WASSELL *vs.* REARDON.

As a general rule agents cannot act so as to bind their principals, where they have, or represent interests adverse to the principals, but this rule does not prohibit an attorney at law, into whose hands a debt has been placed for collection, from acting as the attorney in fact of the debtor to confess judgment upon the debt, the debtor being advised of the extent of the attorney's agency for the creditor, and executing the power to avoid costs of suit.

Such power being made upon a valid consideration, and coupled with an interest, is irrevocable by the principal, or by lapse of time.

The effect of limitation is not enough to extinguish a contract, but it is a defence in bar to a recovery upon the contract, which confesses and admits a valid existing contract, which by lapse of time is presumed to have been satisfied, and is invariably required to be pleaded. Hence where an attorney is empowered to confess judgment on a debt, and he fails to do so until the debt is barred, inasmuch as the subject matter of the power is not extinguished by the limitation, the power is not thereby revoked.

Writ of Error to Pulaski Circuit Court.

Judgment by confession in the Pulaski circuit court, 22d June

1849, before the Hon. WILLIAM H. FEILD, judge. The record shows the following facts:

On the 22d June, 1849, Hempstead & Johnson, attorneys at law, and late partners, &c., appeared in the Pulaski circuit court and read and filed the following power of attorney:

"Know all men by these presents that I have this day nominated, constituted and appointed Messrs. Hempstead & Johnson my true and lawful attorneys, for me and in my name to confess judgment upon two notes now in their hands for collection against me, and that this course is taken by myself for the purpose of saving to myself the costs of a suit thereon, and at my own option and request. The notes are: the first one dated the 1st September, 1841, to L. J. Reardon & Bro., or order, for one hundred and twenty dollars, fifty-six cents in current funds of Arkansas, signed John Wassell and due one day after date for value received, and sealed. The second note dated 1st October, 1841, due one day after date, to L. J. Reardon (for hire of Phillis) or order, for two hundred and ten dollars, signed and sealed and for value received, John Wassell. But I authorize a confession of judgment to be entered on the above specified notes for Arkansas money only, that is for the value of Arkansas money at the day with interest thereon to the rendition of judgment. Witness my hand and seal this 23d March, 1844.

JOHN WASSELL, [SEAL.]"

The execution of said power of attorney was proved by the subscribing witness. It was also proven that Arkansas money, at the maturity of the obligation last mentioned in the power of attorney, was at a discount of thirty-five cents on the dollar. After proving its execution by Wassell, the following instrument was then read and filed.

"LITTLE ROCK, ARK., Oct. 1841.

One day after date I promise to pay to L. J. Reardon (for hire of Phillis) or order the sum of two hundred and ten dollars, to

bear interest at the rate of —— per cent. per annum from due until paid for value received. Witness my hand and seal, this 1st day of October, 1841. JOHN WASSELL, [SEAL]"

The affidavit of Reardon was also read and filed, stating the execution of the above obligation; that some time in the year 1844, he placed it in the hands of Hempstead & Johnson for collection; the execution to them by Wassell of the above power of attorney; that on the 5th June, 1844, by virtue of said power of attorney, Hempstead & Johnson confessed judgment against Wassell, in Pulaski circuit court, on said obligation, but that said judgment was void because no proof was made of the execution of said power of attorney, and that there had been therefore, no valid execution of said power. That Wassell had not paid said obligation, or any part thereof, nor had he paid any thing on said void judgment; and that there was justly due affiant on said obligation $198.25, estimating Arkansas bank paper at the discount above named, &c., &c.

The record of the judgment confessed by Hempstead & Johnson, 5th June, 1844, on said obligation, was also produced and read. It appears that several executions were issued on said judgment, and returned without satisfaction. That a *scire facias* was afterwards sued out to revive the judgment, to which Wassell pleaded *nul tiel* record, and on the 8th of June, 1849, Reardon dismissed the *scire facias.*

On the above facts Hempstead & Johnson were permitted by the court to confess judgment, under and by virtue of said power of attorney, against Wassell, in favor of Reardon, on said obligation for $198.25.

Wassell brought error

FOWLER, for the plaintiff. The attorneys for the plaintiff below could not lawfully act as attorneys of the defendant at the same time and in the same matter, their interests and employment being adverse. *Story on Agency, sec.* 9, 210. 1 *Liv. on*

Agency (*Ed. of* 1818), *ch.* 8, *sec.* 6, *p.* 419, 423. 2 *Petersd. C. L.* 581. 19 *Ves. Rep.* 276, *Chalmondeley vs. Clinton.*

A power of attorney for a special purpose must be strictly pursued or the act is void. (*Fenn vs. Harrison*, 2 *Term. Rep.* 759. *Nixon vs. Hyseroth*, 5 *J. R.* 59. *North River Bank vs. Aymer*, 3 *Hill* (*N. Y.*) *Rep.* 266. *Stewart vs. Donnelly*, 4 *Yerg.* 180. *Fox vs. Fisk*, 6 *How.* (*Miss.*) *Rep.* 345. *Mayor &c. vs. State Bank*, 3 *Eng. Rep.* 230. 3 *Smedes & Marsh. Rep.* 613. 1 *Cow. Rep.* 498. *Story on Agency, sec.* 165, 172, 68, 69. *Bank of Missouri vs. McKnight*, 2 *Mo. Rep.* 38. 6 *Monroe Rep.* 581.) The intention of the party giving the power must govern its construction and the extent of its authority. (2 *Mo. Rep.* 44. *Taggart vs. Stansberry*, 2 *McLean's Rep.* 550); and it was manifestly the intention that the judgment should be confessed immediately, and to execute it after five or six years was unauthorized

Under the statute of limitations were not both the power of attorney and the note extinguished? And in such case as the defendant could not plead the statute, ought not the court to have protected his rights under it? See *Nott & McCord's Rep.* 299, 307. 2 *Hen. & Munf. Rep.* 300. 5 *Yerg. Rep.* 12. 7 *Yerg. Rep.* 543. *Stanley vs. Earl*, 5 *Litt. Rep.* 281. *Williamson vs. King*, 2 *McMullan* (*S. C.*) *Rep.* 506. *Biscoe et al. vs. Jenkins et al.* 5 *Eng. Rep.* 116. *Goodman vs. Munks*, 8 *Porter's Ala. Rep.* 89.

The agency of the attorney had been determined and dissolved by the efflux of time, by operation of law. *Story on Agency, sec.* 462.

The defendant had a right to revoke the power at his own will; and such revocation may be implied from circumstances; (*Story on Agency, secs.* 463, 468, 465, 474, 475. *Story on Bailm. sec.* 208. *Morgan vs. Stell*, 5 *Binn. Rep.* 314); as, conferring a new and incompatible power on another—employing another attorney to defend in this case.

S. H. HEMPSTEAD, contra. The power of attorney to confess judgment was strictly pursued, every prerequisite of the statute complied with, and the stringent rule laid down by this court in

Rapley vs. Price, (4 *Eng.* 431,) observed. Beyond all question the judgment is regular in every respect. *Digest* 818. 2 *Ala. Rep.* (*N.S.*) 303. 6 *Ala. Rep.* (*N.S.*) 503. 5 *Hill* 498. 5 *Ark.* 311.

Efflux of time had not barred the claim, but whether it had or not the rule is inflexible, that the statute of limitations must always be specially pleaded or insisted on, otherwise the defence cannot be noticed; and this rule has been in existence for at least a century and a half. 2 *Ld. Raym.* 838. 2 *Salk.* 422. 2 *Ld. Raym.* 1204. 2 *Stra.* 1055. 2 *Ld. Raym.* 936.

Although the cause of action appears on the face of a declaration to be out of time, yet the defence must be made on plea, so that if the plaintiff is within any of the exceptions he may reply the fact; and thus remove the case from the influence of the statute. *Angell on Lim.* 312. 2 *Wend.* 294. 1 *Denio* 678. *Gra. Pr.* 958. 3 *Eng.* 499.

No attempt was made to revoke the power, which indeed could not have been done, for it is in its nature irrevocable save by the death of the constituent. 1 *Salk.* 87. 2 *Ld. Raym.* 766.

Mr. Justice WALKER delivered the opinion of the Court.

The defendant executed to the plaintiff's attorneys a power of attorney by which they were empowered to confess judgment for said defendant on a note which the plaintiff had placed in the hands of such attorneys for collection. By virtue of this power judgment was regularly confessed and entered of record. To this judgment it is objected

1. That the attorney at law for the plaintiff could not act as attorney in fact for the defendant, touching the same subject matter on account of his prior retainer by the plaintiff—the interest and rights of the plaintiff and defendant being adverse.

2. That the judgment was not confessed until after the note was barred by limitation, and that it was the duty of the attorney to have interposed this defence.

3. That the power was revoked by the efflux of time.

As a general rule it is true that agents cannot act so as to bind their principals, where they have or represent interests ad-

verse to the principal's. This rule is founded upon the consideration that the principal bargains for the skill and vigilant attention of the agent to the subject matter intrusted to him: and the policy of the law will not tolerate the existence of an adverse interest in the agent to that of his principal for fear it may influence his conduct to the prejudice of interests of the principal. This well recognized rule is particularly applicable to buying and selling agents, where the principal contracts for the services of an agent at a time when he has no interest in the subject entrusted to him, but subsequently by his own act acquires interest in it adverse to that of the principal. In the case before us the attorney had no interest in the matter of his agency unless it should arise from his claim to compensation as a collector, which may or may not have been otherwise settled; nor had the plaintiff any interest whatever in the act to be done of which the principal, at the time he instituted him agent, was not fully advised; and if such disqualification existed he, by his own act, expressly waived it by conferring upon the agent such power with a knowledge of the facts. When it is remembered that the whole ground upon which this rule is based, rests upon the fraudulent advantage which such an interest may stimulate the agent to take to the prejudice of his principal's rights, it will scarcely be contended that the circumstances of this case bring it within the reason and spirit of the rule. The principal was informed of the nature and extent of the interest which the payee in the note had in the act to be performed by the agent. The facts disclosed in the instrument itself prove this; and that it was intended that the act to be performed should enure to the mutual benefit of both the payor and payee: to the first by saving him the expense incident to a suit in the usual form; to the other by facilitating and making certain a recovery.

This therefore was not a mere naked power in which the principal was alone interested, but a power coupled with an interest in a third person, made upon good and sufficient consideration, and in regard to which the principal was well advised, and so far from an undue advantage having been taken of him

in the relationship in which the agent stood towards him, he only did that which every truthful honest man should do, and what every prudent, considerate attorney should accede to. The act which the attorney undertook to perform was in perfect harmony with the interest of his client and of the duty and integrity of defendant, the payor.

If the attorney had undertaken to defend for the payor as it is argued that he should have done, then indeed he would have represented adverse interests inconsistent with those of his principal. But it is evident that such is not the nature of his undertaking. He was not only not authorized to interpose a defence to the action, but the powers conferred upon him negative the idea that any defence existed. Suppose the agent had offered to defend and upon a rule to show by what authority he appeared for the purpose of defence, had produced the power of attorney directing him to confess judgment upon the debt, it is evident that such showing would have been held insufficient. We think therefore that there was no such adverse interest involved in the act to be done as to disqualify the attorney from confessing judgment.

It is next contended that by the efflux of time the subject matter of the power was extinguished and thereby the power was revoked. The effect of limitation is not to extinguish the contract. On the contrary it is a defence in bar to a recovery upon the contract, which confesses and admits a valid existing contract, which by lapse of time is presumed to have been satisfied. It is invariably required to be plead and will not be otherwise noticed by the court The case of *Biscoe et al. vs Jenkins et al.* 5 *Eng.* 118, relied upon by counsel to sustain their position, was decided under a very different state of facts from those presented in this. The question in that case was not whether efflux of time extinguished a contract, but whether part payment by one of several joint contractors, made after the cause had been barred by limitation, would take it out of the operation of the statute as to all.

Lapse of time at most only furnishes presumptive evidence of a revocation by the agent of his power by renunciation, but this

like all the other modes of revocation except that of the death of the principal, applies to mere naked powers over which the principal has absolute control, and not to powers coupled with an interest, or such as are made upon sufficient consideration, or for the mutual benefit of the parties. These are not revocable at the pleasure of the principal: they partake of the nature of contracts, and in cases where there is an interest in the thing itself, the power is not revocable even by the death of the principal, as was decided by this court at the last January term in the case of *Pryor vs. Yeates et al.*

STORY, in his work on Agency, says, "But where an authority or power is coupled with an interest, or where it is given for a valuable consideration, or where it is part of the security, there, unless there is an express stipulation that it shall be revocable, it is from its own nature and character, in contemplation of law, irrevocable, whether it is expressed upon the face of the instrument conferring the authority or not." (*Story on Agency* 608.) So, if a power of attorney be given as part of the security to a creditor, the power is irrevocable. (2 *Espinasse R.* 565. *Hammond vs. Allen,* 2 *Sumner R.* 387.) Or if a letter of attorney is taken to sell a ship as a security upon a loan of money, it is irrevocable. (2 *Mason's Rep.* 244.) Or to collect and receive outstanding debts to the benefit of a creditor, and it has also been held that a power of attorney to confess judgment is not revocable. (*Rodes vs. Woodward,* 1 *Salk.* 87.) And so firmly established is the law on this point, that even the death of the principal after the commencement of the term, but before judgment rendered, will not revoke the power to confess judgment. (*Fuller vs. Joclyn,* 2 *Strange's Reports* 868. *Ib.* 1081.) STORY, in his work on Agency says, "The ground of this doctrine is that the party shall not be at liberty to violate his own solemn agreement, or to vacate his own security by his own wrongful act; for that would be to enable him to perpetrate a fraud upon innocent persons, who have placed implicit confidence in him, which is against the clearest principles of justice and equity." *Story on Agency, page* 609.

The above remarks of this learned jurist, we hold to be pecu-

liarly applicable to the case before us; and after an agreement entered into upon good and sufficient inducements and consideration, and after an indulgence under such agreement, to permit the principal to revoke and set aside his contract and interpose a defence based upon the very indulgence he had acquired under the agreement, would indeed be contrary to the "clearest principles of justice and equity" and an act which we cannot sanction.

Whether, if the defendant could show that a valid defence had accrued to him since the execution of the power the court should not upon proper showing permit him to plead or would consider the power as being revoked by the extinguishment of the subject matter in regard to which the power was conferred and refuse to permit judgment to be entered, or would permit the power to be executed and leave the party to his equitable relief before the chancellor, it is unnecessary for us to decide, as no such question is presented in this case. There was no offer made by the defendant in the circuit court either to revoke the power or to interpose a defence. The proceedings are regular and a valid judgment rendered thereon. Let the judgment be affirmed with costs.