seem to be doubtful. If, for example, information comes to an agent which reasonably seems to him immaterial, but which, if he had known what the principal knew, would have led to material information, can it be said that the principal is chargeable with the latter information? If he had acted in person he would be chargeable. But if the duty of the agent to communicate is limited to the communication of that which, from his standpoint, reasonably seems material to the principal's interests, and if the obligation of the principal depends upon the presumption that the agent has performed his duty, the knowledge imputed to the principal could not include the information in question. The same result would seem to flow from the theory of the legal identity of the principal and agent, unless we are prepared to say that that theory leads to the conclusion that the principal knows what the agent knows, and is therefore bound by the results of an investigation which the knowledge of two facts would have prompted, although as a matter of fact he is actually ignorant of one of them.

§ 25. —. RULE APPLIES ONLY TO NOTICE RESPECTING MATTERS WITHIN AGENT'S AUTHORITY.—This rule which imputes to the principal the knowledge possessed by the agent applies only to cases where the knowledge is possessed by an agent within the scope of whose authority the subject-matter lies. In other words, the knowledge or notice must come to an agent who has authority to deal in reference to those matters which the knowledge or notice affects, and whose duty it therefore is to communicate it to his principal. The fact that some other agent, employed in reference to different and distinct transactions, may have had notice or knowledge will not affect the principal.⁶⁸

⁶⁶ *Williamson v. Brown*, 15 N. Y. 354.

⁶⁷ *Field v. Campbell*, 164 Ind. 389, 72 N. E. 260; *Wiley, Banks & Co. v. Knight*, 27 Ala. 336; *Pepper v. George*, 51 Ala. 190.

⁶⁸ *Congar v. Chicago, etc., Ry. Co.*, 24 Wis. 157, 1 Am. Rep. 164; *Stewart v. Sonneborn*, 49 Ala. 178; *Cook v. Anamosa*, 66 Ia. 427, 23 N. W. 907; *Russell v. Cedar Rapids Ins. Co.*, 78 Ia. 216, 42 N. W. 654; *Tate v. Hyslop*, 15 Q. B. Div. 368; *Columbia Paper Stock Co. v. Fidelity & Casualty Co.* (Mo. App.), 78 S. W. 321; *Trentor v. Pothen*, 46 Minn. 298, 49 N. W. 129, 24 Am. St. Rep. 225.

"This," says DIXON, C.J., "seems very clear when we consider the reason and ground upon which this doctrine of constructive notice rests. The principal is chargeable with the knowledge of his

In *Fidelity Trust Co. v. Baker*, 60 N. J. Eq. 170, 47 Atl. 6, the defendant had given an attorney funds with which to procure the release of a mortgage. He appropriated this money to his own use, and later, having forged a check which plaintiff cashed, took the money so obtained and procured the release of the mortgage. The plaintiff seeks to charge defendant with knowledge of the attorney's forgery, and hold her as constructive trustee. The court held it would be an unjust extension of the rule in question to impute to her this knowledge, that the attorney was her agent for the purpose of procuring the release of the mortgage, and not for the purpose of procuring money with which to obtain the release. He had no authority from her to procure money in any way, and his fraud, or knowledge of fraud ingrained in its procurement, cannot be imputed to her.

In a recent Massachusetts case the same question was presented. An attorney was the general manager of the defendants and was authorized to pay taxes on their property. He was also agent for the plaintiff and had been entrusted by her with a considerable sum of money for investment, which, however, he embezzled and paid therewith the taxes on defendant's property. The court found for the defendant, in an action at law brought to recover the money, and said: "But authority to pay taxes did not charge them with constructive notice, for their agent not being empowered to borrow money for this purpose, even the plaintiff does not urge that he was authorized to steal for their benefit, or that his embezzlement conferred upon her any greater right than if, being unauthorized, he had made and delivered the defendants' promissory note for the amount." The court intimates that recovery might be had in equity: *Foot v. Cotting*, 195 Mass. 55, 80 N. E. 600, 15 L. R. A. (N. S.) 693.

In *Warren v. Dixon*, — N. H. —, 68 Atl. 193, by the efforts of one J. B. Dixon and the defendant, the plaintiff had been defrauded into conveying the land in question to Hayes' grantor. It was then conveyed to Hayes and by Hayes mortgaged to Mrs. Dixon, one of the defendants herein. Mrs. Dixon employed J. B. Dixon to collect her debt, and he procured a conveyance of the land to her in satisfaction thereof, but really acted in the interest of Hayes. The plaintiffs, to establish their superior claim, seek to consider the conveyance to Mrs. Dixon as a satisfaction and discharge of the mortgage, and as her agent in securing that conveyance had knowledge of the fraud on plaintiff she must be bound by it. The court said that inasmuch as she claimed nothing by the conveyance to her, she was not estopped to deny J. B. Dixon's agency. As to whether his notice was notice to her, the court, commenting on the general rule, said: "That rule does not charge the principal with his agent's knowledge of facts affecting the subject matter of the business in which the latter is employed, unless the agent, in fact, acts for the principal in what he does in the matter in respect to which it is sought to charge the principal with his knowledge. *Henry v. Allen*, 151 N. Y. 1, 10, 45 N. E. 355, 36 L. R. A. 658. In other words, the principal is not charged with his agent's knowledge in respect to a particular transaction, unless the latter's acts in respect to it were within the scope of his employment. To illustrate: If a person employs an agent to buy property and the latter, instead of buying, sells to the principal property procured from a stranger by fraud, the agent's knowledge of that fraud will not be imputed to the principal (*Allen v. Railroad*, 150 Mass. 200, 206, 22 N. E. 917, 5 L. R. A. 716, 15 Am. St. Rep. 185); but, if the agent buys property for the principal, the latter will be charged with the agent's knowledge of any defects in the grantor's title (*Hovey v. Blanchard*, 13 N. H. 145, 149). The test, therefore, to determine whether an agent's knowledge is to be imputed to his principal is to inquire whether or not the agent was acting for the principal when he did that in respect to which it is sought to charge the principal with his knowledge. *Clark v. Marshall*, 62 N. H. 498, 500; *Brookhouse v. Company*, 73 N. H. 368, 374, 62 Atl. 219, 2 L. R. A. (N. S.) 993, 111 Am. St. Rep. 623; *Gunster v. Company*, 181 Pa. 327, 37 Atl. 550, 59 Am. St. Rep. 650, 658, note; *Akers v. Rowan*, 36 S. C. 87, 15 S. E. 350, 10 L. R. A. 705, 706, note."

agent because the agent is substituted in his place and represents him in the particular transaction; and it would seem to be an obvious perversion of the doctrine, and lead to most injurious

Where the principal had undertaken through an agent to effect insurance on an overdue ship, and failed, that agent knowing the ship was lost but not communicating the fact to any one, insurance effected by the principal through another agent will not be avoided on the ground that the first agent's knowledge was the knowledge of the principal: *Blackman, Low & Co. v. Vigors*, 12 App. Cases, 531.

In an action of deceit for misrepresentations made by the defendant bank as to the value of their stock, on the faith of which representations the plaintiff purchased stock, the defendant pleaded the statute of limitations. The ground relied on by the defendant, in support of this plea, is that one Trimble, who was plaintiff's agent in purchasing the stock and afterwards his agent in selling it, knew the facts more than five years before the commencement of the action. The court said that the knowledge Trimble had while acting as plaintiff's agent in purchasing the stock from the defendant would be sufficient discovery of the fraud by plaintiff to start the statute, in an action against the defendant. But Trimble's knowledge while acting as plaintiff's agent in selling the stock to a third person, or in any other transaction, cannot be imputed to the plaintiff as of this transaction. *Day v. Exchange Bank*, 117 Ky. 357, 25 Ky. Law Rep. 1449, 78 S. W. 132.

Where the defendant was sued for buying corn which he knew had been grown on plaintiff's land, the knowledge of defendant's hired man, whose only duty was to weigh and receive the corn, will not be imputed to the principal: *King v. Rowlett*, 120 Mo. App. 120, 96 S. W. 493.

Where the city marshal had notice of defects in sidewalk, but was under no duty and without any power to repair it, such notice will not be chargeable to the city: *Cook v. Anamosa*, 66 Iowa 427, 23 N. W. 907.

In *Arrington v. Arrington*, 114 N. C. 151, 19 S. E. 351, an attorney who was employed to examine the title to some land about to be purchased by defendant, knew of the indebtedness of the estate from which the title sprung, and which knowledge, if it could have been imputed to the defendant, would have rendered his title bad. But the court refused to impute it, saying the attorney was a mere professional adviser and not an agent to negotiate the purchase or to acquire the title,—“not such an agent as is embraced in the principle relied upon.”

For a case where the attorney was to examine the title and procure the execution of the proper papers for the transfer of the land, and in which notice was imputed, see *Allison v. Faulconer*, — Ark. —, 87 S. W. 639.

In a similar case, where the knowledge of the attorney who examined the title was sought to be charged to the client, the court held that it could not be done, saying the agency was a special one, limited to the examination of an abstract of title and giving an opinion thereon; that it was never understood that the scope of such employment extended to inquiries outside the record; nor is it understood, and it would be dangerous to so construe it, that all the knowledge the attorney may possess, affecting the title but *dehors* the record, is binding on the principal. *Trentor v. Pothén*, 46 Minn. 298, 49 N. W. 129, 24 Am. St. Rep. 225.

A notice to the general attorney of a railroad company relating to matters connected with its land department, before any action is brought against the company, is not notice to the land department or to the company unless the general attorney has been given special charge of the subject matter of the notice. *Atchison, etc., R. R. Co. v. Benton*, 42 Kan. 698, 22 Pac. 698.

In an action for goods sold, the defendant set up that he had sold the business when the goods were so purchased for it, and while no public notice had been given, that he had told the plaintiff's traveling salesman of it. It appeared, however, that he told a salesman who did not cover the territory in which the store was; that the statement was made in a social conversation in a saloon, and not intended as a notice to plaintiff.

results, if, in the same transaction, the principal were likewise to be charged with the knowledge of other agents, not engaged in it and to whom he had delegated no authority with respect to it, but who were employed by him in other and wholly different departments of his business."⁶⁹ Whether the rule be based upon the ground specified by the learned judge, or upon the duty of the agent to communicate, the result is the same,—no duty of communication would rest upon an agent where, from the nature of the acts to be performed by him, the knowledge or notice would appear to be of no use or interest to the principal.

§ 26. ———. NOTICE AFTER TERMINATION OF AUTHORITY DOES NOT BIND.—It follows as a necessary conclusion from the principles considered that notice to an agent, after his authority has entirely ceased, or after his authority to represent the principal in respect to the matters to which the notice relates has terminated, is not notice to the principal.⁷⁰ Under neither of the theories discussed could such notice be imputed to the principal.

§ 27. ———. NOTICE MUST BE OF SOME MATERIAL MATTER.—The knowledge or notice which is to bind the principal must be of some matter so material to the transaction as to make it the agent's duty to communicate it to the principal.⁷¹ It must also come from such an apparently authentic and reliable source that an ordinarily prudent man would be required to give heed to it. But neither the

The court held it would not so operate. *Mackay-Nisbet Co. v. Kuhlman*, 119 Ill. App. 144.

A very similar case, involving notice of bankruptcy, but made to the salesman selling the goods, was decided similarly in *Collins & Toole v. Crews* (Ga.), 59 S. E. 727.

So where an insurance company notified a clerk in the plaintiff's store that it would not renew the plaintiff's policy, it was held not to be notice to the plaintiff, as it concerned a matter not within the scope of the agent's authority. *German Ins. Co. v. Goodfriend*, 97 S. W. 1098 (Ky.).

The fact that the president of a bank has knowledge of the fraudulent inception of a note, gained by him as officer of another corporation, will not charge his bank with notice of the fraud where it purchased the note through another officer and without the knowledge of the president at the time of the purchase. *McCalman v. Lanning*, 154 Fed. 353.

⁶⁹ In *Congar v. Chicago, etc., Ry. Co.*, 24 Wis. 157, 1 Am. Rep. 164, cited *supra*.

⁷⁰ *Boardman v. Taylor*, 66 Ga. 638; *Great Western Ry. v. Wheeler*, 20 Mich. 419; *Irvine v. Grady*, 85 Tex. 120, 19 S. W. 1028; *Traher v. Hicks*, 131 Mo. 180, 32 S. W. 1145; *First Nat. Bank of Emmetsburg v. Gunhus*, — Iowa —, 110 N. W. 611.

Notice to former agent of a corporation is not notice to the corporation after the agent has severed his connection with it. *Great Western Ry. v. Wheeler*, *supra*.

So notice to an agent while negotiating for the purchase of some cattle is not notice to his principal, where the agent's negotiations were broken off and the purchase subsequently consummated by the principal in person. *Irvine v. Grady*, *supra*.

Nor does the fact that the cashier of the plaintiff bank had at one time been a stockholder in and the president of the defendant bank, and his successor had never been elected, charge the plaintiff with knowledge of the character of a transaction carried on by defendant's cashier. *First Nat. Bank v. Gunhus*, *supra*.

⁷¹ *Fairfield Savings Bank v. Chase*, 72 Me. 226, 39 Am. Rep. 319.

principal nor the agent is bound to regard that which appears to be mere idle and baseless rumor or report.⁷²

§ 28. NOTICE MUST COME TO SOMEONE WHO IS AN AGENT.—In order to bind the principal, the notice must come to someone who stands in the attitude of an *agent* to him.⁷³ Thus notice to an independent contractor, a mere bailee, a carrier, a postman, and the like, would not be imputed. It is sometimes said that notice to a mere messenger or to one acting merely in a ministerial capacity would not be imputed. If the theory upon which notice is to be imputed be the legal identity of the principal with the agent, then the person to whom the notice comes must be such a person and acting in such a capacity that it may fairly be said that, for the time being, he is the principal. If the true theory be that the agent owes a duty to communicate, then the person to whom the notice comes must be such an one and acting in such a capacity that it may fairly be said that the principal looks to him for information concerning the subject-matter; that he is the person to whom information is likely to come, and whose duty it would be to communicate it. Such a rule would seem to exclude all persons having merely a casual, temporary, mechanical, non-discretionary relation to the subject-matter.

§ 29. ———. In seeking for a duty to communicate, reference must ordinarily be had to the duty which the law would impose.

⁷² Thus in *Stanley v. Schwalby*, 162 U. S. 255, it is said, p. 276: "In order to charge a purchaser with notice of a prior unrecorded conveyance, he or his agent must either have knowledge of the conveyance, or, at least, of such circumstances as would, by the exercise of ordinary diligence and judgment, lead to that knowledge; and vague rumor or suspicion is not a sufficient foundation upon which to charge a purchaser with knowledge of a title in a third person."

See also *Kerns v. Swape*, 2 Watts (Penn.) 75; *Mulliken v. Graham*, 72 Penn. St. 484; *Jaques v. Weeks*, 2 Watts (Penn.) 261; *Pittman v. Sofex*, 64 Ill. 155; *Vance v. Hickman*, 95 Ill. App. 554.

⁷³ See, for example: *Booker v. Booker*, 208 Ill. 529, 70 N. E. 709; *Jummel v. Mann*, 80 Ill. App. 288; *Doyle v. Teas*, 4 Scammon (Ill.) 202; *Aetna Indemnity Co. v. Schroeder*, 12 N. D. 110, 95 N. W. 436; *Columbia Paper Stock Co. v. Fidelity & Casualty Co.* (Mo. App.) 78 S. W. 321; *Central Coal Co. v. George S. Good & Co.*, 120 Fed. 793, 57 C. C. A. 161; *Wyllie v. Pollen*, 3 De Gex, J. & S., 596, 601.

The circumstances of a mortgagor being a solicitor, and preparing the mortgage deed, and of the mortgagee employing no other solicitor, are not sufficient to constitute the former the solicitor of the latter, so as to affect him with notice of an incumbrance known to the solicitor. *Espin v. Pemberton*, 3 De G. & J. 547.

Notice to a sub-contractor is not notice to the contractor. *Coal & Coke Co. v. Good & Co.*, *supra*.

One employed as a messenger and not a negotiator is not an agent within the rule. *Doyle v. Teas*, *supra*; *Booker v. Booker*, *supra*.

A trustee under a deed of trust is not the agent of the holder of securities. *Jummel v. Mann*, 80 Ill. App. 288.

Notice to an officer employed to make an attachment is notice to the plaintiff. But notice to the plaintiff's attorney, who sued out the writ of attachment, would not be. *Tucker v. Brown*, 55 N. H. 223.

It surely cannot be true that the principal can save himself from the effects of notice by attempting to exonerate the agent from a duty to communicate it, whatever might be the effect of such exoneration between the principal and the agent themselves. On the other hand, it is doubtless true that the principal's obligations might be enlarged by his expressly imposing a duty or authority to receive notice greater than that which the law would otherwise imply.

§ 30. ———. AGENT OF TWO PRINCIPALS—TWO AGENTS OF SAME PRINCIPAL.—Where the same person acts as agent of two or more principals, all interested in the same subject-matter, and concerning which he owes a duty of communication to all, notice to this agent must doubtless be deemed notice to all his principals in accordance with the ordinary rules. Where, however, the same person happens to be agent of two principals not thus interested, notice to him will not necessarily be notice to both principals. To make it so there must be some duty imposed upon him to communicate it to the principal sought to be affected.⁷⁴

§ 31. ———. Where an agent stands in such a relation to two principals (who have not knowingly consented to his double employment) that his present duty to one conflicts with his present duty to the other, it is said that notice which he has with reference to the business of one principal will not be imputed to the other.⁷⁵

⁷⁴ Where one person is an officer of two companies, it was held in *In re Hampshire Land Co.* [1896], 2 Ch. Div. 743, that knowledge which he has acquired as officer of one company will not be imputed to the other company unless he has some duty imposed upon him to communicate his knowledge to the company sought to be affected by the notice, and some duty imposed upon him by that company to receive the notice.

This holding was followed in *In re David Payne & Co.* [1904], 2 Ch. Div. 608.

"Where two companies have the same person as director, and enter into dealings with each other, the knowledge of the common director cannot be attributed to either company 'in a transaction in which he did not represent it.'" *Martin v. South Salem Land Co.*, 94 Va. 28, 26 S. E. 591.

⁷⁵ In *Constant v. The University of Rochester*, 111 N. Y. 604, 19 N. E. 631, 7 Am. St. Rep. 769, 2 L. R. A. 734, an agent acting for Constant had taken a mortgage for him which it was the agent's duty to promptly put upon record. Instead of recording this mortgage, however, he left it in his safe, through what was claimed to be an oversight. Some months later, but while this mortgage was still in his safe, and while he owed a constant and present duty to have it recorded, he acted for the university in taking another mortgage, supposed by the university to be a first mortgage upon the same premises. This second mortgage was also left with the agent to be recorded, and it was recorded. For a short period, therefore, the agent had in his hands two unrecorded mortgages and owed to each principal the duty to record his first so as to secure priority. It was urged that the notice which the agent had of the first mortgage, though unrecorded, should be imputed to the university and that therefore its mortgage was subordinate to the first one.

The court said: "At the time of the execution of the latter mortgage, therefore, he owed conflicting duties to Constant and to the university, the duty in each case being to make the mortgage to each principal a first lien on the property. Owing these con-

§ 32. —. Where two or more persons are acting as agents for one principal, with reference to the same subject-matter, notice to any one of them would be deemed notice to the principal within the rules already considered.⁷⁸

But where two agents are employed to accomplish the same object, notice to, or knowledge by, one of them only, is not notice to the principal, where the one to whom notice is given is not the

sufficing duties to two different principals, in two separate transactions, can it be properly said that any knowledge coming to him in the course of either transaction should be imputed to his principal? Can any agent occupying such a position bind either principal by constructive notice? It has been stated that in such a case where an agent thus owes conflicting duties, the security which is taken or the act which is performed by the agent may be repudiated by his principal when he becomes aware of the position occupied by such agent. (Story on Agency, § 210.)

"The reason for this rule is, that the principal has the right to the best efforts of his agent in the transaction of the business connected with his agency, and where the agent owes conflicting duties he cannot give that which the principal has a right to demand, and which he has impliedly contracted to give. Ought the university to be charged with notice of the existence of this prior mortgage when it was the duty of its agent to procure for it a first lien, while, at the same time, in his capacity as agent for Constant, it was equally his duty to give him the prior lien? Which principal should he serve?" * * * The case of *Nixon v. Hamilton*, decided by Lord PLUNKET, Lord Chancellor, in the Irish Court of Chancery, in 1838 (2 Drury v. Walsh, 364), is a case in many respects somewhat like the one at bar, so far as this principle is concerned, if it be assumed that Deane really had the knowledge of the prior mortgage as an existing lien. It will be observed, however, upon examination of it, that the question whether the knowledge of the common agent in two different transactions with two different principals was notice to the second principal was not raised with reference to this particular ground. The whole discussion was upon the subject of imputing the knowledge of the agent to the second mortgagee, of the existence of the prior mortgage, which knowledge was not obtained in the last transaction. Whether such knowledge should or should not be imputed to the second mortgagee, because of the conflicting duties owed by the common agent, was not raised. The only defense set up was that the information did not come to the agent of the second mortgagee in the course of transacting the business of the second mortgagee, and the question was simply whether such knowledge could be imputed to the second mortgagee, because of the knowledge acquired by his agent at another time, in another transaction, with another principal. The court held, that where it appeared, as in this case it did appear, fully and plainly, that the matter was fresh in the recollection and fully within the knowledge of the agent, and under such circumstances, that it was a gross fraud on the part of the agent, in the first place in keeping a prior mortgage off the record, and in the second place, in not communicating the knowledge which he had to his principal, the second mortgagee, that in such case the second mortgagee was charged with the knowledge of his agent.

"Whether the same result would have been reached if the other ground had been argued we cannot, of course, assume to decide. I have found no case precisely in point where the subject has been discussed and decided either way. I have very grave doubts as to the propriety of holding in the case of an agent, situated as I have stated, that his principal in the second mortgage should be charged with knowledge which such agent acquired in another transaction at a different time while in the employment of a different principal, and where his duties to such principal still existed and conflicted with his duty to his second principal. We do not deem it, however, necessary to decide the question in this case."

⁷⁸ *Bank of United States v. Davis*, 2 Hill (N. Y.) 451; *Brown v. Oatts*, 55 Ga. 416; *Wittenbrock v. Parker*, 102 Cal. 93, 36 Pac. 374, 41 Am. St. Rep. 172, 24 L. R. A. 197.

one who finally accomplishes the object, and the agent who had the notice or knowledge did not impart it to his principal.⁷⁷

§ 33. ———. NOTICE TO SUBAGENT WHEN NOTICE TO PRINCIPAL.—The question whether notice to a subagent is notice to the principal depends upon considerations already stated.⁷⁸ If the subagent be one whom the agent was expressly or impliedly authorized to appoint, he is to be deemed to be the agent of the principal, and notice to such subagent would be notice to the principal as in the case of other agents.⁷⁹ But if the subagent be the agent of the agent merely, then there is no privity between him and the principal, and his knowledge cannot be imputed to the principal.⁸⁰

§ 34. ———. THESE RULES APPLY TO CORPORATIONS—NOTICE TO AGENT.—These rules apply with particular force to the case of corporations. From the very nature of the case, the executive functions of a corporation can only be exercised through the medium of the corporate agents to whom and through whom all notice to the corporation must come. Notice to the officers and agents of a corporation therefore, in reference to those matters to which their authority relates, is in general notice to the corporation.⁸¹

⁷⁷ In *Blackburn v. Vigors*, 17 Q. B. Div. 553, the plaintiff had instructed a broker to effect for him a re-insurance upon an over-due ship. While this broker was acting on behalf of the plaintiff, he received information of a material fact tending to show that the ship was lost. He did not communicate this information to the plaintiff and failed to effect the insurance. Afterwards the plaintiff employed another broker who obtained insurance from the defendant upon the ship, lost or not lost. Subsequent events showed that the ship had in fact been lost some time before the plaintiff attempted to effect the reinsurance, but neither the plaintiff nor the broker who finally obtained the insurance knew of, or concealed from defendant, any fact tending to show that the ship was lost. It was held by the Court of Appeal, that the knowledge of the first broker must be imputed to the plaintiff and that he could not recover on the policy, citing *Fitzherbert v. Mather*, 1 T. R. 12; *Gladstone v. King*, 1 M. & S. 34, and *Proudfoot v. Montefiore*, L. R. 2 Q. B. 511.

This case was, however, reversed by the House of Lords in 12 App. Cases 531; 38 Eng. Rep. 455. Lord HALSBURY said: "When a person is the agent to know, his knowledge does bind the principal. But in this case I think the agency of the broker had ceased before the policy sued upon was effected."

⁷⁸ *Mechem on Agency*, § 197.

⁷⁹ *Merritt v. Huber*, — Ia. —, 114 N. W. 627; *Bates v. American Mtg. Co.*, 37 S. C. 88, 16 S. E. 883; *Carpenter v. German-Am. Ins. Co.*, 135 N. Y. 298, 31 N. E. 1015; *Bergeron v. Pamlico Ins. & B. Co.*, 111 N. C. 45, 15 S. E. 883; *Phoenix Ins. Co. v. Ward*, 7 Tex. Civ. App. 13, 26 S. W. 763; *Goode v. Georgia Home Ins. Co.*, 92 Va. 392, 23 S. E. 744, 53 Am. St. Rep. 817, 30 L. R. A. 842.

⁸⁰ *Hoover v. Wise*, 91 U. S. 308; *Boyd v. Vanderkemp*, 1 Barb. Ch. (N. Y.) 273; *Waldman v. North British Ins. Co.*, 91 Ala. 170, 8 South. 666, 24 Am. St. Rep. 883.

⁸¹ *Holden v. New York, &c. Bank*, 72 N. Y. 286; *Union Bank v. Campbell*, 4 Humph. (Tenn.) 394; *Waynesville Nat. Bank v. Irons*, 8 Fed. Rep. 1; *Hart v. Farmers', &c. Bank*, 33 Vt. 252; *Mihills Mfg. Co. v. Camp*, 49 Wis. 130; *Webb v. Graniteville Mfg. Co.*, 11 S. C. 396, 32 Am. Rep. 479; *Farmers', &c. Bank v. Payne*, 25 Conn. 444, 68 Am. Dec. 362; *Wilson v. McCullough*, 23 Penn. St. 440, 62 Am. Dec. 347; *Fairfield Savings Bank v. Chase*, 72 Me. 228, 39 Am. Rep. 319; *Maryland Trust Co. v. National Mechanics' Bank*, 102 Md. 608, 63 Atl. 70; *Paterson v. Elholm*, — Wis. —, 109 N. W. 76.

But the peculiar characteristics of corporations render it imperative that this rule be kept within its proper limits. Not every person who is a member of a corporation, or who is connected with it, is its agent. Nor is every agent to be deemed to be an agent for all purposes. The magnitude of their business and the extent of territory over which their operations extend require, in the case of many corporations, that their business be divided into several departments, each with its own complement of superior and inferior agents, and that agents be employed in various capacities, at different points. Attention, then, must be given to the questions whether the assumed agent is, in reality, the agent of the corporation in the given transaction, and, if so, does the notice or knowledge relate to matters within the scope of his authority.

§ 35. ———. Regard must also be had to an exception to the general rules which has been previously considered. The doctrine of imputed notice rests, as has been seen, upon the principle that it is the duty of the agent to disclose to his principal all such knowledge and information as the agent possesses which is material to the subject-matter of the agency, and the law conclusively presumes that he has done so. Where, however, the agent has an interest in the transaction which would be prejudiced by the disclosure of the information, this presumption does not prevail. If, then, an officer or agent of the corporation himself deals, as a party in interest, with the corporation, the corporation will not be charged with notice of the information which he possesses relating to the transaction and which he does not disclose. In such a case the assumed agent is in reality the adverse party, and cannot be treated as an agent at all. He is seeking to promote and protect his own interests, and it is not to be expected that he can or will at the same time protect and advance those of the corporation. The same rule applies, as has been seen, where the corporate agent, though not acting openly as the adverse party, is secretly engaged in furthering some fraudulent scheme adverse to his principal's interest, and which would be defeated by the disclosure of the information.⁸²

This is said to be necessarily and particularly true where the agent who receives the notice is practically the corporation itself, being the only officer and agent and the sole stockholder with the exception of one person who was non-resident and inactive: *Lea v. Iron Belt Merc. Co.*, 147 Ala. 421, 42 So. 415, 119 Am. St. 93. To same effect: *Anderson v. Kinley*, 90 Iowa 554, 58 N. W. 909; *Huron Printing Co. v. Kittleson*, 4 S. Dak. 520, 57 N. W. 233.

⁸² *Wickersham v. Chicago Zinc Co.*, 18 Kan. 481, 26 Am. Rep. 784; *Barnes v. Trenton Gas L. Co.*, 27 N. J. Eq. 33; *First Nat. Bank of Hightstown v. Christopher*, 11 Vroom (40 N. J. L.) 435, 29 Am. Rep. 262, s. c. 8 Cent. L. Jour. 181, 8 Rep. 403; *Innerarity v. Merchants' Nat. Bank*, 139 Mass. 332, 52 Am. Rep. 710; *Lyne v. Bank of Kentucky*, 5 J. J. Marsh (Ky.) 545; *Commercial Bank v. Cunningham*, 24 Pick. (Mass.) 270; *Washington Bank v. Lewis*, 22 Pick. (Mass.) 24; *Stevenson v. Bay City*, 26 Mich. 44; *Gallery v. National, &c. Bank*, 41 Mich. 169; *Stratton v. Allen*, 1 C. E. Green (N. J.) Eq. 229;

§ 36. —. These cases, however, are to be distinguished from those where the agent, for some purpose of his own, fraudulently assigns, conveys or appropriates to the use of his principal the property of another. In such a case, if the principal after knowledge of the fraud seeks to appropriate and retain the benefit derived from the agent's fraud, he will be held to have ratified the act and to have assumed responsibility for the means through which it was brought about. This question has already been fully considered in a preceding section.⁸³

§ 37. —. WHEN NOTICE MUST BE ACQUIRED.—It has been said in many cases that notice to an officer or agent of a corporation will not be notice to the corporation unless such notice was received while the officer or agent in question was actually acting as such; or, to put it in a different form, that the corporation will not be charged with notice which comes to its officer or agent while the latter was acting in his private or individual capacity.⁸⁴ This ques-

Winchester v. Baltimore, &c. R. R., 4 Md. 231; *Third National Bank v. Harrison*, 10 Fed. Rep. 243; *Louisiana State Bank v. Senecal*, 13 La. 525; *Seneca County Bank v. Neass*, 5 Den. (N. Y.) 329; *Hummell v. Bank of Monroe*, 75 Iowa 689, 37 N. W. 954. Thus where the general superintendent of a corporation conveyed to it, with warranty, lands which he had purchased in his own interests and which were subject to a prior lease, of which he had actual knowledge, it was held that his knowledge could not be imputed to the corporation. *Wickersham v. Chicago Zinc Co.*, 18 Kans. 481, 26 Am. Rep. 784. So where the president of a corporation conveyed to it land subject to a prior equity against himself, the corporation was held not chargeable with his knowledge. *Frenkel v. Hudson*, 82 Ala. 158, 60 Am. Rep. 736.

⁸³ See *ante*, § 17 n. 55. Thus if the cashier or other officer of a bank who is secretly a defaulter takes or uses the money of A. without authority to make good or cover up his default, the bank, if it seeks to retain the money after notice of the fraud will be held charged with the cashier's fraud and can acquire no title against A. *Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 168, 17 N. E. 496. So a bank is chargeable with notice of facts vitiating the title to securities obtained by the collusion of its teller with an officer of another bank, by certifying as "good" the check of an irresponsible person which is taken by such other bank. *Atlantic Bank v. Merchants' Bank*, 10 Gray (Mass.) 532. So where the treasurer of a town, being also cashier of a bank, gave a note as treasurer of the town to raise money for his private use, and discounted the note as cashier, the bank was held charged with knowledge of his fraud. *Bank of New Milford v. Town of New Milford*, 36 Conn. 93. So where the cashier of a bank, who was also treasurer of another corporation, deposited securities of the latter to obtain a loan for the use of the former bank. *Fishkill Savings Inst. v. Rostwick*, 19 Hun (N. Y.) 354. See also *Holden v. New York, &c. Bank*, 72 N. Y. 286. But see *Hummell v. Bank of Monroe*, 75 Iowa 690, 37 N. W. 954.

⁸⁴ *People's Bank of Talboton v. Exchange Bank of Macon*, 116 Ga. 820, 43 S. E. 269; *The Texas Loan Agency v. Taylor*, 88 Tex. 47, 29 S. W. 1057; *Reid v. Bank of Mobile*, 70 Ala. 199; *Brennan v. Emery, etc. Dry Goods Co.*, 99 Fed. 971; *Grayson Co. Nat. Bank v. Hall*, 91 S. W. 807 (Tex. Civ. App.); *Farmers', &c. Bank v. Payne*, 25 Conn. 448, 68 Am. Dec. 362; *Lyne v. Bank of Ky.*, 5 J. J. Marsh (Ky.) 545; *Mercier v. Canonge*, 8 La. Ann. 37; *Fairfield Savings Bank v. Chase*, 72 Me. 226, 39 Am. Rep. 319; *General Ins. Co. v. United States Ins. Co.*, 10 Md. 517, 69 Am. Dec. 174; *Washington Bank v. Lewis*, 22 Pick. (Mass.) 24; *First Nat. Bank v. Christopher*, 40 N. J. L. 435, 29 Am. Rep. 262; *Westfield Bank v. Cornen*, 37 N. Y. 320, 93 Am. Dec. 573; *Bank of U. S. v. Davis*, 2 Hill (N. Y.) 463; *Bank of Pittsburg v. Whitehead*, 10 Watts (Penn.) 397, 36 Am. Dec. 186.

tion deserves a somewhat closer analysis than it ordinarily receives. As has already been pointed out, it is held by some courts, proceeding upon the theory of the legal identification of the principal with his agent, that notice received prior to the commencement of the agency is not to be imputed to the principal, because at that time it was impossible that they should be identified. Certain of the cases referred to can be disposed of upon this ground, and are entirely consistent with it. The same statement, however, is not infrequently made by courts which base the imputation of notice upon the agent's duty to communicate, and these are the cases which chiefly require consideration. The explanation here is simple and consistent. If information comes to an agent while he is actually acting about the subject-matter of his agency, and the information relates to it, such information is imputable to the principal under either rule. If, however, the information comes to him while he is not actually engaged in the exercise of his agency, even though it be conceded that he was agent at the time, the question whether it is to be imputed to his principal will depend upon a variety of circumstances. Under the second theory, the question at once arises, was it his duty to communicate it to his principal? Suppose an agent, who regularly and habitually acts, during business hours, with reference to a certain subject, during the evening, while away from his place of business and at his home or in some social gathering, receives in his "private and individual capacity" information pertinent and material to the subject upon which he has been acting during the day and upon which he will resume action at the opening of business on the morrow, with this information actually in his mind. Would it be contended, under either rule, that this information would not be imputed to his principal?

§ 38. ———. Suppose that the president of a bank, while absent from the bank and engaged upon his private affairs, learns something concerning X. X is not at that time a customer of the bank, and, so far as the president knows, neither has nor contemplates having any business relations or dealings with it. Suppose, however, that the next day X, without the knowledge of the president, and with reference to matters not within the president's authority, has dealings with the bank through its cashier or board of directors, to which dealings the information received by the president would be material. Would it now be contended that such information would be imputed? Obviously it could not be, because it did not come to an agent who had any authority or duty with reference to the subject-matter to which it related, and there was nothing to suggest to him that it was a matter of any consequence to his prin-

cial or to impose any duty to communicate it. The result would not have been different if the information had come to the president while he was sitting in his office at the bank and actually transacting its business, if, as before, there was nothing to suggest that it was a matter in which he or the bank had any interest. Suppose, however, that though, when the president received this information, it seemed of no importance to the bank, he should be called upon next day, or at any other time while the information was actually fresh in his mind, to deal with X for the bank with reference to a matter to which the information was material. Would it be doubted now that the information would be imputed to the bank? Suppose still further, in the latter case, that because, when he received it, it seemed to be a matter of no interest to him or to his principal, the president paid little or no attention to it; or that, for the same reason, it soon passed from his mind, and later, when he was unexpectedly called upon to act, the information had actually been forgotten. Would it now be imputed? It is assumed that it would not be.

§ 39. ———. The question, then, in all these cases, would seem to be, not whether the information was received by the agent in his private or individual capacity, but whether it was received at such time and under such circumstances as to impose upon him the duty to give heed to it. Notice or information coming to an agent of a corporation in his private and individual capacity concerning a matter as to which he had no authority or duty to act or as to which he never did in fact act would not be imputed to the corporation, even though the corporation, through some other agent, who did not have the information, should act upon the subject-matter to which it related. So notice coming to an agent, even while acting generally in the execution of his agency, but which had no such present relevancy or importance as to impose a duty to communicate it, would not be imputed unless the agent later acted as such upon some matter to which that notice was relevant and with the knowledge still present in his mind.

§ 40. ———. WHEN NOTICE TO DIRECTOR IS NOTICE TO CORPORATION.—The question frequently arises whether notice to a director of a corporation is notice to the corporation. In dealing with this question, regard must be had to the scope and nature of the director's powers. The directors of a corporation are not individually its agents for the transaction of its ordinary business, which is usually delegated to its executive officers, such as its president, secretary, treasurer and the like. Directors are, it is true, possessed of extensive powers even to the extent of absolute control

over the management of its affairs, but these powers reside in them as a board and not as individuals, and only when acting as a board in their collective capacity are they the representatives of the corporation. Notice to them when assembled as a board would undoubtedly be notice to the corporation.⁸⁵ So notice to an individual director which is in fact communicated to the board by him is notice to the corporation, for this thus becomes notice to the board.⁸⁶

§ 41. ———. But it is well settled, as a general rule, that the mere private knowledge of one or more individual directors concerning any business of the corporation (as to which such director has then no special duty or authority to act, or upon which he does not subsequently act with such knowledge in his mind, and which he does not communicate to the board) is not to be imputed to the corporation.⁸⁷ This rule, however, is subject to certain exceptions resting upon obvious principles. Thus it has been held that notice communicated to a director officially for the express purpose of being communicated to the board is notice to the board, although he may have failed to do so, as it is clearly his duty to so communicate it and he ought to be conclusively presumed to have done his duty.⁸⁸

⁸⁵ *First National Bank of Hightstown v. Christopher*, 11 Vroom (40 N. J. L.) 435, 29 Am. Rep. 262; *Fulton Bank v. New York, &c. Canal Co.*, 4 Paige (N. Y.) 127; *Toll Bridge Co. v. Betsworth*, 30 Conn. 380; *In re Marseilles, &c. Ry. Co.*, 7 Ch. Ap. 161.

⁸⁶ *Farmers', &c. Bank v. Payne*, 25 Conn. 444, 68 Am. Dec. 362; *Bank of Pittsburgh v. Whitehead*, 10 Watts (Penn.) 397, 36 Am. Dec. 186.

⁸⁷ *Ayers v. Green Gold Mining Co.*, 116 Cal. 333, 48 Pac. 221; *Lothian v. Wood*, 55 Cal. 159; *Murphy v. Gumaer*, 12 Colo. App. 472, 55 Pac. 951; *Farmers', etc. Bank v. Payne*, 25 Conn. 448, 68 Am. Dec. 362; *Farrel Foundry v. Dart*, 26 Conn. 376; *Home Bank v. Peoria Ag'l Society*, 206 Ill. 9, 69 N. E. 17; *Lyne v. Bank of Ky.*, 5 J. J. Marsh (Ky.) 545; *Louisiana State Bank v. Senecal*, 13 La. 525; *Mercier v. Canonge*, 8 La. Ann. 37; *Fairfield Savings Bank v. Chase*, 72 Me. 226, 39 Am. Rep. 319; *B. & O. R. R. Co. v. Canton Co.*, 70 Md. 405, 17 Atl. 394; *Winchester v. Baltimore, &c. R. R. Co.*, 4 Md. 231; *General Ins. Co. v. United States Ins. Co.*, 10 Md. 517, 69 Am. Dec. 174; *United States Ins. Co. v. Shriver*, 3 Md. Ch. 381; *Sawyer v. Pawnors' Bank*, 6 Allen (Mass.) 207; *Washington Bank v. Lewis*, 22 Pick. (Mass.) 24; *Kearney Bank v. Froman*, 129 Mo. 427, 31 S. W. 769; *First Nat'l Bank of Hightstown v. Christopher*, 40 N. J. L. 435, 29 Am. Rep. 262; *Casco Nat. Bank v. Clark*, 139 N. Y. 307, 34 N. E. 908, 36 Am. St. Rep. 705; *Merchants Nat. Bank v. Clark*, 139 N. Y. 314, 34 N. E. 910; *Westfield Bank v. Corneu*, 37 N. Y. 320, 93 Am. Dec. 573; *Bank of U. S. v. Davis*, 2 Hill (N. Y.) 463; *National Bank v. Norton*, 1 Hill (N. Y.) 572; *Atlantic Bank v. Savery*, 18 Hun 41, s. c. 82 N. Y. 291, 308; *Getman v. Second National Bank*, 23 Hun (N. Y.) 503; *La Forge Fire Ins. Co. v. Bell*, 22 Barb. (N. Y.) 54; *Wilson v. McCullough*, 23 Pa. St. 440, 62 Am. Dec. 347; *Bank of Pittsburgh v. Whitehead*, 10 Watts. (Penn.) 397, 36 Am. Dec. 186; *Custer v. Tompkins Co. Bank*, 9 Pa. St. 27; *Wardlaw v. Troy Oil Mill*, 74 S. C. 368, 54 S. E. 658; *Continental Nat. Bank v. McGeoch*, 92 Wis. 286, 66 N. W. 606; *Laurence v. Holmes*, 45 Fed. 357.

⁸⁸ *United States Ins. Co. v. Shriver*, 3 Md. Ch. 381; *Boyd v. Chesapeake, &c. Canal Co.*, 17 Md. 195, 79 Am. Dec. 646.

§ 42. —. So it has been held that a corporation is properly to be charged with information possessed by an individual director, whether disclosed or not, if, while possessing such knowledge, he acts with the board and as a member of it, upon the very matter to which the information relates.⁸⁹ In such a case there is the strongest possible duty resting upon the director to communicate his information to the board, and it may well be presumed, as against the corporation, that he has done so. But, in accordance with the exception which has been heretofore noticed, that the agent will not be presumed to communicate information hostile to his own interests, it has been held that when a director is himself dealing as the other party with the corporation, the corporation will not be charged with notice of that knowledge possessed by the director which his own interest impelled him to conceal,⁹⁰ even though he acts with

⁸⁹ *Beacon Trust Co. v. Souther*, 183 Mass. 413, 67 N. E. 345; *National Security Bank v. Cushman*, 121 Mass. 490; *Innerarity v. Merchants' National Bank*, 139 Mass. 332, 1 N. E. 282, 52 Am. Rep. 710; *Union Bank v. Campbell*, 4 Humph. (Tenn.) 394; *Bank of United States v. Davis*, 2 Hill (N. Y.) 451; *Clerk's Savings Bank v. Thomas*, 2 Mo. App. 367.

⁹⁰ "A bank or other corporation can act only through agents, and it is generally true, that if a director, who has knowledge of the fraud or illegality of the transaction, acts for the bank, as in discounting a note, his act is that of the bank and it is affected by his knowledge. *National Security Bank v. Cushman*, 121 Mass. 490. But this principle can have no application where the director of the bank is the party himself contracting with it. In such case the position he assumes conflicts entirely with the idea that he represents the interests of the bank. To hold otherwise might sanction gross frauds by imputing to the bank a knowledge those properly representing it could not have possessed." *DEVENS, J.*, in *Innerarity v. Merchants' National Bank*, 139 Mass. 332, 1 N. E. 282, 52 Am. Rep. 710. In this case A shipped a cargo to B for sale on A's account, but gave B a bill of lading in latter's name. B was a director in defendant's bank. B borrowed a large sum of money of the bank and, without authority of A, pledged the bill of lading as security. B met and acted with the board in approving the loan but gave the board no notice of the true ownership of the cargo, nor did the bank have notice from any other source. In an action by the owner of the cargo it was held that the bank could not be charged with knowledge of the director's fraud.

In *First National Bank of Hightstown v. Christopher*, 40 N. J. L. 435, 29 Am. Rep. 262, P, a member of a firm, procured at a bank of which he was a director, the discount of a note belonging to the firm, knowing that the note had been obtained by fraud, but not disclosing this fact to the other officers of the bank. The bank sued upon the note and were allowed to recover, the court holding that the knowledge of the director could not be imputed to the bank. [But as to this case, see the case of *Lanning v. Johnson*, — N. J. L. —, 69 Atl. 490.] To same effect: *Commercial Bank v. Cunningham*, 24 Pick. (Mass.) 270, 35 Am. Dec. 322; *National Security Bank v. Cushman*, 121 Mass. 491; *Frost v. Belmont*, 6 Allen (Mass.) 163. See also *Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 268, 17 N. E. 496.

Mayor, etc. v. Tenth Nat. Bank, 111 N. Y. 446, 18 N. E. 618. [In this case the commissioners for the building of the court house fraudulently raised checks, and the defendant paid them. Three of the commissioners were directors of the bank, but did not act for the bank in this matter, Bliss, its president, representing it solely, and he was innocent of the fraud. The court refused to charge the bank with the knowledge of the fraudulent raising of the checks, because the directors of the bank, who participated in the fraud, had such knowledge.]

the board in reference to it.⁹¹ A director may, also, either by custom, acquiescence or express appointment, be charged with the performance of certain corporate duties, in respect to which he is to be regarded like any other agent of the corporation, and notice to him regarding such matters will be notice to the corporation⁹²

§ 43. ———. NOTICE TO STOCKHOLDER NOT NOTICE TO THE CORPORATION.—The stockholders of a corporation, as such, are in no sense the agents of the corporation. They may, of course, be invested, like other individuals, with representative powers by the corporation, and would in that event be treated like other agents; but their mere position as stockholders gives them no such authority. Notice to a stockholder is, therefore, not notice to the corporation.⁹³

FLOYD R. MECHEM.

UNIVERSITY OF CHICAGO.

⁹¹ *Innerarity v. Merchants' National Bank*, 139 Mass. 332, 52 Am. Rep. 710; *Custer v. Tompkins County Bank*, 9 Penn. St. 27; *Terrell v. Branch Bank of Mobile*, 12 Ala. 502.

United States Bank v. Davis, 2 Hill (N.Y.) 451; and *Union Bank v. Campbell*, 4 Humph. (Tenn.) 394, are *contra*. These cases, however, have been criticised and denied. See *Innerarity v. Merchants' National Bank*, *supra*. They are also cited with approval in *Tagg v. Tennessee National Bank*, 9 Heisk. (Tenn.) 479.

⁹² *Smith v. South Royalton Bank*, 32 Vt. 341.

⁹³ *Pittsburg Bank v. Whitehead*, 10 Watts (Penn.) 397, 36 Am. Dec. 186; *Union Canal v. Loyd*, 4 Watts & S. (Penn.) 393; *Custer v. Tompkins Co. Bank*, 9 Pa. St. 27; *Housatonic, &c. Bank v. Martin*, 1 Metc. (Mass.) 294; *Burt v. Batavia Mfg. Co.*, 86 Ill. 66.