agent, is in any case held out to the public at large, or to third persons dealing with him, as competent to contract for and to bind the principal, the latter will be bound by the acts of the agent, notwithstanding he may have deviated from his secret instructions and orders; for otherwise such secret instructions and orders would operate as a fraud upon the unsuspecting confidence and conduct of the other party." And these rules thus stated by Mr. Justice Story, are approved by the Supreme Court of Massachusetts in *Soldell* v. *Baker*, 1 Metcalf 202, 203.

And even in case of an agent constituted for a special purpose, the rule is laid down by Kent, 2 Com. 621, that though the person dealing with him does so at his peril, when the agent passes the precise limits of his power, yet, if he pursues the power as exhibited to the public, his principal is bound, even if private instructions had still further limited the special power. In the case of *Hatch* v. *Taylor*, 10 New Hampshire 538, Parker, C. J., in delivering the opinion of the court, elaborately discusses the doctrine of special agency, and lays down the distinctions between authority and instructions, more satisfactorily and clearly than we have elsewhere found them. He says: "It is contended, however, that the distinction between authority and instructions does not apply in cases of special agents," etc. "But it is, we think, apparent enough that all which may be said to a special agent about the mode in which his agency is to be executed, even if said at the time that the authority is conferred, or the agency constituted, cannot be regarded as part of the authority itself or as a qualification or limitation upon it. There may be at times upon the constitution of a special agency, and there often is, not only an authority given to the agent, in virtue of which he is to do the act proposed, but also certain communications addressed to the private ear of the agent, although they relate to the manner in which the authority is to be executed, and are intended as a guide to direct its execution. These communications may, to a certain extent, be intended to limit the action of the agent: that is, the principal intends and expects that they shall be regarded and adhered to in the execution of the agency; and should the agent depart from them, he would violate the instructions given him by the principal, at the time when he was constituted agent, and executed the act he was intended to perform in a case in which the principal did not expect that it should be done. And yet in such case he may have acted entirely within the scope of the authority given him and the principal be bound by his acts. This could not be so if those communications were limitations upon the authority of the agent. It is only because they are not to be regarded as part of the authority given, or a limitation upon that authority, that the act of the agent is valid, although done in violation of them; and the matter depends upon the character of the communications thus made by the principal and disregarded by the agent."

Another principle is sometimes applicable even in cases of special agency, that a recognition by the principal of the agency in the particular instances is evidence of the authority; as where a person subscribes policies in another's name, and upon a loss happening the latter pays the amount. This would be evidence of a general authority to subscribe policies: 2 Starkie on Evidence 43.

This would seem to operate in the nature of an estoppel, and the principal cannot be permitted to be at the same time recognizing and denying the agency.

In a case recently tried at *nisi prius*, where a real estate agent had been employed to negotiate a loan, but the principal claimed that there was a specific limitation to his authority, it was strenuously contended on his behalf, that the burden of proof was upon the plaintiff to establish the agency, in all its terms; and that unless he could show by a preponderance of testimony that there was no such limitation as claimed by the defendant, he must fail in his case. This, however, cannot be the law: *first*, because under the well established rules of evidence, whenever certain facts are peculiarly within the knowledge of one party, upon him lies the burden of proof as to these facts: Taylor's Law of Evidence, § 347, p. 384; 1 Phillips on Evidence 821. *Secondly*, because such limitation is matter of defence and avoidance, set up by the defendant, the plaintiff having in the first instance made out a *prima facie* case. In constituting an agency, the principal and agent are ordinarily the only persons cog-