# THE ANATOMY OF NOTICE

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AT THE outset, it is well to confess what will be obvious to all those whom curiosity combined with patience may lead to read this article, namely, my great indebtedness to Professor Warren A. Seavey. His masterly analysis of the notice concept, first presented in 1916[1] and moulded into more exact form for the Restatement of Agency[2] forms the foundation upon which anyone henceforth dealing with the subject must build. My own essay is limited to applying the analysis which he worked out for agency purposes to the entire topic and to extending it in respect to some minor matters not falling within the field to which his attention was devoted.

## I

A discerning legal system will have occasion to discriminate between those acting unwittingly on the one hand, and, on the other, those who have full knowledge, or who for some reason are treated by the law as though they had it. In our system, the legal problems centering around whether one should or should not be enrolled among the knowing are dealt with under the title of Notice.[3] Agreement has been wanting, however, as to both the analysis and the terminology of the subject. The views here set forth are advanced with the hope that they may be of some service in dispelling this confusion.

The simplest case, of course, is that of the man who is aware of the facts with notice of which he is to be charged.[4] In the language of some

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[1] Seavey, Notice through an Agent, 65 U. Pa. L. Rev. 1 (1916). See also Seavey, Agency (Part II), 2 Neb. L. Bul. 23–30 (1923).

[2] Restatement, Agency § 9 (1933).

[3] "Notice is knowledge, or information legally equivalent to knowledge, brought home to the party notified in immediate connection with the subject to which the notice relates." Black v. Roebuck, 17 Pa. Super. 324, 327 (1901). "Notice, generally, may be defined as that which imports information of the fact to the one to be notified, and is divided by the law into several classes, such as actual, constructive, implied, and presumptive notice." Burdine v. White, 173 Ky. 158, 161, 190 S.W. 687, 689 (1917).

[4] New York Underwriters Ins. Co. v. Central Union Bank, 65 F. (2d) 738 (C.C.A. 4th 1933); Gray v. Winder, 77 Cal. 525, 20 Pac. 47 (1888); Bean & Symonds Co. v. Town of Jaffrey, 80 N.H. 343, 117 Atl. 12 (1922); Fildew v. Milner, 57 Ore. 16, 109 Pac. 1092 (1910); Fields v. Rust, 36 Tex. Civ. App. 350, 82 S.W. 331 (1904). Knowledge does not include reason-

cases, he has "express information."[5] This may be because he was an actor in the transaction or because it happened under his immediate observation, but it is also common to say that one has knowledge of that which has been communicated to him through a trustworthy source of information.[6] In many instances, the term "actual notice" is employed to designate the legal consequences arising out of knowledge of this type.[7] Express notice has been used in this sense;[8] as also direct or positive notice.[9] Knowledge of this sort may, of course, be proved by direct evidence,[10] or its existence may be inferred from circumstantial evidence.[11] One court has used the term implied actual notice to describe the drawing

able cause to know. Commonwealth v. Gould, 158 Mass. 499, 33 N.E. 656 (1893); Guernsey v. Miller, 80 N.Y. 181 (1880). Notice is, of course, a much broader term than knowledge, Frazier v. Butler Borough, 172 Pa. 407, 33 Atl. 691, 51 Am. St. Rep. 739 (1896).

[5] Hart's Devisees v. Hawkins' Heirs, 3 Bibb (Ky.) 502, 6 Am. Dec. 666 (1814); Myhra v. Rustad, 58 N.D. 258, 225 N.W. 796 (1929) (based on N.D. Comp. L. 1913 § 7288).

[6] Witherow v. United American Ins. Co., 101 Cal. App. 334, 281 Pac. 668 (1929); Jordan v. Pollock, 14 Ga. 145 (1853); Picklesimer v. Smith, 164 Ga. 600, 139 S.E. 72 (1927); Citizens & Southern Bank v. Farr, 164 Ga. 880, 139 S.E. 658 (1927); Little v. Schul, 118 Md. 454, 84 Atl. 649 (1912); Walkden's Case, 237 Mass. 115, 129 N.E. 396 (1921); Vaughn v. Tracy, 22 Mo. 415 (1856); Brown v. Connecticut Fire Ins. Co., 197 Mo. App. 317, 195 S.W. 62 (1917); Allen v. City of Millville, 87 N.J.L. 356, 95 Atl. 130 (1915); Ayers v. Public Service Co-ordinated Transport, 12 N.J. Misc. 777, 174 Atl. 883 (1934).

The source of information must be trustworthy; bare rumor is insufficient. Parkhurst v. Hosford, 21 Fed. 827 (C.C. Ore. 1884); Huffman v. Smith, 87 Colo. 265, 286 Pac. 861 (1930); Richardson v. Smith, 11 Allen (Mass.) 134 (1865); *In re* School Director, 73 Pitts. L. J. 597 (Pa. C. P. 1925); Green v. Amber Star Film Co., 1 R. I. Super. Ct. Rescr. 58 (1918).

In particular instances the word "knowledge" may be interpreted as requiring "first-hand" experience, precluding information derived from other sources. Smith v. Industrial Accident Commission, 174 Cal. 179, 162 Pac. 636 (1917).

[7] *In re* Bowman, 36 F. (2d) 721 (C.C.A. 2d 1929); Central of Georgia Ry. Co. v. Stamps, 48 Ga. App. 309, 172 S.E. 806 (1934); Funk v. Anchor Fire Ins. Co., 171 Ia. 331, 153 N.W. 1048 (1915); Hutcherson v. Louisville & N.R.R., 247 Ky. 317, 57 S.W. (2d) 12 (1933); Vaughn v. Tracy, 22 Mo. 415 (1856); Myhra v. Rustad, 58 N.D. 258, 225 N.W. 796 (1929); Epley v. Witherow, 7 Watts (Pa.) 163 (1838); Wethered's Adm'r v. Boon, 17 Tex. 143 (1856); Hawley v. Bullock, 29 Tex. 217 (1867). Closely akin is the term "notice in fact," Melms v. Pabst Brew. Co., 93 Wis. 153, 66 N.W. 518 (1896).

[8] Farris v. Finnup, 84 Kan. 122, 113 Pac. 407 (1911); Hood v. Hood, 2 Grant (Pa.) 229 (1858); King v. Travis, 4 Hayw. (Tenn.) 280 (1818); Rublee v. Mead, 2 Vt. 544 (1830); Graff v. Castleman, 5 Rand. (Va.) 195, 16 Am. Dec. 741 (1827).

[9] Masterson v. West End. N. G. R. R., 5 Mo. App. 64 (1878); Holmes v. Doe Run Lead Co., 223 S.W. 772 (Mo. App. 1920).

[10] Knapp v. Bailey, 79 Me. 195, 9 Atl. 122, 1 Am. St. Rep. 295 (1887); Drey v. Doyle, 99 Mo. 459, 12 S.W. 287 (1889); Link v. Jackson, 164 Mo. App. 195, 147 S.W. 1114 (1912).

[11] *In re* Wagner, 110 Fed. 931 (D.C. Ky. 1901); Hall & Brown Wood Working Mach. Co. v. Haley Furn. & Mfg. Co., 174 Ala. 190, 56 So. 726, L.R.A. 1918B, 924 (1911); Sapp v. Warner, 105 Fla. 245, 143 So. 648 (1932); Knapp v. Bailey, note 10 *supra; In re* Brown, 228 Mass. 31, 116 N.E. 897 (1917); Drey v. Doyle, note 10 *supra*.

of an inference of knowledge from circumstances.[12] Presumptive notice has also been employed in this sense.[13]

One who does not know a fact affecting his legal position may nevertheless be conscious of other facts so strongly indicating the existence of the ultimate fact that a man of ordinary prudence would inquire concerning it or conduct his business as though it existed.[14] In such a case he is affected with notice of the ultimate fact. Many cases classify this as a form of actual notice,[15] sometimes with the added epithet "implied."[16] Others simply speak of it as implied notice.[17] Another favorite descriptive term is imputed notice,[18] and the phrase presumptive notice has been applied to it.[19] It comes within a statutory requirement of "reasonable information."[20] One case calls it "notional notice."[21] Another line of authorities has classified notice of this type as constructive.[22]

[12] Hall & Brown Wood Working Mach. Co. v. Haley Furn. & Mfg. Co., note 11 *supra*.

[13] White v. Murphy, 3 Rich. L. (S.C.) 369 (1831).

[14] Compare Restatement, Agency § 9, Comment *c* (1933).

[15] Pique v. Arendale, 71 Ala. 91 (1881); Dewyer v. Dover, 222 Ala. 543, 133 So. 581 (1931); Picklesimer v. Smith, 164 Ga. 600, 139 S.E. 72 (1927); Bowman-Boyer Co. v. Burgett, 195 Ia. 674, 192 N.W. 795 (1923); Beckwith v. Douglas, 25 Kan. 229 (1881); Kleis v. Katcef, 160 Md. 627, 154 Atl. 558 (1931); Twitchell v. Glenwood-Inglewood Co., 131 Minn. 375, 155 N.W. 621 (1915); Sensenderfer v. Kemp, 83 Mo. 581 (1884); Smallwood v. Lewin, 15 N.J. Eq. 60 (1862); Chelsea Exch. Bank v. Weinstein, 226 App. Div. 601, 236 N.Y.S. 185 (1929); Orr v. Reed, 50 Okla. 580, 151 Pac. 200 (1915); Blankenbuehler v. Herron, 2 Wash. Co. L. Rep. 162 (C.P. Pa. 1921); College Park Elec. Belt Line v. Ide, 15 Tex. Civ. App. 273, 40 S.W. 64 (1897); Farmers State Bank v. McCulley, 133 Wash. 364, 233 Pac. 661 (1925); Brinkman v. Jones, 44 Wis. 498 (1878). *Contra:* Ross v. Irving, 14 Ill. 171 (1852); Parker v. Osgood, 3 Allen (Mass.) 487 (1862); Commonwealth v. Gould, 158 Mass. 499, 33 N.E. 656 (1893).

[16] Sapp v. Warner, 105 Fla. 245, 141 So. 124, 143 So. 648 (1932); Farris v. Finnup, 84 Kan. 122, 113 Pac. 407 (1911); Knapp v. Bailey, 79 Me. 195, 9 Atl. 122, 1 Am. St. Rep. 295 (1887); Holmes v. Doe Run Lead Co., 223 S.W. 772 (Mo. App. 1920).

[17] Charles v. Roxana Pet. Corp., 282 Fed. 983 (C.C.A. 8th 1922); Rosen v. Wolff, 152 Ga. 578, 110 S.E. 877 (1922); Kirkham v. Moore, 30 Ind. App. 549, 65 N.E. 1042 (1903); Johnson v. Chicago, B. & Q.R.R., 202 Ia. 1282, 211 N.W. 842 (1929); Edwards v. Myers, 127 Kan. 221, 273 Pac. 468 (1929); Hutcherson v. Louisville & N.R.R., 247 Ky. 317, 57 S.W. (2d) 12 (1933); Vaughn v. Tracy, 22 Mo. 415 (1856); Janvrin v. Janvrin, 60 N.H. 169 (1880); H. C. Tack Co. v. Ayers, 56 N.J. Eq. 56, 38 Atl. 194 (1897); Plant v. Schrock, 102 Okla. 97, 227 Pac. 439 (1924); Rublee v. Mead, 2 Vt. 544 (1830); Graff v. Castleman, 5 Rand. (Va.) 195, 16 Am. Dec. 741 (1827).

[18] *In re* Manufacturers' Box & Lbr. Co., 251 Fed. 957 (D.C. N.J. 1918); Cleveland Woolen Mills v. Sibert, 81 Ala. 140, 1 So. 773 (1887).

[19] Hutcherson v. Louisville & N. R.R., 247 Ky. 317, 57 S.W. (2d) 12 (1933); Thomas v. City of Flint, 123 Mich. 10, 81 N.W. 936, 47 L.R.A. 499 (1900); Holmes v. Doe Run Lead Co., 223 S.W. 772 (Mo. App. 1920); Reichert v. Neuser, 93 Wis. 513, 67 N.W. 939 (1896); perhaps the term is used in this sense in Wilson v. Williams, 52 Miss. 487 (1876).

[20] Bennett v. Cocks, 15 Tex. 67 (1855). [21] King v. Travis, 4 Hayw. (Tenn.) 280 (1818).

[22] The Tompkins, 13 F. (2d) 552 (C.C.A. 2d 1926); Ponder v. Scott, 44 Ala. 241 (1870); Wilkerson v. Thorp, 128 Cal. 224, 60 Pac. 679 (1900) (based on Deering's Cal. Civ. Code

The terminology of this subject is further complicated by the fact that when a principal is affected by the knowledge of his agent, either of ultimate facts or of facts stimulating inquiry, a number of courts hold that the resultant effect upon the principal is to be called constructive notice.[23] It has also been characterized by the adjectives "implied"[24] and "imputed."[25] The better view, however, regards notice derived through an agent as of the same variety that it would be if derived from personal knowledge.[26]

For the sake of completeness, mention may be made at this point of those situations where there is neither knowledge of the ultimate facts nor of inquiry-provoking circumstances but in which one is nevertheless treated as though he had full knowledge because he is under a duty voluntarily assumed, or imposed by law, to attain it. Thus a lawyer is under an obligation to his client to have a grasp of the common legal principles which constitute the normal learning of a reasonably skilled practitioner. In tort law, one is often subject to a duty to use reasonable care in dis-

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1931 § 19); Cummins v. Boston, 25 Ga. 277 (1858); Campe v. Cermak, 330 Ill. 463, 161 N.E. 761 (1928); Moreland v. Lemasters, 4 Blackf. (Ind.) 383 (1837); Allen v. McCalla, 25 Ia. 464, 96 Am. Dec. 56 (1868); Shell v. Guthrie, 129 Kan. 632, 284 Pac. 420 (1930); Russell v. Petree, 10 B. Mon. (Ky.) 184 (1849); Price v. McDonald, 1 Md. 403 (1851); Converse v. Blumrich, 14 Mich. 109 (1866); Link v. Jackson, 158 Mo. App. 63, 139 S.W. 588 (1911); Buchanan v. Balkum, 60 N.H. 406 (1880) (ambiguous); Hoy v. Bramhall, 19 N.J. Eq. 563, 97 Am. Dec. 687 (1868); Birdsall v. Russell, 29 N.Y. 220 (1864); Spencer v. Spencer, 56 N.C. 404 (1857); Anderson v. City of Jamestown, 50 N.D. 531, 196 N.W. 753 (1924) (probably based on N.D. Comp. L. 1913 § 7290); Cooper v. Flesner, 24 Okla. 47, 103 Pac. 1016, 23 L.R.A. (N.S.) 1180, 20 Ann. Cas. 29 (1909) (based on Oklahoma statutory provision which is now Harlow's Okla. Stat. 1931 § 61); Henry v. Brothers, 48 Pa. 70 (1864); Wethered's Adm'r v. Boon, 17 Tex. 143 (1856). In the following cases, constructive knowledge is employed in the same sense as is the term constructive notice in the cases just cited: Friedman v. McGowan, 1 Penn. (Del.) 436, 42 Atl. 723 (1898); Brown v. Green, 1 Penn. (Del.) 535, 42 Atl. 991 (1899); McCallum v. Corn Prod. Co., 131 App. Div. 617, 116 N.Y.S. 118 (1909).

[23] *In re* Wagner, 110 Fed. 931 (D.C. Ky. 1901); Hall & Brown Wood Working Mach. Co. v. Haley Furn. & Mfg. Co., 174 Ala. 190, 56 So. 726, L.R.A. 1918B, 924 (1911); Westchester Fire Ins. Co. v. Green, 223 Ala. 121, 134 So. 881 (1931); Atkinson v. Foote, 44 Cal. App. 149, 186 Pac. 831 (1919); Wiley v. Rome Ins. Co., 12 Ga. App. 186, 76 S.E. 1067 (1913); Continental & Commercial Trust & Savings Bank v. Lantry Constr. Co., 189 Ill. App. 296 (1914); Griffith v. Griffith, 1 Hoff. Ch. (N.Y.) 152 (1839); Noble v. Echo Lake Tavern, 142 Misc. 427, 254 N.Y.S. 662 (1931); Southern Travelers' Ass'n v. Boyd, 1 S.W. (2d) 446 (Tex. Civ. App. 1927); Steinman v. Clinchfield Coal Co., 121 Va. 611, 93 S.E. 684 (1917).

[24] Strahorn-Hutton-Evans Com. Co. v. Florer, 7 Okla. 499, 54 Pac. 710 (1898).

[25] Tindale v. Bove, 97 Vt. 465, 124 Atl. 585 (1924).

[26] There are many cases, mostly affirming the proposition by inference without discussion. City of Denver v. Dean, 10 Colo. 375, 16 Pac. 30, 3 Am. St. Rep. 594 (1887); Prater v. Cox, 64 Ga. 706 (1880); and Atkinson v. Elmore, 103 Mo. App. 403, 77 S.W. 492 (1903) will suffice as representative citations.

covering defects in machinery which he employs or in property under his control. Logically, these come under our definition of Notice. Commonly they are not so dealt with, perhaps for the reason that this would cause an expansion of the topic comparable to the annexation of France and Spain by the Andorran Republic. To round out our collection of phraseology, however, it may be noted that every once in a while judges designate a failure to know what one ought as constructive notice.[27]

In the situations we have been discussing, notice has the connotation either of knowledge or of what should be known. Entirely different is another sense in which it is employed, namely, to characterize those situations wherein one is charged, not because he knows something nor even because he ought to have been cognizant of it, but simply because some formal act has been done by another to which the law attaches the consequence of notice. This is not notice in the sense of knowledge; it may be necessary in certain instances that it be formally communicated to the person to be affected,[28] but once that communication is made the noticee's continued memory thereof is immaterial to its effectiveness;[29] and if it is brought about in some other way than by direct communication the courts refuse to classify it as actual notice.[30] Where direct communication is unnecessary, the noticee will be bound although he has no knowledge that the act creating notice has been performed.[31] In some instances the formal act is so important that knowledge of the existence of the facts notice of which is to be given by the act is, by itself, ineffective; the act is indispensable to the existence of notice.[32]

The variety of acts which may give rise to notice in this sense is protean. Notice may be given by formal statement;[33] by the delivery of a

[27] We need not burden ourselves with cumulative citations. Let these suffice: Bodholdt v. Garrett, 122 Cal. App. 566, 10 P. (2d) 533 (1932); Madison County Com'rs v. Brown, 89 Ind. 48 (1883); Shopbell v. City of St. Joseph, 226 Mo. App. 1170, 49 S.W. (2d) 301 (1932).

[28] Owens v. State, 74 Ala. 401 (1883); Travelers' Ins. Co. v. Farmers' Mut. Ins. Ass'n, 211 Ia. 1051, 233 N.W. 153 (1930); Commonwealth v. Conrad, 21 Berks Co. L.J. 156 (Q.S. Pa. 1928).

[29] Newton v. Guerin, 279 Fed. 256 (C.C.A. 2d 1922).

[30] Bailey v. Ford, 132 Ark. 203, 200 S.W. 797 (1918); Sumner v. Rhodes, 14 Conn. 135 (1840); *In re* Shugar's Estate, 312 Pa. 472, 167 Atl. 567 (1933).

[31] Crain v. Carter, 158 Ga. 428, 123 S.E. 699 (1924) (recorded deed); Mayweather v. Scott County, 36 Ia. 143 (1872) (official proclamation—*dictum*); Town of Walpole v. Town of Hopkinton, 4 Pick. (Mass.) 358 (1826) (delivery of letter, lost without being read).

[32] Walker v. Carrew, 56 Mo. App. 320 (1894); Cowie v. Harker, 32 S.D. 516, 143 N.W. 895 (1913).

[33] Owens v. State; Travellers' Ins. Co. v. Farmers' Mut. Ins. Ass'n; Commonwealth v. Conrad; note 28 *supra*.

document;[34] by mailing a letter;[35] by occupancy of premises;[36] by publication in the press;[37] by posting a placard in some designated place;[38] by registering a document in the public records;[39] by maintaining litigation in relation to property.[40] The act may emanate from public authority, as by the passage of a statute,[41] or by the conduct of judicial proceedings, which the parties to the litigation are said to be bound to notice.[42] Except in the case of formal communication, the term "actual notice," with its connotation of knowledge of some sort, is inapplicable to these situations.[43] There is substantial judicial unanimity in characterizing them as "constructive notice,"[44] although one court has recently questioned the technical accuracy of applying that appellation to notice by public record.[45]

[34] Town of Walpole v. Town of Hopkinton, *supra* note 31; Granite Bank v. Ayers, 16 Pick. (Mass.) 392, 28 Am. Dec. 253 (1835).

[35] Ross v. Hawkeye Ins. Co., 83 Ia. 586, 50 N.W. 47 (1891); Hughes v. Antietam Mfg. Co., 34 Md. 316 (1871); People v. Albany Med. College, 26 Hun (N.Y.) 348 (1882).

[36] Taylor v. Ballard, 41 Cal. App. 232, 182 Pac. 464 (1919); Hubbard v. Smith, 2 Mich. 207 (1851); Corey v. Smalley, 106 Mich. 257, 64 N.W. 13 (1895); Ranney v. Hardy, 43 Ohio St. 157, 1 N.E. 523 (1885).

[37] York County Mut. Fire Ins. Co. v. Knight, 48 Me. 75 (1861); Bamrick v. Village of Minatare, 118 Neb. 644, 225 N.W. 755 (1929); Farley v. Carpenter, 27 Hun (N.Y.) 359 (1882).

[38] Coleman v. Spring Constr. Co., 41 Cal. App. 201, 182 Pac. 473 (1919).

[39] Arizona Land & Stock Co. v. Markus, 37 Ariz. 530, 296 Pac. 251 (1931); Booth v. Barnum, 9 Conn. 286, 23 Am. Dec. 339 (1832); W. A. H. Church, Inc., v. Holmes, 60 App. D.C. 27, 46 F. (2d) 608 (1931); Jordan v. Pollock, 14 Ga. 145 (1853); Case v. Bumstead, 24 Ind. 429 (1865); Masterson v. West End N.G.R.R., 5 Mo. App. 64 (1878); Hill v. Tissier, 15 Mo. App. 299 (1884); Strahorn-Hutton-Evans Com. Co. v. Florer, 7 Okla. 499, 54 Pac. 710 (1898); Hawley v. Bullock, 29 Tex. 217 (1867); Rublee v. Mead, 2 Vt. 544 (1830).

[40] This is so-called notice by *lis pendens*. Regardless of what may be the correct view in the controversy over whether the *lis pendens* doctrine is properly referable to notice or to a public policy in defense of the jurisdiction of courts, it is commonly referred to as constructive notice and the effect of it is the same as though purchasers *pendente lite* were charged with notice of the matters involved in the litigation. McWhorter v. Brady, 41 Okla. 383, 140 Pac. 782 (1914); Shelton v. Jackson, 4 Sneed (Tenn.) 672, 70 Am. Dec. 265 (1857); Maes v. Thomas, 140 S.W. 846 (Tex. Civ. App. 1911). In Garretson v. Brien, 3 Heisk. (Tenn.) 534 (1871) it is termed "presumptive notice."

[41] State v. Moreland, 152 Okla. 37, 3 P. (2d) 803 (1931).

[42] Irving Trust Co. v. Spruce Apartments, 44 F. (2d) 218 (D.C. Pa. 1930); Mussman v. Pepples, 243 Ky. 674, 49 S.W. (2d) 592 (1932).

[43] Santa Rose Bank v. White, 139 Cal. 703, 73 Pac. 577 (1903); also cases cited note 30 *supra*.

[44] See cases cited in notes 33–42 *supra*, most of which were in part selected because of their employment of this term.

[45] "Strictly speaking, the term 'constructive notice' is applicable to extraneous facts which are the subject of proof which may be rebutted. This is very different from notice under the recording statutes. The principal object of requiring registration and the public record of

## II

Such is the anatomy of notice; such the confusion that characterizes its nomenclature. The same term is applied to different varieties of notice; several different names often attach to one type. Well may one echo the words of Judge Selden and say, "But it will be found, on looking into the cases, that there is much want of precision in the use of these terms."[46] Observing the logomachy—logorrhea perhaps would be the apter description—the writers have sought for some satisfactory analysis of the subject.

Mr. Justice Story recognized two classes of notice, actual and constructive, defining the former as "knowledge of the fact .... brought directly home to the party" and the latter as "evidence of notice the presumption of which is so violent that the court will not even allow of its being controverted."[47] This distinction, particularly with respect to the definition of constructive notice, has enjoyed a considerable popularity in American courts.[48] As developed by the author, the result of the classification appears to be that only notice in the sense of personal knowledge comes under the head of actual notice while constructive notice includes inquiry-provoking facts, notice through an agent, notice by registry, *lis pendens* and similar matters.[49] Such a division of the field seems inadequate, first, in failing to recognize that the notice arising from inquiry-provoking facts may often be rebutted, either by showing the presence of other facts allaying the suspicions that would normally have been raised,[50] or by showing that adequate inquiry, actually made, did not lead to knowledge.[51] In the second place, it fails to take into consideration that the principles governing notice through an agent may vary, depending upon whether the situation involves knowledge, or reason to know, upon the

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judgments and liens is notice to all the world of their existence," W. A. H. Church, Inc., v. Holmes, 60 App. D.C. 27, 30, 46 F. (2d) 608, 611 (1931).

[46] Williamson v. Brown, 15 N.Y. 354, 359 (1857).

[47] See 1 Story, Equity Jurisprudence § 399 (13th ed. 1886). This definition of constructive notice, stemming from the words of Chief Baron Eyre in Plumb v. Fluitt, 2 Anst. 432, 438, 145 Eng. Rep. 926, 928 (1791), seems still to be approved in England. See 13 Halsbury's Laws of England 105 (2d ed. 1934).

[48] An abbreviated list of cases employing this or similar language includes: *Ex parte* Caplis, 275 Fed. 980 (D.C. Tex. 1921); Vaughn v. Tracy, 22 Mo. 415 (1856); Rogers v. Jones, 8 N.H. 264 (1836); Van Doren v. Robinson, 16 N.J. Eq. 256 (1863); Garrard v. Pittsburgh & C.R.R., 29 Pa. 154 (1857); Briscoe v. Bronaugh, 1 Tex. 326, 46 Am. Dec. 108 (1846).

[49] See Story, Equity Jurisprudence §§ 400–408.

[50] Thus the effect of possession in stimulating inquiry as to the possessor's title is usually allayed by the fact that he has executed a conveyance to the premises. Clark v. Chapman, 213 Ia. 737, 239 N.W. 797 (1931).

[51] Williamson v. Brown, note 46 *supra*.

one hand, or notice arising out of a formal act upon the other hand.[52] Thirdly, it lumps together, under the head of actual notice, that notice which is derived from personal information and that which results from a formal communication, although, as we have seen, different principles govern them. Finally, the line that is drawn seems to have no particular significance, at least as it is applied. Let it be granted that in many instances the circumstances surrounding facts placing one on inquiry are such that the law will not listen to a denial of notice, i.e. the court is convinced that due inquiry could not have failed to reveal the facts. That does not seem to be any reason for grouping notice derived in that manner, which is, after all, still dependent upon the mental state of the noticee or his agent, with that notice arising from the formal act of someone else, the effectiveness of which is entirely independent of such psychological phenomena. On the other hand, there is every reason for classifying it with notice in the sense of knowledge, to which it is so closely akin.

Professor Pomeroy avoids the first objection to Mr. Justice Story's classification, partly by an ingenious though artificial explanation of some of the decisions upon inquiry-provoking facts as involving a fact-inference of the existence of knowledge, built upon a presumption that inquiry actually was made,[53] partly by defining constructive notice to include cases in which the legal presumption of notice may be overcome by proof of investigation, diligent but unsuccessful.[54] Otherwise his system follows the Story formula and is open to the same objections. Further, the distinction between the inference of actual notice from facts putting one on inquiry and the constructive notice arising from such facts is tenuous, difficult in application, and without any very apparent significance in its results.

Professor Bispham, in a classification which has received considerable judicial approbation, moved inquiry-provoking facts over into the category of actual notice under the heading of "*indirect, implied* or *presumptive* notice,"[55] still keeping, as the test of constructive notice, its irrebuttable nature.[56] The symmetry of his classification is marred by the inclusion of notice through an agent under the head of constructive notice[57]

[52] For these principles, see Restatement, Agency, c. 8 (1933).

[53] 2 Pomeroy, Equity Jurisprudence §§ 596–602 (3d ed. 1905).

[54] " 'Constructive' notice includes all other instances in which the information thus directly communicated cannot be shown, but the information is either *conclusively* presumed to have been given and received from the existence of certain facts, or is implied by a *prima facie* presumption of the law in the absence of contrary proof." 2 Pomeroy, *id.*, § 971.

[55] Bispham, Principles of Equity 458 (9th ed. 1915).

[56] Bispham, *id.*, 459. [57] Bispham, *id.*, 460.

and by a later reversion, influenced by the oft-quoted language of Wigram, V.C. in *Jones v. Smith*,[58] to the position that facts stimulating inquiry are to be classified as constructive notice.[59] He failed to distinguish between the effect of possession as a fact provoking inquiry and the maintenance of possession as a formal act affecting subsequent purchasers or incumbrancers with notice of the possession.[60] While his recognition of the kinship between knowledge and facts putting one upon inquiry marks an advance, its effect is weakened by the inconsistency mentioned in the second preceding sentence, and his system is open to the second and the third criticisms that have been brought against the Story classification.

Mr. Wade's work[61] was an essay at dealing with the subject of Notice as a unit, dissociated from its early position as a ward of the courts of chancery. He recognized clearly the kinship between knowledge and facts arousing inquiry, placing them both under the head of actual notice, denominating the first express and the second implied.[62] He blurred this distinction slightly by a later statement that implied notice "is circumstantial evidence, from which the jury, after estimating its value, may infer notice."[63] This comes dangerously close to Pomeroy's theory of knowledge inferred from circumstantial evidence, a radically different thing from facts stimulating investigation. Some of his examples seem to reflect this confusion.[64] On the whole, however, his category of implied actual notice seems intended to embrace facts placing one upon inquiry. Wade further recognizes that notice through an agent is "governed to a considerable extent by the rules applicable to actual notice,"[65] paving the way for taking out of the category of constructive notice the cases in which the principal is affected with notice because of his agent's knowledge.[66] In the class of constructive notice, Wade, while at times inclined to revert to the notion of including inquiry-provoking facts,[67] places chief emphasis upon notice arising out of formal acts whose effect as notice is prescribed either by comon law[68] or by statute.[69] The main objections to his system

[58] 1 Hare 43, 55 (1841).

[59] Bispham, *op. cit. supra* note 55, 464–466.

[60] Bispham, *id.*, 464.

[61] Wade, Notice (1878).

[62] Wade, *id.*, § 5.

[63] Wade, *id.*, § 8.

[64] Wade, *id.*, §§ 10, 25.

[65] Wade, *id.*, § 31.

[66] "Whether, therefore, the notice by which the principal is to be affected is *actual* or *constructive* depends upon the manner in which it is brought home to the agent. If the agent has actual notice, the principal is charged with notice of the same kind. If the agent is constructively notified, so is the principal." Wade, *id.*, § 672. See also §§ 673, 673a.

[67] Wade, *id.*, §§ 42, 42a, 45, 46, 47.

[68] Wade, *id.*, §§ 41 (*lis pendens*), 43 (contents of document formally executed), 44 (possession).

[69] Wade, *id.*, § 41 (registration laws, publication).

lie in its inconsistencies, in the failure to recognize that direct communication (to Wade, a variety of actual notice[70]) may be one form of notice effective because of the performance of formalities, and in an inadequate recognition of the significance of notice by formal act in the analysis of the notice concept.

Mr. Tiffany, after calling attention to the confusion reigning in the cases and the text books, suggested that the distinction between actual and constructive notice should be made to turn upon whether notice was dependent upon information possessed by the person to be charged, in which event he would call it actual notice, or whether it was imposed, regardless of information, by a common law rule or by statute, to which he would give the name constructive notice.[71] Constructive notice, that is, would be fictitious knowledge. If one is to divide notice into actual and constructive, this seems a very pertinent suggestion, inasmuch as the term constructive in our juridical nomenclature commonly denotes a fiction arising out of a legal rule. The inadequacy of such a classification, however, is illustrated by the application which Mr. Tiffany makes of it. Logically enough, he places knowledge and facts placing one on inquiry in the department of actual notice. He feels required by his definition to put notice of the contents of unknown or unexamined instruments in one's chain of title and notice through an agent under the head of constructive notice. The first seems more properly to belong in the category of inquiry-suggestive facts, since the purchaser knows that a chain of title exists and common prudence would incite an examination of its contents. The second, as we have seen, may or may not be entitled to treatment as notice dependent upon knowledge or arising out of the dictates of prudence.[72]

The truth is that the distinction between notice actual and constructive, involving as it does emphasis upon the noticee's state of mind, tends to discount the significance of formal notice. In all the analyses employing this distinction, the notice through formal communication is grouped with the notice arising out of information present in the mind of the person affected, under the style of actual notice. Yet the principles governing the two are radically different. The uncertainty and confusion we have observed anent the proper labelling of vicarious notice, of inquiry provok-

[70] Wade, *id.*, § 7.

[71] Tiffany, Real Property § 573 (2d ed. 1920).

[72] Completeness probably requires mention of a threefold division of notice into actual, implied and constructive, found in 5 Thompson, Real Property § 4189 (1924). It is not well developed.

ing fact, of notice through possession, of notice through documents, all seem traceable to overemphasis upon what may be termed the subjective factor in notice and a corresponding underemphasis of the formal element. Most of the significant differences in the law of this subject seem to center about this cleavage between notice based in some manner upon knowledge and notice which is founded on formality. Doubtless it might be possible so to restate our definitions as to make the adjectives actual and constructive adequate to describe this cleavage. The uncertain and conflicting manner in which they have been used heretofore, however, has created so much ambiguity that it would seem better to seek a new terminology to fit the revised analysis of the subject.

## III

In 1916 Professor Seavey first presented the new analysis. Pointing out clearly the distinction between notice based on knowledge and notice arising from performance of an act, he termed the first "notice which means knowledge" and the second "absolute notice."[73] He did not go exhaustively into the elements of knowledge-notice but in a later article he made it clear that he included in that class the notice arising out of inquiry-provoking facts.[74] Absolute notice[75] included notice through formal communication brought home to the noticee,[76] notice by record,[77] or by publication[78] or by any other formal act recognized by the law as sufficient.

As developed by Professor Seavey and his advisers in the Restatement of Agency, after passing through a stage wherein knowledge became a generic term including inquiry-provoking facts and situations involving a duty of knowledge and absolute notice was transmuted into notification,[79] the analysis now enumerates knowledge, reason to know (inquiry-stimulating facts), duty to know and notification (notice based on formality), as the elements of notice, notification being so defined as to cover all the situations wherein notice is derived from the performance of some

[73] Seavey, Notice through an Agent, 65 U. Pa. L. Rev. 1 (1916).

[74] Seavey, Agency (Part II), 2 Neb. L. Bul. No. 1, 5, 24 (1923).

[75] The term was taken from Wade, Notice 72 (2d ed. 1886); Bigelow, Fraudulent Conveyances 598 (2d ed. 1911). It also occurs in 2 Pomeroy, Equity Jurisprudence 1007, 1018, 1022, 1043, 1046, 1051, 1109, 1110 (1905), to denominate a notice that cannot be destroyed by any proof as to want of knowledge. See also Coy v. Gaye, 84 S.W. 441, 443 (Tex. Civ. App. 1904).

[76] See Seavey, *op. cit. supra* note 73, 5.

[77] *Id.*, at 2.

[78] *Id.*, at 3.

[79] See Restatement, Agency (Tent. Draft No. 5), c. 12 (1930).

act, whether that act be formally bringing home information of a fact or posting a placard on a fence.[80]

This analysis avoids the criticism that it has been necessary to make concerning the earlier systems. How splendidly it is adapted to stating the legal rules governing notice may be seen in the chapter on notice through agents in the Agency Restatement.[81] However, with all deference to the authority from which it emanates, it appears to me capable of improvement in certain respects.

In the first place, I would suggest a revival of the division of notice into two (not three) parts. This division I would make, not on the basis of the cleavage between notification on the one hand and knowledge and its related concepts on the other, but on the basis of a distinction between the situations in which notice is dependent upon the noticee's awareness, at the time the notice is to be effective, of the facts constituting it, and those in which it is not thus dependent. For the latter, I would revive the term applied by Professor Seavey in 1916 to what he has called notification in the Restatement, i.e. absolute notice.[82] The former, in default of a more euphonious designation, I venture to call by the barbarous name of cognitive notice. The desirability of this classification rests upon the fact that there are one or two situations in the law of notice that I believe can best be explained by such a classification.

The first situation involves what, for want of better words, I have termed unforgettable knowledge. While ordinarily, where knowledge or reason to know is involved, as distinguished from notification, one is bound by notice only so long as he holds in memory the facts by which he is to be affected,[83] there are certain situations in which the law will not

[80] "(1) A person has notice of a fact if he or his agent knows the fact, has reason to know it, should know it, or has been given a notification of it.

(2) A person is given notification by another if the latter (a) informs him of the fact or of other facts from which he has reason to know or should know the fact; or (b) does an act which, under the rules applicable to the transaction, has the same effect on the legal relations of the parties as the acquisition of knowledge." Restatement, Agency § 9 (1933). The comment to this section explains the meaning of the terms employed at some length, but I believe my statement in the text fairly reflects the meaning of this analysis.

[81] Restatement, Agency, c. 8 (1933).

[82] See Seavey, Notice through an Agent, 65 U. Pa. L. Rev. 1, 2 (1916).

[83] Phoenix Ins. Co. v. Flemming, 65 Ark. 54, 44 S.W. 464, 39 L.R.A. 789, 67 Am. St. Rep. 900 (1898); Goodwin v. Dean, 50 Conn. 517 (1883); Cox v. Milner, 23 Ill. 476 (1860); Gray v. Woods, 4 Blackf. (Ind.) 432 (1837); Lytle's Ex'r v. Pope's Adm'r, 11 B. Mon. (Ky.) 297 (1851); Parker v. Prescott, 86 Me. 241, 29 Atl. 1007 (1894); Wheelock v. Postal Tel. Cable Co., 197 Mass. 119, 83 N.E. 313, 14 Ann. Cas. 188 (1908); Norton v. Metropolitan Life Ins. Co., 74 Minn. 484, 77 N.W. 298, 300 (1898); Tong. v. Matthews, 23 Mo. 437 (1856); Green v. Morgan, 21 Atl. 857 (N.J. Ch. 1891); Larson v. Clough, 55 N.D. 634, 214 N.W. 904 (1927);

let a man forget what once he knew. The cases are too numerous for detailed treatment here but a few examples may be given to illustrate the point. In a state following the majority rule refusing to impose liability upon a banker for misappropriations by a fiduciary-depositor merely because the deposit was created by a check drawn or indorsed by the fiduciary in his trust capacity,[84] a duty is imposed upon the bank to remember the source of the deposit. It cannot accept payment therefrom of the fiduciary's individual debt to it.[85] If it does so, in some jurisdictions it must thereafter remember the misappropriation and is charged with liability for all money wrongfully disbursed by the fiduciary from that date.[86] Knowledge acquired in connection with the first of a series of transactions is held very frequently to affect the person acquiring it in his conduct of business later in the series, although lapse of time or other factors indicate that it is no longer held in memory.[87] A party to a lawsuit cannot toll the time for attacking a decision whose rendition occurred in his presence and hearing by forgetting about what was done.[88] In various situations the importance of information acquired seems to lead the court to deny one the privilege of plunging insouciantly into Lethean waters.[89] In all these cases the notice springs from knowledge possessed at one time by the party charged, not from any act performed to affect him with notice. Hence it is impossible to account for them upon the

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Morris v. Daniels, 35 Oh. St. 406 (1880); Epley v. Witherow, 7 Watts (Pa.) 163 (1838); Merchants' & Planters' National Bank v. Clifton Mfg. Co., 56 S.C. 320, 33 S.E. 750 (1899); Kirklin v. Atlas Sav. & L. Ass'n, 60 S.W. 149 (Tenn. Ch. App. 1900); Stephens v. Herron, 99 Tex. 63, 87 S.W. 326, 1144 (1905); Vest v. Michie, 31 Grat. (Va.) 149, 31 Am. Rep. 722 (1878).

[84] See Scott, Participation in a Breach of Trust, 34 Harv. L. Rev. 454 (1921); Merrill, Bankers' Liability for Deposits of a Fiduciary to His Personal Account, 40 Harv. L. Rev. 1077 (1927).

[85] United States F. & G. Co. v. Union Bank, 228 Fed. 448 (C.C.A. 6th 1915); Haase v. Danisch, 268 Ill. App. 281 (1932); Allen v. Puritan Trust Co., 211 Mass. 409, 97 N.E. 916, L.R.A. 1915C, 518 (1912).

[86] Bischoff v. Yorkville Bank, 218 N.Y. 106, 112 N.E. 759, L.R.A. 1916F, 1059; Harden v. State Bank of Goldendale, 118 Wash. 234, 203 Pac. 16 (1922).

[87] National Bank of North America v. Thomas, 30 R.I. 294, 74 Atl. 1092 (1910); Springfield F. & M. Ins. Co. v. Whatley, 279 S.W. 287 (Tex. Civ. App. 1925).

[88] Gulf Production Co. v. Palmer, 230 S.W. 1017 (Tex. Civ. App. 1921).

[89] Runyon v. Smith, 18 Fed. 579 (C.C. Mich. 1883); Christie v. Sherwood, 113 Cal. 526, 45 Pac. 820 (1896); Cushman v. Illinois Starch Co., 79 Ill. 281 (1875); Greenlee v. Smith, 4 Kan. App. 733, 46 Pac. 543 (1896); Bank of America v. McNeil, 10 Bush (Ky.) 54 (1873); Rossman v. Ward, 210 Mich. 426, 178 N.W. 41 (1920); Bramhall v. Hutchinson, 42 N.J. Eq. 372, 7 Atl. 873 (1886); Susquehanna Line v. Auditore, 223 App. Div. 585, 229 N.Y.S. 181 (1928); Teutonia Ins. Co. v. Bussell, 48 S.W. 703 (Tenn. Ch. App. 1897).

familiar ground that the effectiveness of notification, once given, is not destroyed by subsequent forgetfulness.[90] The only adequate explanation seems to be that in these situations a policy of the law, based on that standard of reasonable conduct upon which juristic science so frequently leans, forbids people to lapse into carefree inattention.[91]

This concept of unforgettable knowledge appears to have some usefulness in dealing with a vexed problem in the law of agency, to-wit, how far a principal is affected, in his present transactions, by the knowledge of a former agent no longer in his employ.[92] If the information received by the agent is such that the principal, receiving it himself, could safely forget it, he should not be bound by the knowledge of one no longer his agent.[93] In such a case, if the agent, continuing in the employment, had forgotten his former learning, the principal would not be affected;[94] it would be most inconsistent to deny a similar effect to the agent's quitting his job. On the other hand, if the knowledge is of the unforgettable variety, the principal, being affected by the agent's acquisition thereof, can hardly be relieved by the subsequent close of their relations.[95] As frequently happens in close cases, not all the decisions can be reconciled with this analysis, but it seems to me a more satisfactory way of explaining the greater part of them than to make it rest upon the existence or non-existence of a duty to reveal the information acquired.[96] The presence or absence of the duty may be important in determining whether the agent's knowledge affects the principal with notice at all;[97] the continu-

[90] See cases cited note 29 *supra*.

[91] For a more detailed examination of the cases of unforgettable knowledge, see Merrill Unforgettable Knowledge, 34 Mich. L. Rev. 474 (1936).

[92] The difficulties of the subject may be appreciated by looking at the toilsome examination thereof in 73 A.L.R. 416 (1931).

[93] *In re* Hereford, 229 Fed. 863 (D.C. W.Va. 1916); Murray v. Preferred Acc. Ins. Co., 199 Ia. 1195, 201 N.W. 595 (1925); Hackett v. Catholic Benev. Legion, 168 N.Y. 588, 60 N.E. 1112 (1901).

[94] *In re* Hereford, 229 Fed. 863 (D.C. W.Va. 1916); Strohecker v. Mutual B. & L. Ass'n, 55 Nev. 350, 34 P. (2d) 1076 (1934).

[95] Birmingham Trust & Savings Co. v. Louisiana National Bank, 99 Ala. 379, 13 So. 112, 20 L.R.A. 600 (1892); Iowa Universalist Convention v. Howell, 218 Ia. 1143, 254 N.W. 848 (1934); Loring v. Brodie, 134 Mass. 453 (1883); United States National Bank v. Forstedt, 64 Neb. 855, 90 N.W. 919 (1902).

[96] See Restatement, Agency § 275, comment *e* (1933) for a solution of the problem on this basis.

[97] This seems to be the explanation of Blackburn v. Vigors L.R., 12 App. Cas. 531, 13 Eng. Rul. Cas. 514 (1887), apparently the source of the second illustration given in support of the comment in the Restatement of Agency cited *supra* note 96. It likewise explains such cases as Irvine v. Grady, 85 Tex. 120, 19 S.W. 1028 (1892).

ance of the notice after cessation of the employment should depend upon whether the principal, himself possessing full knowledge, would be bound to hold it in memory.

It may be suggested that the category of unforgettable knowledge as here outlined is merely the concept treated in the Restatement of Agency under the title of "should know."[98] That suggestion does not seem acceptable. The examples given under that heading clearly indicate that the framers of the Restatements had in mind situations wherein one is under a duty to others to acquire knowledge. In unforgettable knowledge situations, *per contra*, there is normally no duty to acquire knowledge in the first place;[99] the obligation is to retain it after it has been received.

There is this likeness between the "should know" and the unforgettable knowledge situations, that both cast notice upon the person affected without regard to whether he is, at the time, aware of the matters with notice of which he is charged. For this reason I would place them, along with notification, under the rubric of absolute notice.

Another point in connection with which the distinction between cognitive and absolute notice seems to be useful is illustrated by cases like *Merchants' National Bank v. Detroit Trust Company*.[100] In most cases, if A formally communicates to B his claim to certain property, for the express purpose of warning B to govern his action accordingly, B thereafter cannot by purchasing the property cut out A's claim, though B may in fact have forgotten the warning.[101] In other words, such a formal communication is a notification to B of A's rights. Where commercial instruments, such as negotiable bonds, are involved, however, most courts hold that if B forgets that he has been informed by A of the latter's claim he may purchase without being affected thereby.[102] Whether these cases, resting upon a supposed policy in favor of the freedom of business men and investors to acquire such paper, are "sound" may be open to doubt,[103] but

[98] Restatement, Agency § 9, comment *d* (1933).

[99] See the cases cited notes 84–89 *supra*.

[100] 258 Mich. 526, 242 N.W. 739, 85 A.L.R. 350 (1932).

[101] Smith v. J. R. Newberry Co., 21 Cal. App. 432, 131 Pac. 1055 (1913); Hookaia v. Kealoha, 30 Haw. 446 (1928); Kithcart v. Kithcart, 145 Ia. 549, 124 N.W. 305, 30 L.R.A. (N.S.) 1062 (1910); see Whitecotton v. Wilson, 197 S.W. 168 (Mo. App. 1917); Parker v. Prescott, 86 Me. 241, 29 Atl. 1007, 1008 (1894).

[102] Merchants' National Bank v. Detroit Trust Co., note 100 *supra;* Seybel v. National Currency Bank, 54 N.Y. 288, 13 Am. Rep. 583 (1873); Lord v. Wilkinson, 56 Barb. (N.Y.) 593 (1870); and see Vermilye v. Adams Express Co., 21 Wall. (U.S.) 138, 146, 22 L. Ed. 609, 612 (1875). *Contra:* Northwestern National Bank v. Madison & Kedzie State Bank, 242 Ill. App. 22 (1926); *cf.* Hinckley v. Union Pac. R.R., 129 Mass. 52, 37 Am. Rep. 297 (1880).

[103] See Merrill, The Wages of Indifference, 10 Temple L. Q. 147 (1936).

they are there and must be fitted into our classification. One way would be simply to say that they treat A's attempted notification as being no more than knowledge, but it seems to me to make matters a little clearer if we focus attention upon the fact that A's communication was definitely for the purpose of notifying B concerning A's claim. We can do this by saying that the communication is a notification which need not be remembered, grouping it, together with knowledge and inquiry-arousing facts under the title cognitive notice.

For these reasons, I prefer to analyze the concept of notice according to the following classification:

I. *Cognitive Notice*
   A. Knowledge
   B. Facts putting one on inquiry (reason to know)
   C. Notification which need not be remembered

II. *Absolute Notice*
   A. Notification
      1. by formal communication
      2. by performance of an act giving notice (i.e. recording, publication, posting, legislation, juristic formulation of legal rules, etc.)
   B. Unforgettable Knowledge
   C. Facts which One is Under Duty to Know

This scheme is put forward with diffidence, in respect to those details wherein it differs from that set out in the Restatement of Agency, but, to one mind at least, it appears to offer advantages over the latter.