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A Study in the Law of Notice

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IN ANOTHER article,[1] the writer had occasion to analyze the concept of notice. He there called attention to the fact that in some instances the existence of notice depends upon awareness by the person to be charged, either of the ultimate facts or of circumstances placing him upon inquiry thereof, while in other cases notice exists entirely independent of such awareness. To characterize notice of the first class he suggested the term "cognitive notice," applying to the latter the designation "absolute notice."

Ordinarily, notice derived from facts coming to one's knowledge falls within the first category. Unlike notice arising from a formal notification or statement of claimed rights, which is given once for all and remains effective despite the forgetfulness of the one notified,[2] it has potency only so long as it is recollected. "The law does not presume that what is once known will always be present in memory." [3] Our reports bristle with illustrations of this principle. Perhaps most numerous are the cases wherein persons who once knew of an outstanding claim to land but had forgotten it at the date of purchase are permitted to acquire an unimpeachable title.[4] The same rule has been applied to

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[1] See Merrill, "The Anatomy of Notice," 3 UNIV. CHI. L. REV. — (1936).

[2] Mechanics' Bank v. Seton, 1 Pet. (26 U. S.) 299, 7 L. Ed. 152 (1828); Smith v. J. R. Newberry Co., 21 Cal. App. 432, 131 P. 1055 (1913); Fidelity Stor. Co. v. Kingsbury, 64 App. D. C. 208, 76 F. (2d) 978 (1935); Kithcart v. Kithcart, 145 Iowa 549, 124 N. W. 305, 30 L. R. A. (N. S.) 1062 (1910); Brumfield v. Union Ins. Co., 10 Ky. L. Rep. 13, 7 S. W. 893 (1888); Bickford v. Aetna Ins. Co., 101 Me. 124, 63 A. 552, 8 Ann. Cas. 92 (1906); Hinckley v. Union Pac. R. R., 129 Mass. 52, 37 Am. Rep. 297 (1880); Schlater v. Winpenny, 75 Pa. 321 (1874); Farley v. Spring Garden Ins. Co., 148 Wis. 622, 134 N. W. 1054 (1912); Peck v. Hartford Acc. & Ind. Co., 207 Wis. 344, 241 N. W. 372 (1932).

[3] McMeans, J., in Fire Association of Philadelphia v. La Grange and Lockhart Compr. Co., 50 Tex. Civ. App. 172 at 177, 109 S. W. 1134 at 1137 (1908).

[4] Goodwin v. Dean, 50 Conn. 517 (1883); Gray v. Woods, 4 Blackf. (Ind.) 432 (1837); White v. Fisher, 77 Ind. 65, 40 Am. Rep. 287 (1881); Foulks v. Reed, 89 Ind. 370 (1883); Farmers' Bank v. Butterfield, 100 Ind. 229 (1884); Lytle's Exr. v. Pope's Admr., 11 B. Mon. (50 Ky.) 297 (1851); Parker v. Prescott, 86 Me. 241,

personalty.[5] A sheriff is not required to remember a deed issued by him in determining, at a subsequent time, who is entitled to receive a tax notice.[6] Information concerning title to insured property, once known to an insurance agent, does not bind his principal unless remembered at the time the insurance is written.[7] Other instances wherein knowledge casually gained and as casually forgotten has been held not to bind one in subsequent business include information relative to the dissolution of a partnership,[8] knowledge that corporate stock had been issued below par, as affecting a creditor's right to require payment of the deficit,[9] a report reaching an insurance agent of the illness of one to whom, apparently in good health, he later delivered an insurance policy,[10] information to the first mortgagee concerning a second mortgage on part of the land, as against a claim that the portion covered by the second mortgage was released by a subsequent extension of time on the first mortgage,[11] casual knowledge of misconduct on the part of a stranger with whom no business dealings are in contemplation,[12] and casual information concerning business matters in which one then had no interest.[13]

In these cases, and in many others, the determinative factor, to the judicial mind, seems to be the very serious clog upon useful business

29 A. 1007 (1894); Tong v. Matthews, 23 Mo. 437 (1856); Strohecker v. Mutual Ben. & L. Assn., 55 Nev. 350, 34 P. (2d) 1076 (1934); Green v. Morgan, (N. J. Ch. 1891) 21 A. 857; Morris v. Daniels, 35 Ohio St. 406 (1880); Epley v. Witherow, 7 Watts (Pa.) 163 (1838); Boggs v. Varner, 6 Watts & Serg. (Pa.) 469 (1843); Kirklin v. Atlas Sav. & L. Assn., (Tenn. Ch. App. 1900) 60 S. W. 149; Vest v. Michie, 31 Grat. (72 Va.) 149, 31 Am. Rep. 722 (1878); Morrison v. Bausemer, 32 Grat. (73 Va.) 225 (1879); see Ogden v. Haven, 24 Ill. 57 (1860).

[5] Gibbens v. Nipp, 80 Wash. 332, 141 P. 689 (1914); see Merchants' Nat. Bank v. Detroit Tr. Co., 258 Mich. 526 at 536, 242 N. W. 739 at 743, 85 A. L. R. 350 at 356 (1932).

[6] Larson v. Clough, 55 N. D. 634, 214 N. W. 904 (1927).

[7] Phoenix Ins. Co. v. Flemming, 65 Ark. 54, 44 S. W. 464, 39 L. R. A. 789, 67 Am. St. Rep. 900 (1898); Continental Ins. Co. v. Cummings, (Tex. Civ. App. 1906) 95 S. W. 48; Virginia F. & M. Ins. Co. v. Lennon, 140 Va. 766, 125 S. E. 801, 38 A. L. R. 186 (1924). *Contra*: Hartford Fire Ins. Co. v. Haas, 87 Ky. 531, 9 S. W. 720, 2 L. R. A. 64 (1888).

[8] See In re Hereford, (D. C. W. Va. 1916) 229 F. 863 at 864.

[9] Mathis v. Pridham, 1 Tex. Civ. App. 58, 20 S. W. 1015 (1892); *contra*, Watt v. German Sav. Bank, 183 Iowa 346, 165 N. W. 897 (1917).

[10] Equitable Life Assur. Soc. v. Cantwell, 4 Tenn. App. 627 (1927).

[11] Norton v. Metropolitan Life Ins. Co., 74 Minn. 484, 77 N. W. 298 (1898).

[12] Merchants' & Planters' Nat. Bank v. Clifton Mfg. Co., 56 S. C. 320, 33 S. E. 750 (1899).

[13] International Fin. Co. v. Magilansky, 105 Pa. Super. 309, 161 A. 613 (1932); Stephens v. Herron, 99 Tex. 63, 87 S. W. 326, 1144 (1905).

activity imposed by charging one throughout his lifetime with all information once possessed. "Miserable would be the condition of recorders if they were required . . . to take notice of and bear in mind the contents of every deed they copied." [14] "Parties engaged in business cannot be required to store away in their memories all facts which they learn, so as to be able to call them up at any time in the future, to affect other transactions than that in which the knowledge was acquired." [15] "It would result in the ruination of every corporation in the land." [16]

This, then, is the general rule: notice resting on knowledge, as distinguished from notification, remains effective only so long as the information creating it is held in memory. There are in the reports, however, a number of cases reaching results not in harmony with this rule. In these cases notice is not derived from some formal act by a third party performed for the purpose of creating notice. It is not, therefore, properly classifiable as notification.[17] It is notice resting on knowledge. Nevertheless, it is held that the notice continues effective although, at the time when it is operative, the person affected has forgotten the facts out of which it arises. In other words, knowledge of this type is, in law, unforgetable.

As yet there seems to be no unified judicial theory behind the cases holding a person bound by information once known but since forgotten. The concept of what may be termed "unforgetable knowledge" has not received general recognition. The cases deal each with the narrow point in issue, often inarticulately. Sometimes opposite results are reached in different jurisdictions. Consequently, it seems worth while to examine the cases in some detail in an attempt to determine the foundation and the utility of the doctrine.

In an early Kentucky case, *Hunt v. Clark's Admr.*,[18] information of a lien upon land was given to one later taking a mortgage thereon, in connection with negotiations for a purchase "which terminated in the execution of the mortgage." [19] The court, giving credence to his asserted

[14] Tong v. Matthews, 23 Mo. 437 at 438 (1856).

[15] Mathis v. Pridham, 1 Tex. Civ. App. 58 at 88, 20 S. W. 1015 at 1024 (1892).

[16] Strohecker v. Mutual Ben. & L. Assn., 55 Nev. 350 at 356, 34 P. (2d) 1076 at 1077 (1934).

[17] AGENCY RESTATEMENT, § 9 (2) (1933): "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."

[18] 6 Dana (36 Ky.) 57 (1837).

[19] Hunt v. Clark's Admr., 6 Dana (36 Ky.) 57 at 59 (1837).

forgetfulness, said that it "was his own misfortune." [20] Under the circumstances any person having even a rudimentary sense of decent regard for the rights of others would have retained this information in mind while the transaction was impending. It need astonish no one that the court held him to the observance of so elementary a rule of honesty. A recent Michigan case is quite similar.[21]

Insistence upon holding in memory matters seriously affecting the interests of others until the conclusion of a transaction or a series of continuing transactions appears to furnish the key to a number of other cases. One is required to remember what must be done to fulfill one's contractual obligations. Thus an assignor of notes secured by a lien on land is charged with notice of the lien's continued existence when he later purchases the land, although the time elapsing—seven years—indicates that he has forgotten the incident.[22] To take the land free of the lien would destroy the interest previously conveyed, which the vendor should respect. Hence he may not, legally, forget the lien. A similar principle seems to be involved in charging an insurance company issuing a renewal policy with the knowledge possessed by its agents when the original policy was executed.[23]

Lending transactions furnish other examples of the duty to remember important facts until the business is complete. In *National Bank of North America v. Thomas*,[24] an applicant for a loan, in explaining his inability to give security, mentioned that certain realty to which he held record title had been conveyed by an unrecorded deed to his wife. The bank nevertheless made the loan, and the debt remaining unpaid, at-

[20] Ibid.

[21] Rossman v. Ward, 210 Mich. 426, 178 N. W. 41 (1920) (purchaser of automobile claimed to have forgotten information of another's interest, received two weeks previously in negotiations for purchase).

[22] Ormes v. Weller, 21 Ky. L. Rep. 763, 52 S. W. 937 (1899). A similar case is Iowa Universalist Conv. v. Howell, 218 Iowa 1143, 254 N. W. 848 (1934); but cf. Germer v. Donaldson, (C. C. A. 3d, 1927) 18 F. (2d) 697.

[23] Springfield F. & M. Ins. Co. v. Whatley, (Tex. Civ. App. 1925) 279 S. W. 287; cf. Schmitt v. Massachusetts Protective Assn., 170 Minn. 60, 212 N. W. 5 (1927).

What about knowledge (as distinguished from notification) acquired by a debtor concerning an assignment of the claim against him? In Phelps v. Holden, (Vt. 1934) 175 A. 250 at 251, the court said by way of dictum, "A notice may be sufficient even though it consists of casual information given by the assignee, or by his procurement, for no definite purpose." The authority cited, Dale v. Kimpton, 46 Vt. 76 at 79 (1873), seems to have no bearing upon our problem. It may well be that such knowledge will be held by the courts to be unforgetable until the termination of the transaction, that is, until discharge of the obligation assigned.

[24] 30 R. I. 294, 74 A. 1092 (1910).

tached the land. The validity of the levy depended upon whether, at the time of the attachment, the bank was chargeable with notice of the wife's title. The only officer of the bank to whom this information had been imparted had severed his connection with the institution. Nevertheless, the bank was charged with notice. For reasons discussed later, this result can be upheld only upon a theory that had the lender been a natural person, directly engaged in the transaction, he would not have been able to cut out the wife's interest by his attachment though he had completely forgotten his previous knowledge.[25] Similar results have been reached in charging a bank, when taking a renewal note, with a former officer's knowledge of the want of authority of the person negotiating the original loan,[26] and with liability for usury where the facts making the transaction usurious were known only to persons representing the bank at the inception of the loan but not in its employ when the interest was collected.[27] In all these cases the fact to be remembered is so important in its bearing upon the interests of others that one actuated by a reasonably decent respect for others' welfare would charge himself with remembrance until the transaction closed.

Another illustration is found in those cases where a person, knowing a fiduciary's disloyalty to his principal, continues to deal with him in a series of transactions of the same type, so closely spaced that a man of ordinarily decent sensibility would remember the past improbity from one time to the next and so be led to inquire as to the continuance of the dishonest practice.[28]

Closely related are cases involving a banker's liability for fiduciary funds deposited in the fiduciary's personal account. While the weight of numerical authority—as distinguished from the weight of commendable authority [29]—absolves the banker from liability for merely per-

[25] See pp. 488-492, infra. This is particularly shown by the fact that the former officer to whom the knowledge had been imparted, testifying at the trial, denied any recollection of the alleged information. 30 R. I. 294 at 298, 74 A. 1092 at 1094. Therefore, had he remained in the bank's employ, there would have been no knowledge of the state of the title attributable to any of its agents at the time of the attachment. To hold the bank affected by his former knowledge is to insist that that knowledge is unforgetable.

[26] Reid v. Linder, 77 Mont. 406, 251 P. 157 (1926).

[27] United States Nat. Bank v. Forstedt, 64 Neb. 855, 90 N. W. 919 (1902).

[28] New England Tr. Co. v. Farr, (C. C. A. 1st, 1932) 57 F. (2d) 103, cert. denied 287 U. S. 612, 53 S. Ct. 14 (1932); Loring v. Brodie, 134 Mass. 453 (1883); New England Tr. Co. v. Bright, 274 Mass. 407, 174 N. E. 469, 73 A. L. R. 416 (1931); Harper v. Merchants' & Planters' Nat. Bank, (Tex. Civ. App. 1934) 68 S. W. (2d) 351.

[29] For citation of authorities and discussion of the merits of the opposing views, see

mitting a fiduciary to place to his personal credit the proceeds of checks whose face indicates their fiducial character, he does assume certain burdens by such acceptance. He cannot accept payment of the fiduciary's own debt from the personal account at a time when its state is such that the payment must come out of the trust money.[30] Likewise, according to the greater number of decisions, if he does take such a payment he becomes liable for aiding any misapplications thereafter made by the fiduciary through honoring checks drawn on the personal account, though not cognizant of the improper uses to which the checks are devoted.[31] The cases cited have been those wherein an appreciable period of time has elapsed. There is no requirement that continued memory be shown. The effect of the decisions, therefore, is to make the presence of fiducial funds in the personal account a matter of unforgetable knowledge, which the banker may dismiss from his attention only at his peril. The judicial attitude is that a banker, knowing trust money has been put in a personal account, should in common decency charge himself so long as the account continues in his bank with seeing that he does not assist in a misappropriation, and that, if he knows of one misapplication, it is his duty to bear that in mind as a ground for suspecting every subsequent withdrawal.[32]

an article by the present writer entitled "Bankers' Liability for Deposits of a Fiduciary to His Personal Account," 40 HARV. L. REV. 1077 (1927).

[30] Conqueror Tr. Co. v. Fidelity & Deposit Co., (C. C. A. 8th, 1933) 63 F. (2d) 833; Carroll County Bank v. Rhodes, 69 Ark. 43, 63 S. W. 68 (1900); Miami County Bank v. State, 61 Ind. App. 360, 112 N. E. 40 (1916); Haase v. Danisch, 268 Ill. App. 281 (1932); Tingley v. North Middlesex Sav. Bank, 266 Mass. 337, 165 N. E. 119 (1929); Wegerslev v. Midland Nat. Bank & Tr. Co., 184 Minn. 393, 238 N. W. 792 (1931); Bischoff v. Yorkville Bank, 218 N. Y. 106, 112 N. E. 759 (1916); First Nat. Bank v. Peisert, 2 Penny (Pa.) 277 (1882) (knowledge that money deposited to individual credit was trust fund); Interstate Nat. Bank v. Claxton, 97 Tex. 569, 80 S. W. 604, 65 L. R. A. 820, 104 Am. St. Rep. 885 (1904). See Burkhalter v. People's Bank, 175 Ga. 744, 165 S. E. 749, 751 (1932); Berg v. Union St. Bank, 179 Minn. 191, 193, 229 N. W. 102, 103 (1930). Cf. Susquehanna Line v. Auditore, 223 App. Div. 585, 229 N. Y. S. 181 (1928) (information indicating claim that corporate deposit belonged to another than the one to whom check which bank honored was payable).

[31] Fidelity & Deposit Co. v. Farmers' Bank, (C. C. A. 8th, 1930) 44 F. (2d) 11; Martin v. First Nat. Bank, (D. C. Minn. 1931) 51 F. (2d) 840; Bischoff v. Yorkville Bank, 218 N. Y. 106, 112 N. E. 759 (1916); Harden v. State Bank of Goldendale, 118 Wash. 234, 203 P. 16 (1922). See U. S. Fidelity & G. Co. v. Adoue & Lobit, 104 Tex. 379, 395, 137 S. W. 648, 138 S. W. 383 (1911). *Contra*: Allen v. Puritan Tr. Co., 211 Mass. 409, 97 N. E. 916 (1912).

[32] The matter is clearly put by Thompson, J., in the following language: "With the beginning of the deposit by Klink of checks drawn by him as treasurer of the water district accounts in the Union Trust Company and Merchants' Bank in his individual account in defendant bank, knowledge came to the bank that the funds which it so re-

Particular business methods may prolong a transaction which otherwise might be regarded as having come to an end, thus requiring knowledge to be kept in memory.[33]

A reasonable expectation of future business relations may bring the doctrine of the continuing transaction into play. Although the case is none too clear, this may be the explanation for *Cushman v. Illinois Starch Co.*,[34] apparently holding, without regard to the fact of continued awareness, that knowledge by a bank of a change in officers of a corporate depositor is effective for future transactions. In *Carnal v. W. B. Thompson & Co.*,[35] a cotton factor's financial statements, submitted to a bank for several years, showed that he owned no cotton and that he had pledged customer's cotton for his own borrowings. In making a loan secured by a pledge of cotton at a subsequent date, the bank was held charged with the knowledge obtained from the earlier statements. A somewhat similar case is *Christensen v. St. James Farmers' Grain Co.*[36] Grain was shipped by a country elevator to a commission merchant to be sold, with information that it had been stored in the local elevator by farmers. The proceeds were credited to the country elevator, whose account with the commission merchant then showed a balance due the latter. Later shipments were made, to be handled the same way, but without specific information to the commission merchant concerning the title thereto. The commission house was held liable to the owners of this grain. The court pointed out that the first transaction constituted a misappropriation by the elevator, to the factor's knowledge, and said that the principle of the banking cases was applicable, citing *Bischoff v. Yorkville Bank.*[37] It must be noted, how-

ceived and credited were trust funds. When the bank received a check of Klink's in payment of an indebtedness of his to it, and his account did not contain sufficient personal funds to meet the check, the bank derived direct knowledge that a part of the payment was made from moneys of the water district, and that the treasurer had converted it to his own use. The bank thus became a party to the misappropriation of the trust funds and an active participant in their diversion. Having acquired knowledge, first, that the account was composed of trust funds, and, second, that the depositor had wrongfully converted a part of such funds to his own use, defendant bank no longer had the right to assume that the depositor would use the moneys that he withdrew, lawfully." Gilliland v. Lincoln-Alliance Bank & Tr. Co., 239 App. Div. 68 at 70, 264 N. Y. S. 799 at 782 (1933), aff'd. per curiam, 264 N. Y. 517, 191 N. E. 543 (1934).

[33] Clay v. Liberty Industrial Life Ins. Co., (La. App. 1934) 157 So. 838 (holding an insurer charged with knowledge of an earlier policy issued by it when the later policy stipulated against liability if the insured held a prior policy in the company).

[34] 79 Ill. 281 (1875).

[35] 16 La. App. 192, 132 So. 149 (1931).

[36] 190 Minn. 299, 251 N. W. 686 (1933).

[37] 218 N. Y. 106, 112 N. E. 759 (1916).

ever, that in the banking cases there is a continuing transaction, due to the presence of the trust money in the fiduciary's personal account, while here each shipment of grain was an independent occurrence. The basis for a duty to remember what was disclosed concerning the first shipment must therefore be found in the factor's reasonable expectation that others would follow.

In this category of a duty to remember information bearing upon business relations reasonably foreseeable may be placed the dictum in *Union Bank v. Campbell* [38] that information (not notification) of the dissolution of a partnership will be effective despite forgetfulness of the recipient.

It is not indispensable to unforgetable knowledge that it relate to matters embraced in a continuing transaction or series of transactions. In a number of cases the duty to remember seems to rest chiefly upon the imminent danger of injury to important interests of others which the party charged should reasonably expect would be the result of failing to retain knowledge.

In *Hutchinson v. Bramhall* [39] a judgment creditor released his lien to enable the debtor to borrow money on the land covered thereby. The mortgage was not recorded. At a date so much later that an assumption of continued memory as a matter of course hardly seems justified, the creditor took another judgment against the debtor. The unrecorded mortgage was given precedence over the second judgment. One ground of decision was that the creditor was "chargeable with knowledge of the . . . mortgage before he recovered his judgment. . . ." [40] The court entered upon no investigation of the creditor's remembrance of the transaction. To uphold the case, it seems necessary to say that the creditor should have charged himself with holding in mind the outstanding claim of the lender, induced in part by his own act, and with refraining from action calculated to interfere therewith.[41]

[38] 4 Humph. (23 Tenn.) 394 (1844).

[39] 42 N. J. Eq. 372, 7 A. 873 (Err. & App. 1886).

[40] 42 N. J. Eq. 372 at 387, 7 A. 873 at 877 (1886).

[41] In Sound Credits Co. v. Powers, 100 Wash. 688, 171 P. 1031 (1918), a party procured the continuance of a hearing in a motion to a day certain. To a ruling made on that day he objected that he had been given no notification that the motion would then be heard. The court said that, the hearing having been continued to that date on his own request, he could not claim a want of notice. *Quære*: does this rest upon an inference of continued knowledge, the intervening time being little over a month, or is it an example of a duty to remember action taken at one's own instance?

Bank of America v. McNeil, 10 Bush. (73 Ky.) 54 (1874), is somewhat similar to Hutchinson v. Bramhall, 42 N. J. Eq. 372, 7 A. 873 (1886), supra, note 39.

In *Christie v. Sherwood* [42] the court held that a bank representing the mortgagee in making a loan and taking a mortgage upon property "was bound to recollect the prior loan at the time [twenty-seven months later] when it subsequently loaned its own money and took a mortgage upon the same property." [43] As the agent of the lender, the bank must have realized that a valuable interest of the lender would be destroyed if, through forgetfulness, the bank later became a bona fide incumbrancer of the land. Apparently the court felt a decently altruistic person would take care that his forgetfulness did not endanger this interest. A somewhat analogous case in Alabama was decided similarly.[44]

In some courts there is an apparent tendency to make unforgetable all knowledge involving property interests of others, particularly in respect to information of an outstanding claim to land. Opposed to the general rule that such information, forgotten at the time one buys, has no effect [45] are a number of decisions either expressly [46] or by necessary inference [47] standing for the proposition that, if the purchaser is

[42] 113 Cal. 526, 45 P. 820 (1896).

[43] 113 Cal. 526 at 531, 45 P. 820 at 821.

[44] Birmingham Tr. & Sav. Co. v. Louisiana Nat. Bank, 99 Ala. 379, 13 So. 112, 20 L. R. A. 600 (1892) (bank acting as agent in collecting proceeds of loan secured by pledge of its stock could not forget the pledge so as to give precedence to its own lien thereon for a subsequent loan.

[45] See cases cited supra, note 4.

[46] Runyon v. Smith, (C. C. Mich. 1883) 18 F. 579 (six years intervening — "They [the owners] are not driven to the impossibility of proving that he had not forgotten that information, and even if he had it was a mistake for which he should answer and not the plaintiffs"); Clark v. Lewis, 215 Mo. 173, 114 S. W. 604 (1908).

[47] Oliver v. Piatt, 3 How. (44 U. S.) 333, 11 L. Ed. 622 (1845) (knowledge of trust in land); Overall v. Taylor, 99 Ala. 12, 11 So. 738 (1892) (partner buying for self years after first transaction charged with knowledge of partner who originally bought for firm); McLennan v. McDonnell, 78 Cal. 273, 20 P. 566 (1889) (August to December, no evidence of continued memory of casual conversation unrelated to any business then contemplated); Crawford v. Chicago, B. & Q. R. R., 112 Ill. 314 (1884) (purchaser "*at one time*" had in his possession and read a deed showing title in another, no showing of memory); Greenlee v. Smith, 4 Kan. App. 733, 46 P. 543 (1896) (notary taking acknowledgment of deed charged with notice thereof when purchasing land thirty-one months thereafter); Boling v. Ewing, 9 Dana (39 Ky.) 76 (1839) (subscribing witnesses to deed charged with notice after seven years). McDaniel v. Stoval, 25 La. Ann. 495 (1873), is cited in the Century Digest, Mortgages, § 390, for the proposition that a witness to an unrecorded mortgage must be regarded as having "actual notice" thereof. If the case bore out this analysis, it should be added to the above list. However, it does not seem citable for that point. The court does not discuss the question of knowledge and puts its decision on the ground that the witness is not a "third person," citing La. Civ. Code, § 3343, requiring registration to validate instruments of this sort as against third persons and § 3342, defining third persons as "all persons who are not

shown once to have known of such a claim, want of memory thereof when acquiring his interest does not make him a bona fide purchaser. The Missouri court phrased the result of these cases aptly by saying that a purchaser's forgetfulness was immaterial, "for notice, once fixed upon him, was continuous from that time on." [48]

Two other cases are of close kinship to these decisions. *Teutonia Insurance Co. v. Bussell* [49] decided that one who, as mortgagee, had once held possession of an insurance policy conditioned to be void in case other insurance was effected could not be an innocent purchaser of a draft in settlement of a claim of loss arising on another policy, concurrent with the first and containing a similar provision. In *Watt v. German Savings Bank*,[50] a bank was charged with memory of casual information to its board of the issue of corporate stock without payment, so that, having later extended credit to the company, it could not recover from the stockholders upon their unpaid subscriptions.

Another interesting case is *Hughes v. Settle*.[51] *A*, as agent of *X*, loaned money to *B*, taking certain bonds as collateral security. *B* then assigned the bonds to *C* as security, subject to the pledge to *A*, and *C* notified *A*. *A* was also president of the *Y* Bank. At a later date, when, as the court specifically stated, *A* had forgotten the prior notification, he permitted *B* to sell the bonds and apply a portion of the surplus remaining after payment of the loan for which they were pledged to the retirement of a debt owed by *B* to the bank. The court held *A* and *X* liable to *C* for the difference between the value of the bonds and the amount due from *B* to *X*. It also held the bank liable for the sum received on its debt. So far as *A* and *X* are concerned, the case is clearly

parties to the act." Obviously, such reasoning has nothing to do with the question of knowledge.

[48] Clark v. Lewis, 215 Mo. 173, 114 S. W. 604 (1908). The opinion in this case does not cite, and the court takes no notice of the apparent inconsistency with, Tong v. Matthews, 23 Mo. 437 (1856). The cases are distinguishable in that the last-mentioned was an action for breach of warranty in which it was sought to increase the recovery by showing a fraudulent failure to disclose a known want of title by evidence that the vendor as a recorder had copied deeds by which others conveyed title to this tract. The court said this was "slight, if any evidence, of knowledge of a defect in his title" and continued with the homily on the miserable condition of recorders required to remember everything they copy, quoted supra at note 14.

[49] (Tenn. Ch. App. 1897) 48 S. W. 703.

[50] 183 Iowa 346, 165 N. W. 897 (1917). *Contra*, Mathis v. Pridham, 1 Tex. Civ. App. 58, 20 S. W. 1015 (1892).

[51] (Tenn. Ch. App. 1895) 36 S. W. 577 (affirmed orally by the Supreme Court, 1895).

supportable upon the principle that a notification is given once for all.[52] The bank's case, as Wilson, J., admits, "presents a question of more difficulty." [53] The notification was not given to *A* in his official capacity as president of the bank, nor was it intended to serve the purpose of warning the bank not to destroy *C's* interest in the bonds. The notification was to *A* in his capacity as agent of *X*. To the bank, it could amount to no more than knowledge possessed by its agent, forgotten when the bank accepted the proceeds of the bonds. If the decision on this point is supported, it must be on the ground that *A*, and the bank, knowing *C's* claim, owed him the duty to remember that information and to avoid even inadvertent interference with his interests.

These last three cases push the judicial enforcement of universal benevolence to an extreme point. They make it a legal duty to carry in mind information casually received concerning the property interests of others lest one inadvertently interfere with them in some hypothetical future transaction of the occurrence of which he has now not the slightest expectation. This is setting a higher standard of ethics than is now prevalent among business men and one which might well tax the best memories. Nevertheless, the cases we have just discussed well illustrate the point that knowledge may be legally unforgetable.

More easily defensible are cases imposing in favor of other persons a duty to remember those things which a prudent regard for one's own interest would lead one to keep in mind. Thus a grantee of land who remained silent in the face of negotiations for purchase from the record owner cannot avoid an estoppel upon the plea that he had forgotten his deed.[54] One hearing the decree rendered in a case to which he is a party cannot toll the statutory limitation within which action to set it aside may be commenced "by afterwards forgetting it." [55] A similar decision has been rendered with reference to knowledge of other facts entitling one to bring an action.[56]

In several insurance cases the keeping of records by the company for its own protection creates a duty toward applicants to resort to them for information pertinent to the application.[57] Inasmuch as these cases

[52] See cases cited, supra, note 2.

[53] See Hughes v. Settle, (Tenn. Ch. App. 1895) 36 S. W. 577 at 581.

[54] Stewart v. Crosby, (Tex. Civ. App. 1894) 26 S. W. 138 ("ordinary prudence would have required him to know of it").

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

[56] Sielcken-Schwarz v. American Factors, 265 N. Y. 239, 192 N. E. 307 (1934).

[57] O'Rourke v. John Hancock Mut. Life Ins. Co., 23 R. I. 457, 50 A. 834, 57 L. R. A. 496, 91 Am. St. Rep. 643 (1902); Mutual Life Ins. Co. v. Nichols, (Tex.

arise because there has been an inadvertent failure to remember information which has once been acquired and filed away, or to recall means of access to it, they are properly classified as involving unforgetable knowledge. Their basis lies in a duty toward others to remember what ordinary regard for one's own interests would lead one to keep in mind.[58] A similar principle appears to govern a case imposing knowledge of facts affecting title to land upon a purchaser having in his possession a letter revealing these facts.[59]

Where a failure to remember facts amounts to a breach of duty owed the public, one may not legally forget. This principle applies to tort liability for negligence,[60] to a notary improperly taking an acknowledgment and later seeking to establish his status as a bona fide purchaser,[61] and to an attorney whose duty it is to see that the judgment in the case in which he is engaged is entered correctly.[62]

The general principle established by the decisions appears to be that one is legally bound to remember that with which a man actuated by a reasonably decent regard for the prosperity of others would charge his memory. For the most part, the principle has remained unexpressed. Its most specific formulation occurs in the words of Carpenter, J., to the effect that "the law supposes that a man will act with due regard to his own interests, and requires him to act with due regard to the rights of others. A failure to do so would evince a willingness, if not a desire, to defraud his neighbor, or at least to get an advantage over him which would be inequitable and unjust." [63] But there is frequent use of such terms as "duty to recollect," [64] "bound to recollect," [65] "bound to

Civ. App. 1894) 24 S. W. 910, 26 S. W. 998; Pellon v. Connecticut General Life Ins. Co., 105 Vt. 508, 168 A. 701 (1933). *Contra,* Hackett v. Supreme Council, 44 App. Div. 524, 60 N. Y. S. 806 (1899), affd. 168 N. Y. 588, 60 N. E. 1112 (1901). In the last case, however, it seems that actually no record was kept.

[58] Cf. the dictum of Farwell, L. J., in London General Omnibus Co., Ltd. v. Holloway, [1912] 2 K. B. 72 at 84: "I am glad to assume that the plaintiffs had forgotten the clerk's previous defalcations, or that it did not occur to them to disclose those defalcations."

[59] Moloney v. Tilton, 22 Misc. 682, 51 N. Y. S. 19 (1897). Cf. Bank of Gilby v. Farnsworth, 7 N. D. 6, 72 N. W. 901, 38 L. R. A. 843 (1897).

[60] Bullock v. Town of Durham, 64 Hun. 380, 19 N. Y. S. 635 (1892).

[61] Rowley v. Braly, (Tex. Civ. App. 1926) 286 S. W. 241.

[62] Sabine Hardwood Co. v. West Lumber Co., (D. C. Tex. 1916) 238 F. 611, affd. on other grounds, 160 C. C. A. 263, 248 F. 123 (1918).

[63] See Goodwin v. Dean, 50 Conn. 517 at 519 (1883).

[64] See Parker v. Prescott, 86 Me. 241 at 243, 29 A. 1007 at 1008 (1894).

[65] See Christie v. Sherwood, 113 Cal. 526 at 531, 45 P. 820 at 821 (1896).

know," [66] "ought to have remembered." [67] The notion of a legally imposed duty of rememoration is well established. To base it upon the requirement of a decent regard for the interests of others seems to harmonize the cases and to be consistent with the judicial conception of the conduct of the standard man in other fields. The ordinarily prudent man in the law of negligence must also be possessed of ordinarily decent instincts. It is not enough that he foresee the danger of harm to others; the law also envisages him as so ordering his conduct as to evade that danger. In contract law, the adoption of the objective theory of interpretation is based upon the requirement that persons shall stand behind their promises in the way that a man of honor would do if, to a reasonable man, these promises convey a particular meaning.[68] The operation of the same principle in relational fields may be observed in judicial enforcement of implied covenants in oil and gas leases according to the standard of the conduct of operators of ordinary prudence, having regard to the interests of both lessor and lessee.[69] The doctrine of unforgetable knowledge is but the extension of this fundamental requirement to the law of notice.

As with all broad standards, narrower and more specific principles need to be worked out to govern its application. The survey heretofore made of the cases leads the author to suggest the following enumeration of the instances wherein the legal standard of reasonable conduct makes knowledge unforgetable:

1. Where the knowledge affects interests of others involved in a continuing transaction or series of transactions;

2. Where the knowledge may affect the interests of others in future business relations whose probable occurrence may reasonably be anticipated;

3. Where a reasonably intelligent man would foresee that his forgetfulness would create imminent danger of injury to important interests of others;

4. Where a prudent regard for one's own interests would lead to remembrance;

5. Where forgetfulness would result in breach of a public duty.

The summation necessarily is tentative; in all likelihood it is faulty.

[66] See Stewart v. Crosby, (Tex. Civ. App. 1894) 26 S. W. 138 at 140.
[67] See Goodwin v. Dean, 50 Conn. 517 at 519 (1883).
[68] See 2 WILLISTON, CONTRACTS, § 605 (1920).
[69] See MERRILL, COVENANTS IMPLIED IN OIL AND GAS LEASES, §§ 75, 76 (1923).

It is advanced in the hope that it may lead to that full and conscious consideration of the doctrine of unforgetable knowledge by bench and bar that is indispensable to its proper development. So long as it finds application in scattered cases whose relation to each other and to a unifying principle remains unrecognized, the doctrine's functions will be greatly restricted. Openly acknowledged as a standard of decision and subjected to the evolutionary processes of judicial technique it may form an important part of the body of our law of notice.[70]

The value of the concept of unforgetable knowledge is particularly illustrated by applying it to the vexed problem of notice to the principal by knowledge of a former agent or employee. When the information was known only to the agent, is the principal to be bound thereby at a time subsequent to the termination of the agent's employment?

So far as notification is concerned the matter is simple. The notification's effectiveness is dependent upon the receipt thereof by one having authority or apparent authority to accept notification on behalf of the principal.[71] Efficacious the minute it is given, it is not vitiated by the later death or demotion of the agent receiving it.[72]

Knowledge, however, presents a different picture. There are cases to be distinguished or reconciled, or else to be catalogued as conflicting. Yet until recent years there has been but little apparent recognition of the problem. Courts have contented themselves in knowledge cases with citing notification cases as authority for the proposition that notice continues despite discontinuance of employment.[73] Text writers have ignored the problem [74] or have contented themselves with statements applicable only to particular circumstances.[75]

[70] The value of concepts, properly employed, in the law is emphasized by Harris, "Idealism Emergent in Jurisprudence," 10 TULANE L. REV. 169 at 185 (1936).

[71] AGENCY RESTATEMENT, §§ 268-270 (1933).

[72] Mechanics' Bank v. Seton, 1 Pet. (26 U. S.) 299, 7 L. Ed. 152 (1828); Bland v. Shreveport Belt Ry., 48 La. Ann. 1057, 20 So. 284, 36 L. R. A. 114 (1896); Bickford v. Aetna Ins. Co., 101 Me. 124, 63 A. 552, 8 Ann. Cas. 92 (1906); Farley v. Spring Garden Ins. Co., 148 Wis. 622, 134 N. W. 1054 (1912); Peck v. Hartford Acc. & Ind. Co., 207 Wis. 344, 241 N. W. 372 (1932).

[73] Thus in Watt v. German Sav. Bank, 183 Iowa 346, 165 N. W. 897 (1917), a knowledge case which goes to the extreme verge, the court cited Mechanics' Bank v. Seton, 1 Pet. (26 U. S.) 299, 7 L. Ed. 152 (1828), a notification case, for the proposition that a corporation "once informed, will not be permitted to forget upon some change in its directorate."

[74] Mechem seems to confuse the problem with that involved in notice reaching the agent after his authority has terminated, to which last question his text statement refers. See 2 MECHEM, AGENCY, 2d ed., § 1832 (1914). HUFFCUT, AGENCY, 2d ed. (1901), seems to ignore it entirely.

[75] Powell merely states that notice coming to one agent will not affect the principal

The Restatement has undertaken to deal with the problem entirely from the standpoint of the agent's duty to disclose to his employer the information which he receives. The matter is not treated in the black-letter text, but a comment on Section 275 states in effect that information received by an agent having a duty to reveal it to the principal remains effective despite the subsequent termination of the employment.[76] The cases wherein the principal is exonerated from liability are placed upon the ground that the agent had no duty to communicate his knowledge.[77]

This explanation seems unsatisfactory, from the standpoint either of authority or of principle. No doubt there are cases wherein the principal's freedom from liability founded upon his former agent's knowledge properly may be attributed to the absence of any duty of revelation. *Blackburn v. Vigors*,[78] apparently the source of the illustration of a situation negativing liability set out in the Restatement,[79] avowedly rests upon the express ground that the agent was appointed to perform a very limited task, to procure a reinsurer, and was under no duty to report information which might come to him concerning the state of the risk. *Irvine v. Grady* [80] was decided upon a like ground. Other decisions may be subject to a similar explanation.[81]

On the other hand there are cases, so satisfactorily decided that we may not properly attack them as erroneous, which simply do not seem to fit in with any such interpretation. Thus when a railway company was exempted from knowledge, possessed by a former employee, as to

if the first agent abandons the matter and it is completed by a second. See TIFFANY, AGENCY, Powell's 2d ed., 293-294 (1924). Fletcher, without distinguishing between knowledge and notification, makes notice binding irrespective of subsequent termination of the agency. See 3 FLETCHER, CYCLOPEDIA OF CORPORATIONS, 2d ed., 48 (1931).

[76] "If an agent or servant has a duty to reveal information to be acted upon by another, the fact that subsequently he is discharged or his employment otherwise terminates before the effects of his failure to disclose take place does not prevent the principal or master from being liable." AGENCY RESTATEMENT, § 275, Comment e (1933).

[77] "If, however, an agent is entrusted with the performance of a transaction and is discharged before the transaction is completed, there may never have been a duty to reveal the facts connected with it to the principal or others, and hence the fact that he has failed to reveal them would not affect the principal." AGENCY RESTATEMENT, § 275, Comment e (1933).

[78] L. R. 12 App. Cas. 531, 13 Eng. Rul. Cas. 514 (1887).

[79] AGENCY RESTATEMENT, § 275, Illustration 10 (1933).

[80] 85 Tex. 120, 19 S. W. 1028 (1892).

[81] In re M. S. Fersko, Inc., (C. C. A. 2d, 1918) 250 F. 357 (doubtful); Roy E. Hays & Co. v. Pierson, 32 Wyo. 416, 234 P. 494 (1925) (also explicable on theory of forgetable knowledge).

the meaning of certain cryptic marks inscribed on freight,[82] there seems no good reason to doubt that the employee was under a duty to communicate his knowledge. It related to the efficient discharge of the railroad's business as a carrier of freight. Under the general principle laid down in the Restatement itself,[83] the information should have been reported. So where a traveling salesman selling liquor knew that the use to be made thereof violated the local law, it seems clear that he owed a duty to report that to his principals, yet they were held unaffected thereby in a subsequent transaction at a time when he no longer represented them.[84] Still other cases, presenting situations equally indicative of a duty of the agent to tell what he learns, exonerate the principal from liability in regard to transactions subsequent to the termination of the employment.[85]

On principle, the rule basing liability for a former agent's knowledge upon the existence or non-existence of a duty to disclose is equally unsatisfactory. To take a simple illustration, suppose that an agent to investigate the title to real property learns of an unrecorded deed. Unquestionably he is under a duty to report his information. Let us assume that he does so. The principal himself then has knowledge of the outstanding interest. Later, having forgotten the information thus received and having discharged the agent, he buys the land. By the preferable view, if the principal had employed no agent at all but had gained the information in person and then had forgotten it, he could keep the land unaffected by the unrecorded deed.[86] It is in the highest degree illogical—and by an illogic that has no justification in experience [87]— to say that if he got his information from an agent rather than from a stranger his forgetfulness will be no excuse. And if we admit

[82] Great Western Ry. v. Wheeler, 20 Mich. 419 (1870).

[83] "Unless otherwise agreed, an agent is subject to a duty to use reasonable efforts to give his principal information relevant to affairs entrusted to him which, as the agent has notice, the principal would desire to have and which can be communicated without violating a superior duty to a third person." AGENCY RESTATEMENT, § 381 (1933).

[84] Second National Bank v. Curren, 36 Iowa 555 (1873).

[85] Hackett v. Supreme Council, 44 App. Div. 524, 60 N. Y. S. 806 (1899), affd. in memorandum opinion 168 N. Y. 588, 60 N. E. 1112 (1901) (knowledge affecting insurance risk gained by former employees in connection with prior application); Murray v. Preferred Acc. Ins. Co., 199 Iowa 1195, 201 N. W. 595 (1925) (same); cf. Lynch v. McKee, (Tex. Civ. App. 1919) 214 S. W. 484 (knowledge by former attorney of bankruptcy proceedings).

[86] See cases cited supra, note 4.

[87] The reference, of course, is to Mr. Justice Holmes' oft-cited pronouncement that, "The life of the law has not been logic; it has been experience." HOLMES, THE COMMON LAW 1 (1881).

that, by forgetting what the agent had told him, the principal could become a bona fide purchaser, it is absurd to say that if the agent leaves the employment without performing his duty of advisement the principal will continue to be affected by the agent's knowledge.

Another avenue of approach leads to equal dissatisfaction with the view that knowledge which the agent should, but does not, communicate necessarily continues to affect the principal after the agency's termination. Assume that the agent remains in the employment and continues to represent the principal in the affair. If the knowledge is of the forgetable variety and his former awareness actually has been obliterated from the agent's mind, the principal will not be charged with notice.[88] Here the agent's forgetfulness insulates the principal from liability. It seems extremely unrealistic to say that if the same agent left the principal's employ shortly after receiving the information, the principal continues to be affected despite the agent's lapse of memory.

The Restatement explanation, then, does not adequately account for all the cases and it is unsatisfactory from the standpoint of principle. Existence or non-existence of a duty to report the information obtained affects the question whether the principal is to be charged with notice at the time. Continuance of the notice, after cessation of the employment has rendered it most likely that the duty will not be performed, should depend upon a test more closely related to the situation in which the principal would have been placed had the agent actually made the proper report.

It has been suggested that an adequate explanation of the cases may be furnished by regarding the agent as under a duty to third persons to prevent the principal from injuring their interests because of his omission to report them to the principal. The failure to make such disclosure would then be a tort, committed in the course of the employment, for which the principal must respond.[89] This seems subject to the same criticism as the Restatement view. It is not enough simply to

[88] Phoenix Ins. Co. v. Flemming, 65 Ark. 54, 44 S. W. 464, 39 L. R. A. 789, 67 Am. St. Rep. 900 (1898); Department of Trade & Commerce v. Bankers Automobile Ins. Co., 117 Neb. 388, 220 N. W. 830 (1928); Strohecker v. Mutual Ben. & L. Assn., 55 Nev. 350, 34 P. (2d) 1076 (1934); Virginia F. & M. Ins. Co. v. Lennon, 140 Va. 766, 125 S. E. 801, 38 A. L. R. 186 (1924). See In re Hereford, (D. C. W. Va. 1916) 229 F. 863 at 864; Great Western Ry. v. Wheeler, 20 Mich. 419 at 424 (1870). Cf. Continental Ins. Co. v. Cummings, (Tex. Civ. App. 1906) 95 S. W. 48 at 51.

[89] See 44 HARV. L. REV. 1137 (1931), discussing New England Tr. Co. v. Bright, 274 Mass. 407, 174 N. E. 469, 73 A. L. R. 416 (1931).

say that a duty to the third person has not been performed. We must go farther and inquire to what extent the principal would have been affected had the duty been performed. Unless the actual communication would have imposed liability upon the principal regardless of continued remembrance, there seems no justification in charging him with the uncommunicated knowledge of a former employee.[90]

The concept of unforgetable knowledge is of service in this connection. Nearly all the cases wherein the principal is held affected with notice because of unreported information which should have been told by former agents may be grouped under one or another of the categories which have been worked out for unforgetable knowledge.[91] Only two decisions apparently irreconcilable with these categories have been

[90] See the statement in 11 BOSTON UNIV. L. REV. 537 at 539 (1931), defending New England Tr. Co. v. Bright, 274 Mass. 407, 174 N. E. 469, 73 A. L. R. 416 (1931): "If imputed or constructive notice is to have any effect at all, it should be treated as actual notice during the existence of the agency."

[91] *Continuing transaction or series of transactions affecting the interests of others:* Constam v. Haley, 124 C. C. A. 128, 206 F. 260 (1913) (knowledge of insolvency acquired by agent to collect debt, attributable to principal in receiving payments after termination of agency); New England Tr. Co. v. Farr, (C. C. A. 1st, 1931) 57 F. (2d) 103, cert. denied 287 U. S. 612, 53 S. Ct. 14 (1932) (series of transactions with agent known to be unfaithful by representative conducting first transaction); Bryant v. Booze, 55 Ga. 438 (1875) (knowledge of former agent initiating continuing negotiations for land); Farnsworth v. Hazelett, 197 Iowa 1367 at 1374, 199 N. W. 410 at 413 (1924) (well-considered dictum—knowledge by attorney initiating litigation, later replaced, of facts making attachment wrongful); Iowa Universalist Convention v. Howell, 218 Iowa 1143, 254 N. W. 848 (1934) (knowledge by former agent of assignment of mortgage, mortgage remaining in bank with naught to indicate assignment); Loring v. Brodie, 134 Mass. 453 (1883) (knowledge of breach of trust by fiduciary at inception of continuing transaction); New England Tr. Co. v. Bright, 274 Mass. 407, 174 N. E. 469, 73 A. L. R. 416 (1931) (same—continuing series of transactions); Reid v. Linder, 77 Mont. 406, 251 P. 157 (1926) (knowledge of partner's want of authority to borrow, at inception of loan); United States Nat. Bank v. Forstedt, 64 Neb. 855, 90 N. W. 919 (1902) (knowledge of usurious contract, at inception of loan); National Bank of North America v. Thomas, 30 R. I. 294, 74 A. 1092 (1910) (knowledge of third person's title to property of which debtor was record owner, at inception of loan); Harper v. Merchants' & Planters' Nat. Bank, (Tex. Civ. App. 1934) 68 S. W. (2d) 351 (knowledge of breach of trust by fiduciary, at inception of continuing transaction). *Possibility of affecting interests of others in business relations reasonably to be anticipated:* Birmingham Tr. & Sav. Co. v. Louisiana Nat. Bank, 99 Ala. 379, 13 So. 112, 20 L. R. A. 600 (1892) (banker's knowledge of pledge of bank's stock to secure a loan to stockholder). *Forgetfulness leading to a breach of a public duty:* Bullock v. Town of Durham, 64 Hun. 380, 19 N. Y. S. 635 (1892) (knowledge by town officer of defect in bridge); Baird v. New York Central & H. R. R., 64 App. Div. 14, 71 N. Y. S. 734 (1901), affd. 172 N. Y. 637, 65 N. E. 1113 (1902) (knowledge by railroad officials of brakeman's incompetence).

found. Each seems erroneous. In *Overall v. Taylor*,[92] the court appears to charge one purchasing land for himself with knowledge of an unrecorded lien possessed by his former partner in buying the land years before for the partnership. Since that date the land had been sold several times. It is a reasonable inference that the partnership had been terminated, and in any event the purchaser was acting individually and not as a member of the partnership. Unless we follow the decisions holding that knowledge of an outstanding claim to property is unforgetable, the result of this case is difficult to support. *Watt v. German Savings Bank*[93] is more palpably wrong. It holds a bank affected by the knowledge of a former board of directors that corporate stock had been issued without payment of subscriptions, although at that time no business relations between the bank and the corporation appear to have been contemplated. The court cites, for the proposition that the new directorate will not be permitted to forget what the old board knew, a case involving notification.[94] Obviously the decision is based upon this failure to distinguish between notification and knowledge. There seems no reason for holding knowledge of this sort unforgetable. A contrary decision in Texas must be regarded as sounder law.[95]

Conversely, cases exempting the principal from liability for the unrevealed knowledge of a former agent nearly all[96] involve knowledge of a type not falling within any categories denominated unforgetable.[97]

[92] 99 Ala. 12, 11 So. 738 (1892).

[93] 183 Iowa 346, 165 N. W. 897 (1917).

[94] Mechanics' Bank v. Seton, 1 Pet. (26 U. S.) 299, 7 L. Ed. 152 (1828).

[95] Mathis v. Pridham, 1 Tex. Civ. App. 58, 20 S. W. 1015 (1892).

[96] The only apparent exception is Lynch v. McKee, (Tex. Civ. App. 1919) 214 S. W. 484, holding the knowledge of an attorney employed to collect a debt that the debtor was in bankruptcy not attributable to the principal after the termination of the employment. As there seems no ground to doubt that the attorney should have transmitted this information and as the importance of the matter both to the principal and the bankrupt would seem to make the knowledge unforgetable, it seems that the court must overlook the distinction between ordinary knowledge and unforgetable knowledge.

[97] In addition to the cases cited supra, notes 82, 84, 85, there should be included in this group Norton v. Metropolitan Life Ins. Co., 74 Minn. 484, 77 N. W. 298 (1898) (executor not affected by knowledge of deceased as to existence of second mortgage on part of premises, in granting extension to first mortgagor—the court pointing out that the deceased had no expectance of granting any such extension when he got his information); Ross v. Houston, 25 Miss. 591, 59 Am. Dec. 231 (1853) (grantor of land, representing his title to be good, not chargeable with uncommunicated knowledge of defect by former agent who had purchased the land for him); Roy E. Hays & Co. v. Pierson, 32 Wyo. 416, 234 P. 494 (1925) (bank not charged with former officer's knowledge of outstanding claim to land—also explicable on ground of no duty to report at the time).

Hence they present instances wherein the principal, had he been the sole actor, might have forgotten with entire safety what once he knew.[98] It is, therefore, proper to cite them for the proposition that the principal is not bound by the undisclosed knowledge of an agent, after the termination of the agency, unless that knowledge is of the unforgetable variety.

Whether notice based upon knowledge which could be forgotten ceases immediately upon the termination of the agency, does not appear to have received the attention of the courts. The cases refusing to affect the principal with notice have paid no attention to the time elapsing since the agent received knowledge. One might infer from this that the notice falls with the agency. On the other hand, much could be said in favor of a rule imposing notice upon the principal after cessation of the agency until such time as he would be privileged to forget the information if he himself possessed it. Analogy to the agency cases involving unforgetable knowledge [99] might support this view, inasmuch as there probably is some point of time at which most of even the knowledge we classify as unforgetable may be dismissed from memory. The question merits judicial consideration in the light of the purposes to be served by notice through an agent.

Recognition of the distinction between knowledge forgetable and knowledge unforgetable will, it is believed, aid materially in clearing up this vexed problem of agency.[100] In other fields of the law of notice it may prove equally useful. It is to be hoped that we may substitute a conscious judicial exploration of the scope and functions of the doctrine of unforgetable knowledge for the somewhat haphazard and opportunistic development that has prevailed hitherto. Only in that way will it be possible for this doctrine to attain its widest, most profitable application.

[98] See cases cited supra, notes 3-13.

[99] See cases cited, supra, note 91.

[100] For example, the objection brought against New England Tr. Co. v. Bright, 274 Mass. 407, 174 N. E. 469, 73 A. L. R. 416 (1931) in 79 UNIV. PA. L. REV. 974 at 976 (1931), that it unduly extends the doctrine of imputed knowledge to a case where the rationale of that doctrine fails because the principal no longer is receiving the benefits of the agency relation, falls when we accept the doctrine of unforgetable knowledge. The principal is chargeable with knowledge at the inception of the transaction, when the agent represents him. Had the information been given him at that time, he would not have been permitted to forget it until the series of transactions came to an end. Hence the termination of the agency before that time cannot affect the duration of the knowledge chargeable to the principal in the beginning. See 11 BOSTON UNIV. L. REV. 537 at 539 (1931).