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Law of Agency Chapter I Introductory Matters

State of Indiana Legislators

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Chapter I
INTRODUCTORY MATTERS

Topic 1. Definitions

Section 1. Agency; Principal; Agent.

(1) Agency is the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.

(2) The one for whom action is to be taken is the principal.

(3) The one who is to act is the agent.

Comment on Subsection (1):

a. The relationship of agency is created as the result of conduct by parties manifesting that one of them is willing for the other to act for him subject to his control, and that the other consents so to act. The principal must in some manner indicate that the agent is to act for him, and the agent must act or agree to act on his behalf and subject to his control.

b. It is not necessary that the parties intend to create the legal relationship or to subject themselves to the liabilities which the law imposes upon them as a result of it. On the other hand, there is not necessarily an agency relationship because the parties to a transaction say that there is, or

*These annotations are being prepared by a committee of the Faculty of the College of Law of the University of Notre Dame in cooperation with The American Law Institute.

It is not intended to cite all cases bearing upon the subject matter of the particular section; nor is it intended to analyze the cases which are cited. It is intended to furnish an introduction to the leading Indiana authorities bearing upon the rule under consideration. The object is to facilitate the comparison of the rule under consideration with the holdings of the Indiana cases and to enable the user more easily to form his own opinion as to whether the principles are the same.

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contract that the relationship shall exist, or believe it does exist. Agency results only if there is an agreement for the creation of a fiduciary relationship with control by the beneficiary. The characteristics indicative of agency are stated in §§ 12-14.

* * *

Comment on Subsections (2) and (3):

c. "Principal" is a word used to describe a person who has authorized another to act on his account and subject to his control. It includes, therefore, both a person who has directed another to act on his account in business dealings or to represent him in hearings or proceedings, but who has no control or right of control over the other's physical conduct, and also a person who employs another to act in his affairs, having such control or right to control over his conduct that the other is termed servant, whether or not he renders merely manual service. The word "master" as defined in §2 is not used in contrast with the word "principal," but as included within it. Thus, the owner of a business is a principal not only in regard to brokers who, as to their physical acts, are independent of his supervision, but also in regard to salesmen who conduct business transactions under supervision as to their conduct and who therefore come within the definition of servant, and likewise in regard to janitors whose jobs are confined to the performance of manual acts on the premises under the owner's supervision. The word "principal," therefore, includes both persons who are masters and persons who are principals but not masters.

d. "Agent" is a word used to describe a person authorized by another to act on his account and under his control. Included within its meaning are both those who, whether or not servants as described in § 2, act in business dealings and those who, being servants, perform manual labor. An agent may be one who, to distinguish him from a servant in determining the liability of the principal, is called an independent contractor. Thus, the attorney at law, the broker,
the factor, the auctioneer, and other similar persons employed either for a single transaction or for a series of transactions are agents, although, as to their physical activities, they are independent contractors. These are to be contrasted with others, such as clerks, train conductors, and other persons similarly employed, who are also agents although they fall within the category of servants. Likewise, the janitor of a building or the driver of a truck is an agent as that word is used in the Restatement of this Subject if he is employed under such conditions that he becomes a servant. For many purposes it is immaterial whether or not one who is an agent is also a servant. However, the liability of a master for the torts of his servant is greater in extent than the liability of a principal for the torts of an agent who is not a servant (see §§ 219-255), and a master's duties to servants are different from those of a principal to agents who are not servants (see §§ 472-528).

 Annotation:
The following Indiana cases deal with the relationship of principal and agent, and indicate agreement with the definitions given: *Kingan & Co. Limited v. Silvers*, 13 Ind. App. 80, 37 N. E. 413 (1895); *Indiana Insurance Co. v. Hartwell*, 123 Ind. 177 (1889); *Indiana Insurance Co. v. Hartwell*, 100 Ind. 566 (1884).

Subsection (2). An agent is one who acts for or in the place of another, denominated the principal in virtue of power or authority conferred by the latter to whom an account must be rendered. *Rowe, Trustee, v. Rand, Receiver*, 111 Ind. 206 (1887).


Section 2. Master; Servant; Independent Contractor.

(1) A master is a principal who employs another to perform service in his affairs and who controls or has the right to control the physical conduct of the other in the performance of the service.

(2) A servant is a person employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master.

(3) An independent contractor is a person who contracts with another to do something for him but who is not con-
trolled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking.

Comment:

a. A master is a species of principal, and a servant is a species of agent. The words "master" and "servant" are here-in used to indicate the relationship from which arises the tort liability of an employer to third persons for the tort of an employee (see §§ 219-249), and the special duties and immunities of an employer to the employee (see §§ 473-528.) The factors which are of importance in determining whether or not the person is a servant or an independent contractor are stated in § 220. The distinction between servants and agents who are not servants is of importance only for the purposes of those Sections, and statements made in the Restatement of this Subject as applicable to principals or agents are, unless otherwise stated, applicable to masters and servants. The rules as to liability of a principal for the torts of agents who are not servants are stated in §§ 250-267, and as to his liability to such agents in §§ 470-472. The duties of servants to masters and their liabilities to third persons are the same as those of agents who are not servants. However, servants do not ordinarily have possession of goods entrusted to them by the master (see Comment k on § 339 and §349), and a servant, because of his position, may not be responsible for mistakes made by him as to facts upon which his authority depends, where an agent not a servant would be (see Comment c on § 383).

b. The word "servant" is used in contrast with "independent contractor," a term which includes all persons who contract to do something for another and who are not servants with respect thereto. An agent who is not a servant is, therefore, an independent contractor when he contracts to act on account of the principal. Thus, a broker who contracts to sell goods for his principal is an independent contractor as distinguished from a servant. Although, under some conditions, the principal is bound by the broker's unauthorized
contracts and representations, the principal is not liable to third persons for tangible harm resulting from his unauthorized physical conduct within the scope of the employment, as the principal would be for similar conduct by a servant; nor does the principal have the duties or immunities of a master towards the broker. While an agent who contracts to act and who is not a servant is therefore an independent contractor, not all independent contractors are agents. Thus, one who contracts for a stipulated price to build a house for another who reserves no direction over the conduct of the work is an independent contractor; but he is not an agent since he is not a fiduciary, has no power to make the one employing him a party to a transaction, and is subject to no control as to his conduct.

The word “servant” is thus used to distinguish a group of persons for whose physical conduct the master is responsible to third persons. It is convenient to distinguish this group of persons from all other persons for whose physical conduct the employer is not responsible. These persons fall into two groups: those who are agents but do not respond to the tests for servants, and those who are not agents. For the purpose of determining whether or not the employer is responsible for their physical conduct, however, it is immaterial whether such persons are agents or are not agents. For this reason the term “independent contractor” is used to indicate all persons for whose conduct, aside from their use of words, the employer is not responsible.

c. The words “agent,” “master,” and “servant” are frequently used in statutes with a limited meaning. The definitions of these words in this Section are not applicable in the interpretation of such statutes.

Annotation:
Subsections (1) and (2). Kingan v. Co. Limited v. Silvers, 13 Ind. App. 80, 37 N. E. 413 (1895); Indiana Iron Co. v. Cray, 19 Ind. App. 565, 48 N. E. 803 (1897); Indiana Union Traction Co. v. Benadum, 42 Ind. App. 121, 83 N. E. 261 (1908); Muncie Foundry & Machine Co. v. Thompson, 70 Ind. App. 157, 123 N. E. 196 (1919). Discussion of how existence of relationship is to be
determined. Standard Oil Co. v. Allen, 121 N. E. 329 (Ind. 1918), rehearing denied, 123 N. E. 693, and both superseded by opinion in Supreme Court, 126 N. E. 674.


Section 3. General Agent; Special Agent.

(1) A general agent is an agent authorized to conduct a series of transactions involving a continuity of service.

(2) A special agent is an agent authorized to conduct a single transaction or a series of transactions not involving continuity of service.

Comment:

a. The distinction between a general agent and a special agent is one of degree, as is the distinction between a servant and an independent contractor, and the resulting differences in liability of the principal are based in part upon similar grounds of policy. In determining whether an agent is a general agent or a special agent, the number of acts to be performed in accomplishing an authorized result, the number of people to be dealt with, and the length of time needed to accomplish the result are important considerations. The manager of a business or the agent in charge of a construction project is clearly a general agent for the one employing him. On the other hand, a person employed only to deliver a promissory note on specified terms is just as clearly a special agent. Between such cases, in which the class to which the agent belongs is clear, are other cases which require the use of judgment to determine in which class the agent belongs. Thus, one directed by another to purchase two horses, although the purchase may be made from two separate individuals, would ordinarily be a special agent; a person employed to buy one hundred horses in as many transactions as may be necessary to accomplish the total purchase might well be considered a general agent.
b. One who is a general agent with respect to some things may be a special agent with respect to the particular transaction, as where the owner of a manufacturing business directs his manager to purchase a country estate for him.

c. A general agent may have little discretion in regard to the transactions which he is employed to perform, while a special agent may have great discretion in the single transaction which he conducts. Thus, one is a general agent if he is in continuous employment, although the employment consists of purchasing articles as the employer directs with no discretion as to the kinds, amounts, or prices to be paid; while one employed to purchase a single article would be a special agent although given the widest discretion, as where one is directed to purchase any suitable article as a wedding gift.

d. The distinction between a special agent and a general agent has several important consequences. First, the general agent may have a power to bind his principal in excess of his authority or apparent authority in many situations in which the special agent may not have such power (see §§ 161, 194). Again, the continuity of the employment of the general agent may result in the continuance of apparent authority after the termination of his authority when this would not result in the case of a special agent (see §§ 127-132). Furthermore, manifestations of the principal to a general agent in connection with his authority may be interpreted as merely advice or as instructions not intended to affect the rights of third persons, when similar manifestations made to a special agent would be interpreted as limiting his authority or power to bind the principal (see Comment b on § 34).

Annotation:
Subsection 1. The Indiana cases defining general agent are in substantial accord with the stated definition. _Cruzan v. Smith_, 41 Ind. 288 (1872); _Fatman v. Leet_, 41 Ind. 133 (1872); _Robinson v. Bank of Winslow_, 42 Ind. App. 350, 85 N. E. 793 (1908); _Thompson v. Michigan Mutual Life Insurance Co._, 56 Ind. App. 502, 105 N. E. 780 (1914); _The Cleveland, C., C. & I. Ry. Co. v. Closser_, 126 Ind. 348, 26 N. E. 159, 9 L. R. A. 754, 22 Am. St. Rep. 593 (1890); _Cleveland, C., C., & St. Louis Ry. Co. v. Moore, Receiver_, 170 Ind. 328, 82
Subsection 2. Nearly all cases cited under Section 3, Subsection (1), define and distinguish between general and special agents. The following cases deal with special agencies: Buchanan v. Caine, 57 Ind. App. 274, 106 N. E. 885 (1914); Rich v. Johnson, 61 Ind. 246 (1878); Davis v. Talbot, Receiver, 137 Ind. 235, 36 N. E. 1098 (1894); Blackwell v. Ketcham, 53 Ind. 184 (1876); Berry v. Anderson, 22 Ind. 36 (1864); Reitz v. Martin, 12 Ind. 306, 74 Am. Dec. 215 (1859); Pursley v. Morrison, 7 Ind. 356, 63 Am. Dec. 424 (1855).

Section 4. Disclosed Principal; Partially Disclosed Principal; Undisclosed Principal.

(1) If, at the time of a transaction conducted by the agent, the other party thereto has notice that the agent is acting for a principal and of the principal's identity, the principal is disclosed.

(2) If the other party has notice that the agent is or may be acting for a principal but has no notice of the principal's identity, the principal for whom the agent is acting is partially disclosed.

(3) If the other party has no notice that the agent is acting for a principal, the principal is undisclosed.

Comment:

a. The classification of principals into disclosed, partially disclosed, and undisclosed is for the purpose of simplifying the statement of the rules determining the legal relations of the third person with respect to the principal and the agent, since many of these relations are dependent upon notice to the third person of the existence and identity of the principal. The other party has notice of the existence or identity of the principal if he knows, has reason to know, or should know of it, or has been given a notification of the fact. See § 9 for the meaning of the word "notice."

b. Manifestations at time of transaction. Whether a principal is a disclosed principal, a partially disclosed principal or an undisclosed principal depends upon the manifestations of the principal or agent and the knowledge of the other party at the time of the transaction. The disclosure of the existence or identity of the principal later has no bearing upon the relations created at the time of the transaction. The nondisclosure of the principal on the face of a docu-
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ment integrating the transaction does not of itself indicate that the principal is undisclosed, although it may affect the liability of the parties to the transaction. Thus, where a simple contract is made in the name of the agent, but the other party knows that the principal is the contracting party and intends to contract with him, the contract is with the principal as a disclosed principal, although his name does not appear in the instrument (see § 149); and this is so even though the agent, in a suit by the other party, may not be able to escape liability (see § 323).

* * *

c. Sources of third person's knowledge. Ordinarily, the third person derives his knowledge as to the existence or identity of the principal from the agent or the principal in the transaction with them, but his legal relations with the principal are not affected by the source of his knowledge. The agent may, however, manifest that he contracts only for himself and thereby exclude the principal as a party to the transaction (see § 150).

If the manifestations of the principal or agent are such as reasonably indicate to the other party the identity or existence of the principal, the latter is disclosed or partially disclosed, and this is true although the other party believes that he is dealing with the agent alone. On the other hand, although the agent purports to be acting on his own account, if the other party knows that he is acting as agent, the principal is not an undisclosed principal but is either a disclosed principal or a partially disclosed principal, depending upon the nature of the other party's knowledge. If the manifestation as to agency is ambiguous, the belief of the other party, if reasonable, is conclusive.

* * *

d. Disobedience as to concealment or disclosure of principal. The fact that the agent disobeys instructions to conceal the principal's identity or existence does not prevent the
principal from being a disclosed or partially disclosed principal, nor prevent the application to him of the rules relating to disclosed or partially disclosed principals (see § 163). The fact that the agent disobeys instructions to reveal the existence or identity of the principal does not prevent him from being an undisclosed principal if the other party has no notice of his existence; and the rules relating to undisclosed principals apply to him (see § 197).

e. When principal is or is not identified. Whether a principal is a disclosed principal or a partially disclosed principal depends upon whether or not the third person has sufficient information or other notice as to his identity. This is a question of degree. If the manifestation of the principal or agent to the third person, or the information the third person has, is such that he is able to or should be able to distinguish the principal from all others, or he otherwise has notice of the principal’s identity, the principal is disclosed. If the manifestation is ambiguous and the third person has no reason to know which of two or more principals the agent is representing, the principal is partially disclosed. If the manifestation is ambiguous and the third person is reasonably mistaken as to the person for whom the agent acts, there is no contract with the principal (see Restatement, Contracts, § 71).

Annotation:
No cases are found defining the terms covered by this section.

The cases dealing with problems of undisclosed principals seem to make no distinction between what are herein designated as undisclosed, and partially disclosed principals. Where a descriptive word, “Cash,” was affixed to the name of the cashier of a bank, indicating that the cashier acted in a representative capacity, the bank was allowed to sue as undisclosed principal, Nave v. Hadley, 74 Ind. 155 (1881); where third party dealt with agent as a principal, the principal was allowed to sue on the contract, Rathbone v. Sanders, 9 Ind. 217 (1857). Third party having no knowledge that agent was not principal, principal sued as undisclosed principal, Johnson v. Hoover, 72 Ind. 395 (1880), and Thomas v. Atkinson, 38 Ind. 248 (1871).

Section 5. Subagent.

A subagent is a person to whom the agent delegates, as his agent, the performance of an act for the principal which the agent has been empowered to perform through his own representative.
Comment:

a. An agent may be authorized to appoint another person to perform an act for the principal which the agent is authorized to perform or to have performed. The agreement may be that upon the appointment of such a person the agent’s function as agent is performed, and that thereafter the person so appointed is not to be the representative of the agent but is to act solely on account of the principal, in which case the one so appointed is an agent and not a subagent. On the other hand, the agreement may be that the appointing agent is to undertake the performance of the authorized act either by himself or by someone else and that the person so appointed while doing the act on account of the principal is also, in so doing, to be the agent of the appointing agent, who consequently will have the responsibility of a principal with respect to such person. If this is the agreement, the person so appointed is a subagent. What the agreement is depends, as do other agreements, upon the manifestations of the parties as interpreted by the usages between them, the customs of business, and all other circumstances (see §§ 77-81). A person may be a subagent although the appointing agent has no authority to appoint him. This is so if the agent has apparent authority to make the appointment, or if he otherwise has power to bind the principal, as where he is a general agent and the appointment of a subagent is an ordinary incident of his position, although forbidden in the particular instance (see § 161).

b. Types of subagents. The subagent may be an employee of the agent or he may be a person not in the general employment of the agent but appointed for a specific undertaking. Thus, the receiving teller of a bank which acts as an agent in the collection of a note is a subagent with respect to clients of the bank; another bank to which the depositary bank sends a note for collection may also be a
subagent. The inference is that the regular employees of an agent are subagents; there is no inference in the case of other persons selected by an agent to act for the principal, except that if the person so employed is a public officer, as in the case of a notary not employed continuously, it is inferred that he is not a subagent.

c. Liabilities resulting from subagency. A subagent acting in the performance of acts which the appointing agent has authorized him to perform in accordance with an authorization from the principal is an agent of the principal and affects the relations of the principal to third persons as fully as if the appointing agent had done such acts (see § 142). Furthermore, the subagent stands in a fiduciary relation to the principal, and is subject to all the liabilities of an agent to the principal except liability dependent upon the existence of a contractual relationship between them (see § 428 (1)). Likewise, the principal may have correlative duties to the subagent (see § 458).

The subagent is also the agent of the appointing agent, with power to subject the appointing agent to liability to the principal for his defaults in the performance of the principal's business (see § 406), and to third persons for his acts within the scope of his authority or employment (see § 362). Likewise, the appointing agent has the same rights and liabilities with respect to the subagent as any other principal has to his agent (see §§ 428 (2) and 459).

Annotation:
No definition of subagent is found in an Indiana case but the following cases recognize and enforce principal's obligation and rights in accordance with the stated definition: Tippecanoe Loan & Trust Co. v. Jester, 180 Ind. 357, 101 N. E. 915, L. R. A. 1915E, 721 (1913); Indiana Insurance Co. v. Hartwell, 123 Ind. 177, 24 N. E. 100 (1890); Thompson v. Michigan Mutual Life Insurance Co., 56 Ind. App. 502, 105 N. E. 780 (1914).

Section 6. Power.
A power is an ability on the part of a person to produce a change in a given legal relation by doing or not doing a given act.
Comment:

a. The word "power" denotes not a physical or mental quality but a legal attribute, the ability to change legal relations. This ability may be rightfully exercised, as where an agent makes an authorized contract; or it may be wrongly exercised, as where an agent, having apparent authority so to do, makes an unauthorized contract.

b. A power may be held by any person, irrespective of legal capacity to contract or to be subject to liability. It may exist irrespective of the consent or knowledge either of the one subject to it or of the one holding it. Thus, a thief of a negotiable instrument payable to bearer has power to pass title to a third person although the owner does not even know that the instrument has been stolen. Likewise, a person whom another authorizes to act on his account has a power to bind the other although he has neither legal capacity to bind himself nor the desire to act for the one who has conferred the power upon him.

Annotation:

No Indiana case was found wherein the court uses the term power as defined above.

Section 7. Authority.

Authority is the power of the agent to affect the legal relations of the principal by acts done in accordance with the principal's manifestations of consent to him.

Comment:

a. Authority includes only the power which an agent has to affect the relations of his principal, in the exercise of which he is privileged with respect to his principal. Authority exists only in accordance with manifestations of the principal and, as to transactions capable of delegation to the agent, by a principal who has capacity to give consent and to become a party to the transaction.

b. By manifestation is meant the expression of the principal's will as distinguished from undisclosed purpose or intention. The manifestation to the agent must be prior to or contemporaneous with an act done by the agent in order
to confer authority upon the agent. A manifestation of consent by the principal after the agent has acted may result in ratification (see § 82).

c. The manifestation may be made by words or other conduct, including acquiescence. Sections 26-31 state the manner in which it may be made. The rules for the interpretation of the manifestation are stated in §§ 32-81.

d. The fact that the third person with whom the agent deals on account of the principal has no knowledge of the manifestations of the principal or even of the principal's existence, does not prevent the agent from having authority to make the principal a party to the transaction in accordance with his instructions. This is true even though the agent acts in accordance with instructions given in error or acts after the principal has withdrawn his consent, if neither the agent nor the third person has notice of such error or withdrawal. If, however, the third person has notice of such error or withdrawal, the agent has no power to bind the principal to him although the agent, if without notice, is privileged to deal with him.

Annotation:

By inference of law an agent has authority to do any and all acts necessarily incident to the performance of the duty intrusted to him by the principal. American Tel. & Tel. Co. v. Green, 164 Ind. 349, 73 N. E. 707 (1905). Principal is bound by authority manifested and not relieved by breach of instructions. La Rue v. American Diesel Engine Co., 176 Ind. 609, 96 N. E. 772 (1911); The Cincinnati, Indianapolis, St. Louis and Chicago Railway v. Davis, 126 Ind. 99, 25 N. E. 878, 9 L. R. A. 503 (1890); The Commercial Union Assurance Co. v. The State, 113 Ind. 331, 15 N. E. 518 (1888); Robbins v. Magee, 76 Ind. 381 (1881) (Escrow); Fatman v. Leet, 41 Ind. 133 (1872); Manning v. Gasparie, 27 Ind. 399 (1866); Longworth v. Conswell, 2 Blackf. 469 (1831).

Section 8. Apparent Authority.

Apparent authority is the power of an apparent agent to affect the legal relations of an apparent principal with respect to a third person by acts done in accordance with such principal's manifestations of consent to such third person that such agent shall act as his agent.

Comment:

a. An apparent agent is a person who, whether or not authorized, reasonably appears to third persons, because of the
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manifestations of another, to be authorized to act as agent for such other. An apparent principal is the person for whom an apparent agent purports to act. The apparent agent may have authority which is coextensive with his apparent authority; he may be authorized to act in other ways but not in the way as to which he has apparent authority; or he may not be authorized to act in any respect for the purported principal. If the authority and the apparent authority are coextensive, the liability of the principal resulting from conduct of the agent may be based upon either authority or apparent authority.

*   *   *

b. The manifestation that another is to act as agent may be made to the community in general, by advertisements or otherwise. Apparent authority, however, exists only with respect to a person to whom such a manifestation has been made or to whom knowledge of it comes.

*   *   *

c. Where an agreement is made between a third person and an agent acting within the scope of his apparent authority, the fact that the third person gives nothing but a promise and does not otherwise change his position in reliance upon the appearance of authority does not prevent the transaction from being a contract upon which both the principal and the third person are mutually subject to liability. In this respect, apparent authority conforms to the principles of contracts; there is a manifestation of consent by the principal to the third person and, in case of a bilateral transaction, a counter-manifestation by the third person which completes the transaction. As in the case of other contracts, there may be a unilateral transaction, as where an apparent agent makes an offer which becomes binding upon an act being done by the third person with intent to accept the offer.

*   *   *
d. "Apparent authority" is to be distinguished from "inferred authority," which indicates authorization created otherwise than by express language and which has no reference to an appearance of authority created by the principal's manifestations directed toward third persons. There may be "inferred apparent authority."

Annotation:

Topic 2. Knowledge and Notice

Section 9. Notice.

(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.

Comment:

a. The legal relations of a person are frequently affected by his knowledge, or by the existence of facts because of which he is treated, for the purpose in question, as if he had knowledge. To express the idea that legal relations may be changed because of knowledge or something equivalent thereto in the particular case, the word "notice" is used. For some purposes, one has notice of a fact only if he has such knowledge concerning it that to act in disregard of it constitutes bad faith; for other purposes one has notice of a fact of which he has reason to know or of which he should know (see Comments c and d) or if another has done an act amounting to a notification (see Comment e).
b. Use of “notice” in Restatement. Under the definition in this Section a person has notice of a fact if he has knowledge or reason to know of it, should know of it, or has been given a notification of it; and hence it would be permissible to state that a legal result follows if a person has notice of a fact, although the result would follow only if the person were to have knowledge of the fact, or would follow only if the person were to have reason to know of the fact. In the Restatement, however, for purposes of clarity, where it is stated that a legal result follows if a person has notice of a fact and there is no qualification in the Comment or otherwise, it means that the result follows if such person, in the alternative, has knowledge of the fact, or reason to know of it, or should know of it, or has been given a notification. When only knowledge has the effect stated, the word “knowledge” is used; likewise, where, to constitute notice, it is necessary that the person have reason to know of the fact, that he should know of it, or that he should receive a notification, the particular requirement is stated.

c. Reason to know. A person has reason to know of a fact if he has information from which a person of ordinary intelligence, or of the superior intelligence which such person may have, would infer that the fact in question exists or that there is such a substantial chance of its existence that, if exercising reasonable care with reference to the matter in question, his action would be predicated upon the assumption of its possible existence. The inference drawn need not be that the fact exists; it is sufficient that the likelihood of its existence is so great that a person of ordinary intelligence, or of the superior intelligence which the person in question has, would, if exercising ordinary prudence under the circumstances, govern his conduct as if the fact existed, until he could ascertain its existence or nonexistence. The words “reason to know” do not necessarily import the existence of a duty to others to ascertain facts; the words are used both where the actor has a duty to another and where he
would not be acting adequately in the protection of his own interests were he not to act with reference to the facts which he has reason to know. One may have reason to know a fact although he does not make the inference of its existence which would be made by a reasonable person in his position and with his knowledge, whether his failure to make such inference is due to inferior intelligence or to a failure properly to exercise such intelligence as he has. A person of superior intelligence or training has reason to know a fact if a person with his mental capacity and attainments would draw such an inference from the facts known to him. On the other hand, "reason to know" imports no duty to ascertain facts not to be deduced as inferences from facts already known; one has reason to know a fact only if a reasonable person in his position would infer such fact from other facts already known to him.

* * *

d. Should know. A person should know of a fact if a person of ordinary prudence and intelligence, or the intelligence which such person has or professes to have, would ascertain, in the performance of his duty to another, that such fact exists or that there is such a substantial chance of its existence that his action would be predicated upon its possible existence. The words "should know" express the idea that the person of whom they are spoken has a duty to others to ascertain facts or, if he does not ascertain them, to act with reference to the likelihood that such facts exist. In conduct not involving consensual relations, a person is required to ascertain what would be ascertained by a person of ordinary intelligence exercising ordinary care in the protection of his own interests or those of others, unless he has superior attainments, in which case he is required to exercise the intelligence which he has. In consensual transactions, he should know what a person with the knowledge or skill which he professes would ascertain.

* * *
e. Notification. Under normal circumstances an act constituting notification results in knowledge to the person notified; but although notification is an act having some relation to the receipt of knowledge by the person notified, it may be performed and result in notice to such person although he does not thereby acquire knowledge; it may consist of acts which, although normally resulting in knowledge by the one notified or someone acting for him, do not so result in the particular case. This is true where an agreement, commercial custom, or statute provides that for certain purposes the doing of specified acts, after the lapse of a time which is reasonable under the circumstances, shall have the effect of knowledge by the one towards whom they are directed. In any case, the important matter is not the realization of the facts by the one notified, but the act or other event which in the particular case is considered sufficient either to apprise the one notified or to create such likelihood of his being apprised that for the purposes of the case the consequences are the same.

* * *

f. In the absence of a special custom, there is notice only in favor of the person giving the notification and his successors in interest or, if given on behalf of another, in favor of such other if the other has authorized or ratified it. As to others, the effect of notification is merely that of information received by the person notified if the notification results in knowledge by him. The acts required for notification by principal or agent to each other are stated in § 11. The acts required for notification to a third person of a change in the agent’s authority are stated in § 136.

* * *

g. Notice through an agent. By the rules of agency, notice is sometimes attributed to a principal because of knowledge which his agent has, has reason to have, or should have, as well as because of a notification given to the agent. The
rules by which a principal is affected with respect to third persons because of the knowledge of or notification to an agent are stated in §§ 268-283. Section 90 states the rule applicable to the ratification of a notification by a purported agent. The rules by which a master is affected in his duties to his servants because of the knowledge of or notification to other servants are stated in § 496. Wherever the knowledge of or notification to a servant or other agent as to a fact is effective as against the principal, the principal has notice of such fact.

Annotation:
This section defines notice. The cases cited here are not intended to apply to problems of the effect of notice. For effect of notice in particular situations, see appropriate titles.

Whatever puts a party on inquiry amounts in judgment of law to notice, provided the inquiry becomes a duty and would lead to the knowledge of the facts by the exercise of ordinary diligence and understanding. Morland v. Lemas ters, 4 Blackf. 383 (1837); Case v. Bumstead, 24 Ind. 429 (1865); Wilson v. Hunter, 30 Ind. 466 (1868); Kuhns v. Gates, 92 Ind. 66 (1883); Blair v. Whittaker, 31 Ind. App. 664, 69 N. E. 182 (1903); Webb v. John Hancock Mutual Life Ins. Co., 162 Ind. 616, 69 N. E. 1006, 66 L. R. A. 632 (1904).


Section 10. Knowledge Which Principal or Agent Should Have Inter Se.

Unless the parties have manifested otherwise to each other, a principal or agent, with respect to the other, should know what a person of ordinary experience and intelligence would know, and in addition, what he would know if, having the knowledge and intelligence which he has or which he purports to have, he were to use due care in the performance of his duties to the other.

Comment:

a. The rule stated in this Section is but a special application of far-reaching rules applicable in all branches of the law to the effect that, while in nonconsensual transactions the law requires a minimum standard of conduct with the
additional requirement that one must use the knowledge and intelligence which he in fact has, in consensual relations and in situations where one person justifiably relies upon the conduct of another, the standard may vary with the agreement or with the representations as to mental and physical attainments. The relations between principal and agent, including those between master and servant, are so varied that it is feasible to state only the application of the rule to some of the common situations.

b. The principal. Unless he indicates otherwise, a principal engaged in business represents to his agents that he knows the business usages of the locality or localities in which he regularly does business, that he is reasonably familiar with the laws pertaining to the business, that he has at his command a knowledge of pertinent scientific discoveries, and such knowledge of the general nature of the act which he requires to be performed by the agent, of his own goods and of the conditions of the premises upon which he conducts business, as would be acquired by the exercise of due care. For special requirements as to knowledge requisite to prevent harm to a servant or other agent, see §§ 435, 495.

A nonprofessional and nonbusiness principal makes no representations, by the employment of an agent to perform business for him, as to special knowledge or skill. The agent may, however, ordinarily assume that the principal will have the knowledge which he will derive from communications sent to him by the agent to his place of business.

c. The agent. Unless he indicates otherwise, a business agent represents that he understands the usages of the business in which he is employed. One undertaking a matter involving special knowledge ordinarily thereby represents that he has the special knowledge required, and undertakes that, so far as it is necessary to keep in touch with events, he will do so. If he is a professional agent he represents that he has the knowledge which is standard for the pro-
fession in which he is employed; there is, however, no representation that his knowledge is complete and accurate (see § 379). If the agent maintains an office, the principal may assume, unless he has notice to the contrary, that he will have the information which will come from reading communications delivered to a proper person at his office by the principal or by third persons doing business with the principal through him.

Annotation:
No Indiana case has been found dealing with this principle.

Section 11. Notification by Principal or Agent to the Other.

Unless otherwise agreed, there is a notification of a fact by the principal to the agent or by the agent to the principal:
(a) when one of them states such fact to the other; or
(b) when a reasonable time has elapsed after a writing stating such fact has been delivered
   (i) to the other personally,
   (ii) to the other's place of business,
   (iii) to a place designated by the other as a place for the receipt of business communications, or
   (iv) to a place which, in view of business customs or the relations between the parties, is reasonably believed to be the place for the receipt of such communications by the other.

Comment:

a. The parties may agree that any particular act shall be notification from one to the other. The usages of the particular business may indicate that a certain act constitutes notification, as where the owner of a business provides a bulletin board upon which he posts documents containing information for employees which they are required to read. The rule stated in this Section is applicable only when there is no agreement otherwise.

b. The requirements of Clause (b) are not met by the mailing of a letter by the principal or the agent to the other; the letter or message must reach the other personally, his place of business or other designated place and, if delivered to a person there or elsewhere, be delivered to a person who
has authority or apparent authority to receive it. Depositing a communication in a designated receptacle, such as a post office box held in the name of the addressee, is sufficient. The principles of agency are applicable and a notification given to an agent with power to bind his principal by its receipt is notification to the principal (see § 268).

c. Ordinarily, written communications to an agent or principal should be delivered to his place of business if he has one. Another place, however, may be designated. If the one addressed has no place of business and no other place is designated, the other, in seeking to communicate with him, may deliver communications to the place which, in view of all the facts, he reasonably believes to be the place at which the communication is most likely to be received, such as his residence.Unless otherwise agreed, the mailing of a letter by either party does not of itself constitute a notification to the other party of the facts contained in the letter. The communication is ineffective unless it is in such form that the party receiving it is likely to take notice of its contents. Thus, letters sent by other than first class mail and in the form of circulars, if not read by the recipient, have no effect.

* * *

d. Where a notification is made by the delivery of a writing to a proper place, the notification becomes effective as notice when the recipient reads it, or after such time has elapsed as is sufficient for him to become acquainted with its contents, in light of the circumstances which exist or which his conduct has caused the sender to believe to exist. It becomes effective before this only if there is an agreement that ready means of communication shall be provided. If the principal confides business to an agent who agrees to keep an office open regularly for the receipt of communications, a letter sent by the principal to his office ordinarily would be effective as notice after such time as it would have been read had the agent been attending to business, al-
though the principal knows that the agent has gone, if this appears to be the most feasible method of communicating with the agent; the same principle applies to communications sent by the agent. In matters of great importance, however, such as the termination of the relationship, the notification may be ineffective until the other has had an opportunity of learning of the communication or until the sender reasonably believes that such an opportunity has existed.

* * *

e. Either principal or agent can notify the other by giving a notification to the agent of the other, in accordance with the rule stated in §268. If the agent employs a subagent to act in the principal’s business, the principal can notify the agent by speaking or delivering a writing either to the agent himself or, if the subagent is an authorized recipient of communications, to the subagent. If the communication has reference to the subagent’s action, a notification given to the agent becomes effective with respect to such action only when the agent has had an opportunity to communicate it to the subagent; a notification to the subagent is effective only if, from it, the subagent should realize that it comes from the person whose business he is conducting.

* * *

Annotation:
No Indiana case has been found dealing with this principle.

Topic 3. Essential Characteristics of Relationship
Section 12. Agent as Holder of a Power.

An agent or apparent agent holds a power to alter the legal relations between the principal and third persons and between the principal and himself.

Comment:

a. The words “power of the agent” denote the ability of an agent or apparent agent to affect the legal relations of the principal in matters connected with the agency or apparent agency. The exercise of this power may result in
binding the principal to a third person in contract; in di-
vesting the principal of his interests in a thing, as where the
agent sells the principal’s goods; in the acquisition of new
interests for the principal, as where the agent buys goods
for the principal; or in subjecting the principal to a tort lia-
bility, as where a servant, while acting within the scope of
his employment, injures a third person. The agent also has
power to alter the legal relations between himself and the
principal, creating rights and liabilities inter se by his proper
or improper exercise of authority.

When a duly constituted agent acts in accordance with his
instructions in matters as to which it is possible for a prin-
cipal to act through an agent (see §§ 15-19), he has power
to affect the legal relations of the principal to the same ex-
tent as if the principal had so acted. The agent’s power,
however, is broader than authority, which exists only in ac-
cordance with the manifestations of the principal to the
agent, and is even broader than apparent authority, which
is dependent upon manifestations by the principal to third
persons. It includes the power which agents may have to
bind the principal to a contract or to subject him to actions
of tort, although there is neither authority nor apparent au-
thority to do the act creating liability (see §§ 140-267).

b. The power to affect the legal relations of others is not
peculiar to agents. The power of agents is distinctive, how-
ever, since it may exist solely because of the agency rela-
tion. Thus, the power which agents sometimes have to bind
their principals to a contract, although there is neither au-
thority nor apparent authority to do so (see §§ 161-176
and 194-202), is not based upon principles of contract.
Likewise, the power of servants to subject their masters to
tort liability may be based wholly upon the master-servant
relationship.

c. Ordinarily, the power of an agent includes a power to
subject the principal to personal liability. In this respect,
the agency relationship differs from that arising from a bail-
ment, since a bailee has, as such, no power to subject the bailor to liability in contract or in tort. It also distinguishes the agency relationship from that of trust, executorship, guardianship, and other similar relations, in that trustees as such, executors, and guardians have no power to impose personal liability upon those on whose account they act. A trustee may, however, also be an agent and is such if appointed by the beneficiary and subject to his directions. A trustee who is also an agent may subject his beneficiary to personal liability as may any other agent and is subject to the liabilities of an agent to the principal.

On the other hand, the agent's power is similar to that of the holder of a power given as security (see § 138) who, in certain cases, may subject the one giving the power to personal liability. Such power holders, however, are not agents because they do not have the duty to act primarily for the benefit of the giver of the power, nor are they subject to his right of control.

Annotation:

Section 13. Agent as a Fiduciary.

An agent is a fiduciary with respect to matters within the scope of his agency.

Comment:

a. The agreement to act on behalf of the principal causes the agent to be a fiduciary, that is, a person having a duty, created by his undertaking, to act primarily for the benefit of another in matters connected with his undertaking. Among the agent's fiduciary duties to the principal is the duty to account for profits arising out of the employment, the duty not to act as, or on account of, an adverse party without the principal's consent, the duty not to compete with the principal on his own account or for another in matters relating to the subject matter of the agency, and the duty to
deal fairly with the principal in all transactions between them. These duties and the resulting liabilities between the principal and agent are stated more fully in §§ 387-431. They have an important effect upon the interpretation of the authority conferred upon the agent (see § 39) and upon the liabilities between the third person and the principal (see §§ 165, 311-313).

b. The fact that an agent is subject to these fiduciary duties distinguishes him from other persons who have power to affect the interests of others; and the understanding that one is to act primarily for the benefit of another is often the determinative feature in distinguishing the agency relationship from others. Thus mortgagees, pledgees, and other similar powerholders, although having power to sell the property involved under certain conditions or to subject another to contractual liability, are not agents of the power giver; they have not undertaken to exercise such power primarily for the benefit of the person in whose name they formally act, and they are entitled to prefer their own interests in dealing with the subject matter. Likewise, the assignee of a nonnegotiable chose in action, whose right to enforce it has been developed through the fiction of an irrevocable power of attorney from the assignor, is not an agent if he holds the assignment for his own benefit. A bailee whose only duty is to hold goods for the bailor in accordance with the terms of the bailment is not an agent since he does not have an agent’s duties of loyalty and obedience. A real estate broker whose sole function is to find someone who will enter into a transaction with the owner of land is ordinarily an agent, but the agreement with him may be such that he has no fiduciary duties and hence is not an agent.

c. The facts in each case must be considered in determining whether or not it is understood that the primary obligation of one party is to act for the benefit of the other. The name which the parties give to the relationship is not determinative. Likewise, the fact that one of the parties has
subsidiary duties to act for the interests of another, as where a purchaser of goods from a manufacturer agrees that he will advance the interests of the manufacturer in certain respects, does not create an agency relationship with respect to the sale. If, in such case, he is authorized to make representations for the manufacturer, as is frequently true of retail automobile dealers, he acts as agent in making these although his position otherwise is that of an adversary party. There are other cases where there is a dual relationship, as where an agent to sell makes advances, in which case he is in the position of a pledgee in regard to such advances.

\[d.\] If the agent has limited capacity, as where he is an infant, he may not be subject to personal liability for his failure to carry out the duties he has undertaken. If, however, he acquires something as a result of his undertaking, for which it would be his duty to account were he of full capacity, the principal may have quasi-contractual rights against him or he may be charged as a constructive trustee. It is not within the scope of the Restatement of this Subject to state generally the liabilities of persons of limited capacity.

Annotation:

Section 14. Control by Principal.

A principal has the right to control the conduct of the agent with respect to matters entrusted to him.

Comment:

a. The right of control by the principal may be exercised by prescribing what the agent shall or shall not do before the agent acts, or at the time when he acts, or at both times. The agent is subject to a duty not to act contrary to the principal's directions although the principal has agreed not to give such directions (see § 385). If the agent has notice of facts from which he should infer that the principal would not wish him to act as originally specified, the agent's authority is terminated, suspended, or modified accordingly (see § 108). The control of the principal does not, however, include control at every moment; its exercise may be very attenuated and, as where the principal is physically absent, may be ineffective.

The extent of the right to control the physical acts of the agent is an important factor in determining whether or not a master-servant relationship between them exists (see § 220).

b. Where it is otherwise clear that there is an agency relationship, as in the case of recognized agents such as attorneys at law, factors, or auctioneers, the principal, although he has contracted with the agent not to exercise control and to permit the agent the free exercise of his discretion, nevertheless has power to give lawful directions which the agent is under a duty to obey if he continues to act as such (see § 385). Where the existence of an agency relationship is not otherwise clearly shown, as where the issue is whether a trust or an agency has been created, the fact that it is understood that the person acting is not to be subject to the control of the other as to the manner of performance determines that the relationship is not that of agency.

c. There are many relationships in which one acts for the benefit of another which are to be distinguished from agency...
by the fact that there is no control by the beneficiary. Thus, executors, guardians, and receivers, although required to act wholly for the benefit of those on whose account the relationship has been established, are not subject to their directions. A trustee, that is, one holding property in trust for another and subject to equitable duties to deal with the property for the other's benefit, may or may not be subject to control in the management of the property by the one for whose benefit he is required to act. If he is so subject, he is also an agent, and the rules stated in the Restatement of this Subject apply to him. The directors of a corporation for profit are fiduciaries having power to affect its relations, but they are not agents of the shareholders since they have no duty to respond to the will of the shareholders as to the details of management. The partnership relationship, while having many of the characteristics of the agency relationship, differs from it in that a partner's power to bind his co-partner is not subject to the co-partner's right of control unless there is an agreement to that effect.

Annotation:

Chapter 2
CREATION OF RELATIONSHIP

Topic 1. Mutual Consent and Consideration

Section 15. Manifestations of Consent.

An agency relationship exists only if there has been a manifestation by the principal to the agent that the agent may act on his account, and consent by the agent so to act.

Comment:

a. One becomes an agent only if another in some way indicates to him consent that he may act on the other's account. This consent may be communicated by any of the
means stated in § 26, including acquiescence by the principal in a series of acts previously done by another as agent. A person is not an agent merely from the fact that he believes he has been authorized to act as agent for another or purports to act as such. It is only where the person acting believes reasonably, from conduct for which the other is responsible, that he is authorized so to act, that there is an agency relationship. The same consequences as if there were an agency may result, however, from the ratification by the person on whose account the act is purported to be done (see §§ 100-101).

b. The agency relationship exists only if the agent consents to it. A person may, by his sole act, create a power in another to act on his account, but since agency is a fiduciary relationship, it can exist only if the other accepts the power. As in the case of contractual relations, the manifestation of the principal may be such that it is not necessary for the acceptance to be communicated to him. Thus, if the principal requests another to act for him with respect to a matter, and indicates that the other is to act without further communication and the other consents so to act, the relationship of principal and agent exists. If, under such conditions, the other does the requested act, it is inferred that he acts as agent unless he manifests that he does not so intend or unless the circumstances so indicate. This inference is strengthened if, being requested to act in the matter, the other does something which he could properly do only as an authorized agent.

* * *

c. A person who causes another to act in his affairs but without the other's knowledge that he is so acting may be subject to the duties and liabilities of a principal although there have been no manifestations between the parties, as where an agent of an undisclosed principal, operating a busi-
ness for the principal, employs persons to act in the business. Such persons have all the rights of employees with respect to the owner of the business and are subject to some but not all of the duties of an agent to his principal (see § 431). Such persons also have the power of affecting the relations of the undisclosed principal to third persons, as if such principal had employed them directly (see § 142).

d. One acting for the benefit of another without a manifestation of consent by the other may subject himself to the liabilities of an agent at the election of the principal. Thus, one who purports to act on behalf of another but without the authority to do so is subject to liability to the other as if he were a disobedient agent if he affects the principal’s interests either by binding the principal to a third person where he has apparent authority, or by disposing of or meddling with the principal’s assets (see § 430). Likewise, although a purported agent when he acts does not have power to affect the principal’s interests, the principal may ratify and thereby impose upon the agent the same liabilities as if he originally had authority (see § 408).

e. In the requirement of mutual consent, the agency relationship differs from a trust, since the beneficiary may not have created or consented to the trust; likewise, a trustee, unlike an agent, may act on account of a person, such as an idiot, who is so lacking in capacity that his consent has no effect (see the Restatement of Trusts). The agency relationship is also to be distinguished from executorships, guardianships, and receiverships which may be created irrespective of the consent or capacity of the beneficiaries.

Annotation:
Accord: Carnahan v. Hughes, 108 Ind. 225, 9 N. E. 79 (1886); Hockett v. Jones, 70 Ind. 227 (1880).

Principal not bound by act of one purporting to be subagent when no assent had been given to appointment of a subagent. Lucas v. Rader, 29 Ind. App. 287, 64 N. E. 488 (1902).

Relationship of employer and employee is contractual and is a product of meeting of minds and to create such a relationship there must be an express contract or such conduct as will unequivocally show that parties recognize one another as master and servant. Rogers v. Rogers, 70 Ind. App. 659, 122 N. E. 778 (1919).
Section 16. Consideration.

The relationship of principal and agent can be created although neither party receives consideration.

Comment:

a. Agency may result from a contract between the parties or it may result from a direction by a person to another to act on his account with or without a promise by the other so to act and with or without an understanding that the other is to receive compensation for his services if he does act.

b. Where the relationship is created without consideration on the part of either, it ordinarily may be terminated by either without liability (see §§ 378, 450). During the existence of the relationship, however, the agent has the same power to affect the principal's legal relations to third persons as if there were consideration in the creation of the relationship.

Annotation:
No Indiana cases directly holding on this question were found; however, a gratuitous agent was held liable to principal for damages arising from failure to observe instructions of the principal. Criswell v. Riley, 5 Ind. App. 496, 30 N. E. 1101 (1892).

Topic 2. Delegable Acts and Powers

Section 17. What Acts Are Delegable.

A person privileged, or subject to a duty, to perform an act or accomplish a result may properly appoint an agent to perform the act or accomplish the result, unless public policy or the agreement requires personal performance; if personal performance is required, the doing of the act by another on his behalf does not constitute performance by him.

Comment:

a. For most purposes, a person may properly create a power in an agent to achieve the same legal consequences by the performance of an act as if he himself had personally acted. The performance of a duty or the enjoyment of a privilege, however, may require personal action by the one owing the duty or having the privilege. This is so as to the performance of duties under a contract which calls for the exercise of personal qualities of the contractor. Likewise,
the privilege of entry upon land is frequently personal and
does not include the entry of servants.

* * *

b. Duties or privileges created by statute may be im-
posed or conferred upon a person to be performed or exer-
cised personally only. Whether a statute is to be so inter-
preted depends upon whether or not in view of the purposes
of the statute, the knowledge, consent or judgment of the
particular individual is required. The making of affidavits
as to knowledge and the execution of wills are illustrations
of acts commonly required by statute to be done personally.

c. The attempted exercise by an agent of a power in the
performance of a nondelegable act does not operate as the
performance of the act. Thus, one who has contracted to
perform personal services does not render the performance
although some one whom he has appointed so to act renders
services as valuable as those promised. The act of a person
who attempts to vote as agent of another at a public election
is inoperative as a vote.

The appointment of another to attempt to perform a non-
delegable act for the first may, in itself, be criminal or
tortious, as where a public officer permits a third person to
perform the essential functions of his office, or where an
agent, without authority to do so, appoints a subagent. The
Comment on §§ 400, 401, 406, 409 states consequences
which may follow an improper delegation.

Annotation:

Any person capable of transacting his own business may appoint an agent
to act in his behalf in all the ordinary affairs of life. Calev v. Morgan, 114 Ind.
350, 16 N. E. 790 (1888).

One who has authority to act for another cannot redelegate an authority to
do an act involving the exercise of judgment or discretion. New v. Germania
Roder, 29 Ind. App. 287, 64 N. E. 488 (1902).

Cochell v. Reynolds, 156 Ind. 14 (1900) (Authority to sign remonstrance
against granting license to person against whom agent saw fit to remonstrate,
held invalid.).

Ragle v. Mattox, 159 Ind. 584 (1902) (Authority to sign name to remon-
strances against all applicants for license, held valid.).

No Indiana cases were found involving contracts calling for personal per-
formance.
Section 18. Delegation of Powers Held by a Fiduciary.

Unless otherwise agreed, a person cannot properly delegate to another the exercise of discretion in the use of a power held for the benefit of a third person.

Comment:

a. The rule stated in this Section is a special application of the rule stated in § 17, since the personal discretion of the one holding a power for the benefit of another is an essential part of its proper exercise.

b. Delegation by agents. Unless the principal manifests otherwise, an agent has no authority to delegate to another the exercise of discretion in the performance of his authority; nor may a servant delegate to another the performance of service. This rule is to be distinguished from the general rule as to the appointment of agents by other agents; although many agents are employed to appoint other agents, it is not usual to authorize a person to conduct a transaction and at the same time confer upon him a power of substitution with respect to matters involving the exercise of discretion. Sections 78-81 state more specifically the circumstances which are pertinent in determining the authority of agents in both types of cases.

c. Delegation by fiduciaries generally. Trustees cannot delegate to others the use of discretion in exercising their powers, unless the terms of the trust so provide or unless, as in the case of details involved in the management of trust property, the act is of such a nature that it is inferred that the exercise of personal discretion is not mandatory. A corporate trustee must, of course, act through its officers and members of its business staff. For the power of a trustee to delegate, see the Restatement of Trusts. The same principles apply to administrators, guardians, receivers, and other fiduciaries. It is not within the scope of the Restatement of this Subject to state the rules which limit the power of delegation held by particular kinds of fiduciaries.
d. Effect of attempted or improper delegation. The attempt of a fiduciary to delegate power to another person may be ineffective so that his appointee has no power, as where one, holding the title to land as trustee through a recorded deed which discloses the trust, authorizes another person to convey it in his discretion; in other cases, an effective transaction may result, as where a trustee of land whose fiduciary capacity does not appear in the record, improperly authorizes an agent to sell and convey, and a conveyance is made to a bona fide purchaser. In some cases the person to whom an improper but effective delegation is made is subject to liability to the beneficiary, as he is normally if he knows of the improper delegation. If, however, the fiduciary has a legal title, his appointee, if without notice as to the interest of the beneficiary, is protected (see Comment c on § 349). Ordinarily, the attempt to delegate discretion by one having a duty to use his own discretion is itself a breach of duty although the appointee refuses the appointment or does no acts under it.

e. Those holding powers primarily for their own benefit are to be distinguished from those holding powers in trust. Thus, a shareholder in a business corporation, unlike a citizen voting at a public election or a director of the corporation, may appoint another to vote for him, since he is not a fiduciary with respect to his fellow shareholders.

Annotation:

Section 19. Appointment to Perform Illegal Acts.

The appointment of an agent to do an act is illegal if an agreement to do such an act or the doing of the act itself would be criminal, tortious, or otherwise opposed to public policy.

Comment:

a. One may not properly appoint an agent to commit a criminal or otherwise illegal act, but the appointment ordi-
narily is not wholly ineffective. If the one directed to perform the act does the act directed, the person directing him may be responsible criminally and, if a tort is committed, civilly. Furthermore, the authorization gives an immunity from liability, as between the parties, to the one doing the act and, if the one acting is ignorant of facts making the transaction illegal, he is entitled to compensation and indemnity (see Comment c on § 439 and § 467).

b. It is not within the scope of the Restatement of this Subject to state what agreements or acts are illegal nor to state generally the effect of illegality upon the relations of parties to the agreement. The Restatement of Contracts, §§ 512-609, states the rules by which the illegality of a bargain is determined and the effect of such illegality upon the bargaining parties. The liabilities between the principal and agent where the employment is illegal depend upon the principles stated therein. The special duty of an agent to account for money received from or on account of the principal, or for profits derived from an illegal transaction conducted by him for the principal, is stated in § 412 of the Restatement of this Subject. The liability for improperly causing an agent to violate his fiduciary duties to another principal is stated in §§ 312-313.

c. Directions to agent to conduct illegal transactions. If an agent obeys a direction to conduct a transaction with a third person which is illegal for reasons other than the personality of the agent, the principal has the same rights and is subject to the same civil liability with respect to the third person as if he had conducted the transaction in person; a direction to commit a tort or a crime subjects the principal to tortious or criminal liability for its performance by the agent to the same extent as if the principal had himself committed the act, subject to the rules of criminal law in regard to the responsibility of accessories. The principal's responsibility for directing an illegal act is to be distinguished from the liability of a master or other principal for
the crimes and torts of his servants or other agents committed in the course of the agency or the scope of the employment, under the rules stated in §§ 215-267.

d. Acts illegal if performed by agents. An act may be criminal or tortious if performed by the agent although not if performed by the principal, as where a statute provides for the compounding of medicines only by a licensed person, the principal alone having a license, or where the principal has a personal privilege to enter premises. Whether or not the license of the principal includes a power of delegating his privilege of acting, as it does normally where a license to sell is required, depends upon the construction of the statute. If a statute requires the doer of an act to be licensed, ordinarily an unlicensed principal may employ a licensed agent to do it.

Statutes requiring agents to be licensed are sometimes enacted for the protection of principals, such as many of those regulating the business of brokers. The effect of these statutes may be not only to cause an agent who acts without a license to be liable criminally but also to deprive him of a right to compensation from the principal; the relations of the principal with third persons are not thereby affected. If the statute is passed for the protection of the public also, a principal knowingly employing an unlicensed agent may be deprived of the normal compensation or other benefit of an act done by an agent, as where one whose business is that of a public weigher, required to have licensed employees, employs an unlicensed person to weigh goods.

As used in the Restatement of this Subject, the word "statute" refers to legislation enacted by any lawmaking body, including legislatures, administrative boards, and municipal councils.

Annotation:
Appointment of agent to appear before legislature and urge claim to compensation for principal, by which agent was to be paid by a percentage of the award secured, is illegal. Coquillard's Adm'r v. Bearss, 21 Ind. 479, 83 Am. Dec. 362 (1863).
Contract by one appointed to supervise performance of public work cannot enter into contract to work for contractor doing the work. *Cheney v. Unroe*, 166 Ind. 550 (1906).

**Topic 3. Capacity of Parties to Relationship**

**Section 20. Capacity of Principal.**

A person who has capacity to affect his legal relations by the giving of consent has capacity to authorize an agent to act for him with the same effect as if he were to act in person.

**Comment:**

*a. Meaning of capacity.* A person has capacity to enter into a legal relation if he has a power to create or enter into the relation under the same circumstances in which a normal person would have the power to create or enter into such relation; if he does not have such power because of a personal characteristic, he lacks capacity. Certain classes of persons, such as married women at common law, infants, insane persons and, in some states, aliens, have capacity to create and enter into some legal relations but they have not capacity to create or enter into other legal relations which are open to others who have full capacity.

A transaction between any two persons may be void or otherwise illegal because of the nature of the transaction and not because of the personal characteristics of either of the parties (see §§ 17, 19). Likewise, it may be illegal for a person having a certain relationship with another to enter into transactions with him upon the ordinary terms (see § 18). In such cases, the lack of power to create a binding legal obligation is not due to the lack of capacity as that word is used in the Restatement of this Subject, since the lack of power is not due to a personal characteristic.

*b. Agency as a consensual relationship.* Agency is not necessarily the result of a contract; hence it is not necessary for the appointment of an agent that the principal should have capacity to contract. Agency is, however, a consensual relationship, and therefore the principal must have capacity to give a legally operative consent. Aside from statute, there
are no special rules which limit the capacity of persons to become principals. Thus, married women and insane persons can authorize agents to accomplish transactions if, but only if, they have capacity to become parties to such transactions.

c. Principals of limited capacity. The ordinary consequences of agency follow the appointment of an agent by a person of limited capacity, except that the appointment and transactions done thereunder are subject to defenses which the principal may have because of his lack of capacity. Thus, infants and persons lacking full capacity because of mental defects are affected by acts done on their account by a person whom they direct so to act, to the extent to which they have capacity to give consent and become parties to the transaction. Likewise, aside from statute, to the same extent that a married woman may be bound by her consent to a delegable act, the act of an agent pursuant to her directions binds her.

d. Matters not herein stated. Statutes may limit the capacity of persons to appoint agents to do particular types of acts which they may themselves perform with legal effect. Thus, statutes have been passed making illegal the appointment by married women of agents to convey property although they have capacity to convey it by personal acts. It is not within the scope of the Restatement of this Subject to state the effect of such statutes. Likewise, no statement is made as to what persons have capacity to give operative consent, or as to the rules determining the liabilities between a principal lacking full capacity and the person whom he appoints as agent, or the extent to which such a principal is subject to liability for the tortious acts of his servant or other agent which he does not authorize but for which a principal having full capacity would be liable.

e. Acting for unincorporated groups. A person acting for an unincorporated group of persons may be an agent either of all members of the group or certain of them. If the one who authorized him to act for all has also been au-
thorized by all the members or certain of them to appoint him, he is the agent of such persons. Thus, one appointed by a member of a partnership who has been authorized to act for the partnership is the agent of all the partners. Whether one acting for other groups, such as clubs, is the agent for the entire group or only of certain members there-of is dependent upon the interpretation of the manifestations of those alleged to be principals.

f. Joint Principals. A number of persons may act jointly in the authorization of an agent. In such case, the agent may have power to subject them to joint liability to third persons and may have contractual rights against them as joint promisors.

Annotation:
Any person capable of transacting his own business may appoint an agent to act in his behalf in all the ordinary affairs of life. Coley v. Morgan, 114 Ind. 350, 16 N. E. 790 (1887).

Section 21. Capacity of Agent; in General.

(1) Any person has capacity to hold a power to act on behalf of another.

(2) The extent to which the person holding such power is a fiduciary and is subject to duties and liabilities to the principal depends upon his capacity.

Comment on Subsection (1):

a. Any person may be appointed to act on account of another and to affect the relations of that other by his conduct. The power of a person to affect another who has consented to an action by him on the other’s account is limited only by the agent’s physical or mental ability to act. Capacity to have rights or be subject to duties and liabilities is not necessary. The incapacity of the agent to affect his own legal relations by the performance of an act done on his own account similar to that done for the principal does not affect the resulting relations of the principal to third persons.
Thus, an infant, a married woman, or a person otherwise so incompetent that he cannot bind himself by a contract may bind one who appoints him to make a contract for him. One whom a court has adjudged totally insane but who retains volition, or one who has had been deprived of civil rights, has power to affect the principal as fully as if he had complete capacity. A corporation, partnership, or other association has capacity to act as agent; it may, however, be illegal for a particular kind of association so to act.

b. One may hold a power to bind another although it is illegal for him to hold or exercise it. Thus, one forbidden to act as agent without a license, although he may be penalized for so acting, as in the case of a broker or attorney at law, may nevertheless affect the one for whom he acts if he does act. Likewise, where one acts as agent for two contracting parties without the knowledge of either, he may affect the relations of each, although it is unlawful for him to do it (see § 313). The effect of a statute, however, may be to prevent, as well as to make illegal, the holding of a power.

Comment on Subsection (2):

c. Although all persons have legal capacity to hold powers, not all persons have legal capacity to be subject to fiduciary duties. Thus, a person without capacity to bind himself because lacking in mentality may have a power to bind one who appoints him to act, but he is not subject to the duties or liabilities which result from a fiduciary relationship. Likewise, an infant is not subject to the liabilities to which an adult agent would be subject. It is not within the scope of the Restatement of this Subject to state to what extent partially incompetent persons are subject to fiduciary duties.

d. Although the person appointed to act may not be subject to the normal duties resulting from fiduciary undertakings, other consequences of a fiduciary relationship may result. Thus, irrespective of liability otherwise, if an infant or married woman acquires something as agent, the principal
may have rights with respect to it or may have quasi-contractual rights. A statement as to the existence and extent of such rights is not within the scope of the Restatement of this Subject.

*Annotation:*

No Indiana cases are found declaring necessary capacity of agent.

**Section 22. Husband and Wife as Principal and Agent.**

A husband or wife may be authorized to act for the other party to the marital relationship.

**Comment:**

a. It is not necessary that the parties to an agency relationship have capacity to contract with each other. To the extent that a married woman may contract or appoint others as agent, she has capacity to appoint her husband to contract or do other acts on her account, aside from statute. To the extent that a married woman is subject to liability for the torts of an agent, she is subject to liability for the torts committed by her husband acting as agent. Statutes sometimes create a disability in the husband to convey his wife's property at her request or to conduct particular types of transactions for her.

b. Neither husband nor wife by virtue of the relationship has power to act as agent for the other. The relationship is of such a nature, however, that circumstances which in the case of strangers would not indicate the creation of authority or apparent authority may indicate it in the case of husband or wife. Thus, a husband habitually permitted by his wife to attend to some of her business matters may be found to have authority to transact all her business affairs. Likewise, if a wife is customarily permitted to order household supplies, apparent authority on her part to purchase things needed in the household may be readily inferred.

* * *
c. The power of a wife to subject her husband to liability for necessaries when he does not supply them is to be distinguished from authority or apparent authority to purchase household supplies. It is not within the scope of the Restatement of this Subject to state the rules as to the liabilities in the first case, which are dependent upon quasi-contractual principles and exist irrespective of consent by the husband.

Annotation:


Wife may ratify unauthorized act of husband. Lichtenberger v. Graham, 50 Ind. 288 (1875).

Notice to husband is notice to wife when husband is acting as agent of wife in the transaction. Forseythe v. Brondonburg, 154 Ind. 588, 57 N. E. 247 (1900).

Section 23. Agent Having Interests Adverse to Principal.

One whose interests are adverse to those of another may be authorized to act on behalf of the other; it is a breach of duty for him so to act without revealing the existence and extent of such adverse interests.

Comment:

a. One may be an agent for another although he violates his fiduciary duty to the other in acting as such. The disabilities of an agent who has interests of his own or is in charge of interests of a third person which conflict with the interests of the principal, and the effect of such disabilities upon the mutual rights and liabilities of principal and agent are stated in §§ 289-398. The fact that the agent has interests adverse to the principal does not affect his power to bind the principal to third persons who have no notice of the adverse interests (see §§ 165, 199); transactions with third persons with notice of them are voidable by the principal (see § 166).
Annotation:

No Indiana cases dealing with the effect of adverse interest upon the capacity of one to act as agent for another and so create rights in and obligations upon third persons toward that other have been found.

Section 24. Adverse Party to Transaction as Agent.

One party to a transaction may be authorized to act as agent for the other party thereto, except for the purpose of satisfying the requirements of the Statute of Frauds.

Comment:

a. An agent may be authorized to make a contract between himself and the principal and may be authorized to buy from or sell to the principal. It is ordinarily understood that an agent is not to do this without the principal's knowledge and if he does so, the transaction is voidable. In such cases, however, he may have power to affect the interests of the principal and, although it is wrongful for him to exercise it, its exercise has legal consequences. The position of the third person with respect to such situations is dealt with in §§ 165-167, 199. The effect between principal and agent is dealt with in §§ 389-390.

* * *

b. A party to a transaction within the Statute of Frauds cannot orally confer power upon the other party to the transaction to sign effectively a memorandum required to satisfy the provisions of the Statute. A party may, however, orally confer power upon the agent of the other party so to do.

Annotation:

Agent to sell may not purchase from himself; and court will compel reconveyance unless a ratification by principal with full knowledge is shown. Gage v. Pike, 1 Smith 145 (1848).

An agent to sell may purchase from the principal if all facts are disclosed to principal—burden is on agent to show he fairly dealt with principal. Rochester v. Levering, 104 Ind. 562, 4 N. E. 203 (1886).

Contract by agent to sell with a partnership of which he is a member or a corporation, in which agent is actively interested, may be repudiated by principal. Bedford Coal & Coke Co. v. Parke County Coal Co., 44 Ind. App. 390, 89 N. E. 412 (1909).

No cases involving the exception were found.
Topic 4. Relationship of Master and Servant

Section 25. General Rule.

The rules stated in §§ 20-24 as applicable to principal and agent are applicable to master and servant.

Annotation:

No distinction has been made under sections 20-24 between strictly principal and agent relationship and master and servant relationship cases.

(To be continued.)