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Agency - Revocability of Power of Sale Coupled with an Interest

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Notes

AGENCY—REVOCABILITY OF POWER OF SALE COUPLED WITH AN INTEREST—An individual named Cowie advanced money to the plaintiff, and as security for the loan, he was authorized by the plaintiff to reimburse himself through the sale of a quantity of liquid amber which belonged to the plaintiff. Defendant, an agent of Cowie, was notified by the plaintiff that he, the plaintiff, had revoked the power given to Cowie to sell the amber in question. Ignoring this notification the defendant sold the amber and credited the proceeds to the account of Cowie. Plaintiff sues for the value of the amber sold. *Held,* the power given to Cowie was coupled with an interest and therefore irrevocable. *Eduardo Fernandez Y Compania v. Longino and Collins,* 6 So. (2d) 137 (La. 1942).

The instant case is in accord with the universally established rule that an agency in which the agent or a third person has an interest cannot be revoked during the lifetime of the principal. The authorities, however, are in conflict as to whether the agency continues after the death of the principal. Although the instant case involves the problem of an attempted revocation during the life of the principal, the contents of this note will be directed primarily toward a discussion of the various views relating to the revocation of the agency by the death of the principal.

The English courts hold that a power given as security, although not an estate in the thing itself, is coupled with an interest and therefore not revocable by the principal,[1] but that it ceases upon the principal's death.[2] While the American courts similarly recognize that a power coupled with an interest may not be revoked by the principal, they do not follow the English rule that it is terminated upon the death of the principal. In *Hunt v. Rous-*

1. Walsh v. Whitcomb, 2 Esp. 565, 170 Eng. Rep. 456 (N.P. 1797); In re Hannan's Empress Gold Mining and Development Co., Carmichael's Case (1896) 2 Ch. Div. 643, 648 [quoting from Clerk v. Laurie, 2 H. & N. 199, 200; 157 Eng. Rep. 83 (Exch. 1857)]: "What is meant by an authority coupled with an interest being irrevocable is this,—that where an agreement is entered into on a sufficient consideration, whereby an authority is given for the purpose of securing some benefit to the donee of the authority, such authority is irrevocable."

2. Wynne v. Thomas, Willes 563, 125 Eng. Rep. 1322 (C.P. 1745); Watson v. King, 4 Campb. 272, 171 Eng. Rep. 87 (N.P. 1815) held, a power of attorney though coupled with an interest is revoked by the death of the grantor.

manier's Administrators,[3] the leading American case, Chief Justice Marshall distinguished between the general situation of a power in which the agent or a third person may have acquired an interest, and the more specific "power coupled with an interest" in a stricter sense of that term, and held that only the latter remained unrevoked by the death of the principal. In the former case, the power could only be exercised in the principal's name and hence terminated upon his death. A reading of that opinion is not productive of any very definite conception of the distinction between "a power coupled with an interest" and other powers in which an agent or a third party has an interest. The criterion appears to be that the agent must be able to exercise the power in his own name if it is to be placed in the first category.[4]

The late Professor Mechem[5] has declared that the reasoning of the *Hunt* case was too technical, being based on the old agency theory that the act is done in the name of the principal. Applying this theory, where the principal is dead, he no longer retains legal capacity and cannot act through a representative. Therefore, any act done in the principal's name after his death is a nullity. Another distinguished American scholar[6] criticizes the *Hunt* case as being based on a medieval idea of extended will of the principal, and argues that the distinction drawn by Chief Justice Marshall is without justification or any authoritative basis. He points out that a requirement that the agent have a legal title, as the case seemingly requires, would virtually limit its application to cases where he is really a principal.

The Restatement of Agency also rejects the distinction enun-

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3. 8 Wheat. 174, 5 L.Ed. 589 (U.S. 1823).

4. 1 Mechem, A Treatise on the Law of Agency (2 ed. 1914) 464, § 654. If an equitable estate or interest in the subject matter was created by the contract and the power, then there are authorities (whether consistent with Hunt v. Rousmanier or not) which would hold the power to be one coupled with an interest and therefore irrevocable by the grantor's death. Osgood v. Franklin, 2 Johns. Ch. (N.Y.) 1, 20; 7 Am. Dec. 513 (1816); Pacific Coast Co. v. Anderson, 47 C.C.A. 106; 107 Fed. 973 (1901); Estate of Keys, 137 Pa. 565, 21 Am.St.R. 896 (1890); Farmers' Bank v. Kansas City Publishing Co., 3 Dillon 287, Fed. Cas. No. 4,652 (1876). In criticizing these decisions Professor Mechem points out that a purely equitable interest cannot suffice to preserve the power to convey the legal estate after the death of the principal. 1 Mechem, op. cit. supra note 4, at 468, § 756.

5. 1 Mechem, loc. cit. supra note 4.

6. Seavey, Termination by Death of Proprietary Powers of Attorney (1922) 31 Yale L. J. 283. He declares that a power given as security should not be revoked by death any more than by act of the principal or his insolvency, since the agency is no longer purely personal; and furthermore to maintain that an interest in the proceeds given as security is not "coupled with an interest" is to make a distinction of no practical value.

ciated in the *Hunt* case[7] and furthermore states: "If the creator of the power dies and the power is given to secure the performance of a duty not terminated by the death of the power giver, the power survives."[8] Under this view a power given for the benefit of the agent or a third party is not terminated by the death of the one giving it.[9]

The Roman law counterpart of an agency coupled with an interest was the *procuratio in rem suam*[10] which, although revocable, expressly or by death, allowed the *mandatarius* an *actio utilis* in his own name.[11] A man appointed agent in a matter in which he is interested has a right of action in his own name.[12]

According to the French Civil Law, a power granted in the common interest of principal and agent or third party is irrevocable by death or act of the principal without consent of the other party, it being in the nature of a synallagmatic contract.[13] A mandate which is the condition or clause of the contract is also irrevocable.[14] If an agent, advancing sums of money to the principal,[15] or being the creditor of the principal,[16] is given a mandate to collect sums of money from debtors of the principal, it is not revoked by the principal's death. Thus, in the French Civil Law there is no distinction between a power given as security or one co-existent with the interest in the thing itself, and since the person is no longer considered as important,[17] neither is revoked by death of the principal.

7. 1 American Law Institute, Restatement of Agency 308-311, § 120, 121; 350-359, § 138, 139. Nowhere is the term "power coupled with an interest" used, and no distinction is suggested between death and act of the principal as means of revocation. 1 American Law Institute, Restatement of Agency 350, § 138: "A power given as security is a power to affect the legal relations of another, created in the form of an agency authority, but held for the benefit of the power holder or a third person and given to secure the performance of a duty or to protect a title, either legal or equitable, such power being given when the duty or title is created or given for consideration."

8. 1 American Law Institute, Restatement of Agency 357, § 139(1)(d).

9. Id. at 308, § 120(a).

10. Buckland, A Textbook of Roman Law (1921) 518: "The assignment was effected by giving the assignee a mandate to sue on the claim, on the understanding that he was not to be accountable for the proceeds—*procuratio in rem suam.*"

11. Ibid.

12. D.3.3.55.

13. 8 Marcadé et Pont, Explication Théorique et Pratique du Code Civil (2 ed. 1877) 655, nº 1140; Baudry-Lacantinerie et Wahl, Traité Théorique et Pratique de Droit Civil, du Mandat, du Cautionnement (3 ed. 1907) 431, nº 810.

14. 28 Laurent, Principes de Droit Civil Français (2 ed. 1877) 114, nº 104.

15. Id. at 92, nº 86.

16. 8 Marcadé et Pont, op. cit. supra note 13, at 656, nº 1141; Baudry-Lacantinerie et Wahl, loc. cit. supra note 13; 11 Planiol et Ripert, Traité Pratique de Droit Civil Français (1932) 846, nº 1492.

17. 28 Laurent, op. cit. supra note 14, at 93, nº 86.

The Louisiana Civil Code, unlike the French Civil Code, expressly provides that the mandate may be conferred in the interest of either the mandatary or a third person.[18] Despite this express code provision, the jurisprudence of Louisiana is confused because of the use of language similar to that employed in the principal case.

Renshaw v. His Creditors[19] dealt with the insolvency of the principal and in holding the agency to be irrevocable, intimated that there would be no difference between revocation by act of the principal, or by his death. Although citing the *Hunt* case, the decision relied primarily upon the French authorities.[20]

In *Louque v. Dejan*,[21] decided in 1911, the court ignored the French authorities and relied primarily upon the *Hunt* case in determining what was an agency coupled with an interest. Subsequent opinions of the Louisiana Supreme Court[22] rely upon this acceptance of the reasoning of Chief Justice Marshall and use language much stronger than is necessary to decide the issue. In only one of these cases was the question of death involved,[23] and

18. Art. 2986, La. Civil Code of 1870: "The mandate may take place in five different manners: For the interest of the person granting it alone; for the joint interest of both parties; for the interest of a third person; for the interest of such third person and that of the party granting it, and finally, for the interest of the mandatary and a third person."

Art. 3027, La. Civil Code of 1870, which enumerates the ways in which a procuration expires, has been held to apply only to naked powers. Renshaw v. His Creditors, 40 La. Ann. 37, 3 So. 403 (1888). It was amended by La. Act 19 of 1882 to make a power of attorney by public or private act, or by letter, to transfer shares of stock or bonds on the books of a corporation, where the person receiving the power has paid value therefor, irrevocable by any cause. This amendment was not necessary because a power thus given is necessarily for the interest of the agent or a third person, which would render it irrevocable.

19. 40 La. Ann. 37, 3 So. 403 (1888).

20. In Union Garment Co. v. Newburger, 124 La. 820, 50 So. 740 (1909), it was held that the power of attorney was an essential part of the contract and therefore irrevocable.

21. 129 La. 519, 526, 56 So. 427 (1911): "We are led at this point to the inquiry, What is the power coupled with an interest?

"We find a ready answer by Chief Justice Marshall in Hunt v. Rousmanier, 8 Wheat. 178, 204, 5 L.Ed. 589. It is that the power delegated to collect, and the interest of ownership in the property are vested in the same person."

22. Fowler v. Phillips, 159 La. 668, 106 So. 26 (1925); Planter's Lumber Co. v. Sugar Cane By-Products Co., 162 La. 123, 110 So. 172 (1926); Succession of Toombs, 167 La. 21, 118 So. 488 (1928); Price v. Foster, 177 La. 586, 148 So. 887 (1933); Bryson v. United Gas Public Service Co., 169 So. 350 (La. App. 1936); United Gas Public Service Co. v. Christian, 186 La. 689, 173 So. 174 (1937); Marchand v. Gulf Refining Co. of La., 187 La. 1002, 175 So. 647 (1937); In re Buller's Estate, 192 La. 644, 188 So. 728 (1939).

23. Succession of Toombs, 167 La. 21, 118 So. 488 (1928). Although the case did not cite Louque v. Dejan, it did state the principal of the Dejan and Hunt cases. While ordinarily a power of attorney is terminated by the death

the same result could have been reached by relying upon the French authorities.

In the principal case, Justice McCaleb declared: "To constitute such an agency [coupled with an interest] it is necessary that there should co-exist in the agent, along with the power given him, an interest or estate in the thing to be disposed of or managed under the power."[24] Though the court did not cite the *Hunt* case it relied upon earlier Louisiana cases[25] which in turn had adopted the common law rule as stated by Chief Justice Marshall. While the *Hunt* case did not hold that a power must be coupled with an interest so as to render it irrevocable by an act of the principal, the principal case purports to require this, thus indicating that the Louisiana rule is even more rigid.

Looking more specifically to the facts of the case, Cowie had no legal title to the amber nor any privilege or chose in action.[26] Thus it would seem to follow that there was no interest such as Chief Justice Marshall and the Louisiana court apparently deems necessary. Although the principal case was correctly decided, the language used is unfortunate in that it appears to follow the often criticized *Hunt* case.[27] The reasoning of that decision is fast losing ground with legal commentators[28] who see no valid basis for the distinction between revocation by act of the principal and revocation by his death. The view of the French authorities, that if there is a power in the nature of a synallagmatic contract or a clause of such contract then the power should survive the death of the principal, also admits no distinction.

The distinction verbally adopted by the principal case seems rather artificial. There is no good reason why a power given as security should not survive the death of the principal and one

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of the principal, yet this is not so when the power of attorney is coupled with an interest.

24. Eduardo Fernandez Y Compania v. Longino and Collins, 6 So. (2d) 137, 142-143 (La. 1942).

25. Union Garment Co. v. Newburger, 124 La. 820, 50 So. 740 (1909); Louque v. Dejan, 129 La. 519, 56 So. 427 (1911); Fowler v. Phillips, 159 La. 668, 106 So. 26 (1925); Marchand v. Gulf Refining Co. of La., 187 La. 1002, 175 So. 647 (1937); Bryson v. United Gas Public Service Co., 169 So. 350 (La. App. 1936).

26. See Seavey, loc. cit. supra note 6, to the effect that the logic of the *Hunt* doctrine is to require the existence of one of these requisites.

27. Seavey, loc. cit. supra note 6; 1 Mechem, loc. cit. supra note 4; Note (1932) 6 U. of Cincinnati L. R. 233.

28. Seavey, op. cit. supra note 6, at 287: "The case is remarkable for the almost unanimous acceptance of its reasoning by the American courts and for the avoidance of its effects by many of them."

The distinction in the *Hunt* case has lost much of its effect by the enlargement of the term "interest." Comment (1933) 19 Cornell L. Q. 267.

"coupled with an interest" should. The interest seems to be equally efficacious in both cases regardless of whether it is engrafted in the thing itself. To require that a power coupled with an interest or estate in the thing to be disposed of must be held by the agent to render the agency irrevocable by the principal is an innovation which even the *Hunt* case does not support. Since no distinction between a power coupled with an interest and one given as security is recognized by the French authorities, the early Louisiana cases, or the modern trend of American legal thought, it is particularly unfortunate that the court saw fit to give lip service to it in the principal case.

J.C.W.

BOTTLER'S LIABILITY TO ULTIMATE CONSUMERS FOR INJURY CAUSED BY DEFECTIVE PRODUCTS—Plaintiff sustained certain injuries as a result of the explosion of a bottle of carbonated beverage. Plaintiff, relying on the doctrine of res ipsa loquitur,[1] received a judgment in the trial court, which judgment was set aside by the Second Circuit Court of Appeal, the court indicating that the doctrine of res ipsa loquitur was not applicable to this type of case. The Supreme Court of Louisiana, however, reversed the decision of the circuit court and reinstated the judgment of the district court. *Ortego v. Nehi Bottling Works*, 199 La. 599, 6 So. (2d) 677 (1941).

The decisions of American state courts applying to cases involving liability of manufacturers to ultimate consumers where bottled beverages have exploded or contained deleterious substances are marked by a noticeable lack of uniformity.

Courts have approached the problem upon two distinct theories of liability,[2] i.e., the tort theory of negligence and the contract theory of implied warranty. The latter has been increasingly applied in recent years.

A majority of the common law courts, in applying the negligence theory, have held that the doctrine of res ipsa loquitur is

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1. For a thorough discussion of the doctrine see the article by Malone, Res Ipsa Loquitur and Proof by Inference—A Discussion of the Louisiana Cases (1941) 4 LOUISIANA LAW REVIEW 70.

2. Prosser, Handbook of the Law of Torts (1941) 688-689.