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ATTORNEY AND CLIENT.

SEC. 1. *The subject stated.*

It is proposed in this paper to consider, in a practical manner, the question, *How far attorneys at law may, by an unauthorized appearance, bind or conclude those for whom they assume to act?*

The importance of the subject, as well as the unsettled state of the authorities, has induced us to examine it with care. The result of the examination will be briefly embodied in this article.

That the existing state of the law may be understood, it is necessary to trace with some minuteness the history of the leading adjudications respecting the power and authority of attorneys at law.

SEC. 2. *Requirements of ancient common law: Attorneys, how appointed, orally and by warrant: Civil law rule:—verbal retainer sufficient, but written authority preferable for prudential reasons.*

The ancient common law required the parties to be present in court and prosecute or defend in person. It required a patent or special authority from the crown (*a dedimus potestatem de attorney faciendo*) to enable parties to appear by attorney. Subsequently, by various statutes, the right to appear by attorney was recognised. But a party might still sue or defend in person—the

right to appear by attorney being a mere privilege for the benefit and convenience of suitors. (See on this subject, 3 Bl. Com. 25; Fitz. N. B. 25, 96; Gilbert C. P., c. 8; *Thompson v. Blackburn*, 1 N. & M. 271; 1 Keble 89; 2 Id. 199; Glanville Lib. XI., c. 1; Com. Dig. *Attorney* (B), 7; *Anonymous*, 1 Salk. 86; Id. 88; s. c., 6 Mod. 16; Cro. Jac. 695; 1 Str. 693; *McCullough v. Gueffner*, 1 Binn. 214; Id. 469; *Holbert v. Montgomery*, 5 Dana 11; *Cox v. Nichols*, 2 Yeates 456; *Compher v. Anawalt*, 2 Watts 490, 493; *Campbell v. Kent*, 3 Penna. (Pen. & W.) 72; *Denton v. Noyes*, 6 Johns. Rep. 296; *Allen v. Green*, 1 Bailey (Law) S. C. 448; *Henck v. Todhunter*, 7 Harr. & Johns. (Md.) 275.)

In the earlier periods of the common law, as the above authorities show, attorneys were appointed orally in court. Afterwards they were allowed to be appointed by warrant, out of court. And the practice of the court originally was to require the warrant to be filed; but the want of it, in the record, was cured by statute, and could not be assigned for error. The strictness of the ancient law corresponds to the provisions of the civil law.

By the Roman law, and the practice under it in modern Europe, a party to a suit may appear in person, or by attorney (*procurator*). But unlike the common law, there is no presumption that the procurator has authority to represent his client. And it is the universal practice, as the writer is informed by a learned civilian, for the procurator to file his written warrant of attorney, as the first step, before argument, or other proceedings by him in court. This is required by the court. While this would in many cases be inconvenient, there is much to recommend it, and this course is strongly urged by Lord TENTERDEN (*Owen v. Ord*, 3 Car. & P. 349). He says: "The attorney ought to do this (*i. e.* procure formal authority) as well for his own sake as for the sake of his client. It is much better for him, because he gets rid of all difficulty about proving his retainer; and it would also be better for some clients, as it would put them on their guard and prevent them from being drawn into lawsuits without their own express direction;" and what is equally desirable, it may be added, it would protect parties against being represented by unauthorized attorneys.

But it is now settled that an attorney may be retained or appointed *verbally*, and his appearance is considered as *prima*

facie evidence of his authority : *Osborn v. The Bank*, 9 Wheat. 738 ; *Henck v. Todhunter*, 7 Harr. & Johns. 275 (1826) ; *Allen v. Green*, 1 Bailey (Law) 448 (1830) ; *Arnold v. The Mayor, &c.*, 5 Scott N. S. 741.

SEC. 3. *Attorney cannot, without special authority, admit service of jurisdictional process : but his appearance is presumed to be authorized.*

Although an attorney cannot, without special authority, admit service of *jurisdictional process* upon his client, yet it will be presumed in all collateral proceedings, and perhaps on appeal or in error, that a regular attorney at law, who has appeared for a defendant, though not served, had authority to do so. (See authorities *supra* ; also *Shelton v. Tiffin* (bill for relief), 6 How. (U. S.) Rep. 163, per McLEAN, J. ; *Prince v. Griffin* (ejectment), 16 Iowa 552 ; *Lagow v. Patterson* (on appeal), 1 Blackf. (Ind.) 327 ; *Hill v. Ross* (on appeal), 3 Dall. 331 ; *Homer v. Doe* (ejectment), 1 Ind. 130 ; *Masterton v. Le Claire*, 4 Minn. 163 ; Hare & Wallace's Notes to *Mills v. Duryee*, 2 Am. Lead. Cases, and authorities there collected.)

SEC. 4. *Results of the doctrine of the attorney's presumptive authority. In actions upon foreign judgments, attorney's want of authority may be shown in defence—quere as to domestic judgments? Relief grantable, however, when the unauthorized judgment is directly and not collaterally attacked.*

It results from this doctrine that in order to enable a party who has been represented by an unauthorized attorney to be relieved, he must negative the presumption of authority in the attorney. This he cannot ordinarily do on appeal or by writ of error. He must apply for relief either by motion or bill in equity.

And here we may notice certain distinctions taken by some of the cases involving, at least, an *apparent* conflict of doctrine and want of consistency in the application of principles.

Thus, it is held in a *suit upon a domestic judgment* rendered against a party in consequence of an unauthorized appearance of an attorney, he cannot plead in defence his ignorance of the suit and the attorney's want of authority to appear for him : *St. Albans v. Bush* (action on judgment), 4 Vt. 58 (1832) ; compare with

Campbell v. Bristol, 19 Wend. 101, where relief in just such a case was granted *on motion*; *Pillsbury v. Dugan* (ejectment), 9 Ohio 117 (1839); *Holbert v. Montgomery* (where the reasons based upon public policy for this view are very forcibly stated), 5 Dana (Ky.) 11 (1837); *Field v. Gibbs*, 3 Peters C. C. R. 155, 2 Am. Lead. Cases (4th ed.) 803, and cases there cited.

While in a *suit upon a foreign judgment* the contrary is settled, and the judgment-debtor may successfully defend by showing that he was not served and that the attorney who entered an appearance for him had no authority to do so. This last proposition is now put at rest and settled both in the Federal and State Courts: *D'Arcy v. Ketchum*, 11 How. (U. S.) 165 (1850); *Harris v. Hardeman*, 14 Id. 334 (1852); *Hindman v. Mackall*, 3 G. Greene (Iowa) 170; *Latterett v. Cook*, 1 Iowa 1; *Thomas v. Emmert*, 15 Ill. 415 (1854), and prior Illinois cases there cited; *Miller v. Gaskins*, 2 Rob. (La.) 94 (1842); *Gleason v. Dodd*, 4 Met. (Mass.) 333, and prior cases in that state there cited; *Id.* 343; *Aldrich v. Kinney*, 4 Conn. 380; *Starbuck v. Murray*, 5 Wend. 148, 161 (1830); *Wilson v. The Bank*, 6 Leigh (Va.) 570; *Norwood v. Cobb*, 24 Texas 551; *Rape v. Heaton*, 9 Wis. 328; *Price v. Ward*, 1 Dutch. (N. J.) 225; *Hess v. Cole*, 3 Zab. 116.

It may be doubted whether the above distinction between foreign or domestic judgments is fully settled; and if so, whether it rests on sound principle. Is not the *gravamen* the same in the one case as in the other, and does it not consist in undertaking to bind one man by the unauthorized act of another, whom he never employed? And it may well be inquired, if the defendant can make this defence in the one case, why he should not in the other?

The only reason that occurs to us is, that in the case of the foreign judgment it is impossible, or at least unreasonable, to require the defendant to go into the courts of the state which rendered it, and attack it *directly by bill or motion*; hence it is permitted him to avail himself of this fact, defensively and collaterally.

Whereas, in the case of a domestic judgment it may be deemed better to compel or force the party to assail it *directly* (thus giving the court an equitable control over the proceedings), by prohibiting him from resorting to the want of authority collaterally, as a defence to a direct action on the judgment. If the distinction is maintainable, it must be upon some such ground. Certain it is

(as the cases below cited establish), that courts are in the constant practice of relieving parties upon equitable terms, sometimes by motion, and sometimes in equity, from judgments rendered against them in consequence of the totally unauthorized acts of a pragmatical attorney. See, without quoting, *Critchfield v. Porter*, (discarding early English rule, 1 Salk. 86; approving *Robson v. Eaton*, *infra*, and granting relief upon *motion*, and not by *bill*), 3 Ohio Rep. 518 (1828); *Shelton v. Tiffin* (strong case; referred to, *infra*, bill held the proper remedy); 6 How. (U. S.) Rep. 163 (1845); *Campbell v. Bristol* (on motion), 19 Wend. 101 (1838); *De Louis v. Meek* (by bill), 2 G. Greene 55 (1849); *Powell v. Spaulding*, 3 Id. 443; *Harshey v. Blackman*, 19 Iowa (1866); *Ridge v. Alter* (relief by action, the right to which held not dependent upon actual fraud, or attorney's responsibility), 14 La. An. 866 (1859); s. p., *Marvel v. Manourrier*, Id. 3 (distinguished from *Walworth v. Henderson*, 9 Id. 339); *Truett v. Wainwright*, 4 Gillrn. (Ill.) 420; *McKelway ads. Jones*, 2 Harr. (N. J.) 345; *Price v. Ward*, 1 Dutch. (N. J.) 225 (commenting on prior cases in that state)

SEC. 5. *Early English rule bound the party for whom an unauthorized attorney appeared, and compelled him to take an action against the attorney. Modification of that rule. Cases in Salkeld stated and criticised.*

It is essential to a thorough apprehension of the subject proposed to be further discussed, to view it in the light of the adjudged cases, commencing with the earlier ones in England. It is laid down as law in a case in Salkeld, that "where an attorney takes upon himself to appear, the court looks no further, but proceeds as if the attorney had sufficient authority, and leaves the party to his action against him:" 1 Salk. 86.

This rule (taking the above loose report to mean what the case is generally cited to prove) has, it is submitted, no good foundation upon which to stand. It obliges a person to be bound by the unauthorized act of a mere stranger. It binds him by the judgment of a court without a day in court. It relieves the plaintiff of a duty which in reason belongs to him, viz., *to serve his process, and to see at his peril that his adversary is in court*. As a consequence of its unsoundness, it compels the *wrong party* to look to the attorney for indemnity. That the rule, as thus stated

(1 Salk. 86, *supra*), should, without modification, permanently stand as the law of enlightened tribunals would be impossible. It has accordingly been much modified, exception after exception having been engrafted upon it. The English courts, however, with their conservative tendencies and tenacious adherence to precedent, instead of overturning it at once, have gradually undermined it, leaving it standing, perhaps, but tottering and ready to fall. The rule as laid down in 1 Salk. 86 was essentially qualified in the K. B., as will appear by an anonymous case also reported by Salkeld, p. 88, decided in the 2d of Anne in the time of Lord HOLT. As the case is brief, and is the basis of subsequent decisions, we give the entire report, as found in Salkeld. It is as follows:—"An attorney appeared, and judgment was entered against his client, and he had no warrant of attorney; and the question was, If the court could set aside the judgment? *Et per Cur.* If the attorney be able and responsible, we will not set aside the judgment. The reason is, because the judgment is regular (*quere?*) and the plaintiff ought not to suffer, for there is no fault in him [but was not the defendant equally faultless?]; but if the attorney be not responsible or suspicious, we will set aside the judgment; for otherwise the defendant has no remedy, and any one may be undone by that means:" 1 Salk. 88. And see s. c. 6 Mod. 16, where the language used is, that "If the attorney be a beggar, or in a suspicious condition, the court will set aside the judgment."

The report is not very clear, and it is not impossible that the real objection was the want of a formal warrant of attorney, and not the want of authority in point of fact. But assuming it was the latter, the right to relief is thus illogically made to depend upon the attorney's pecuniary condition, and not upon his authority.

SEC. 6. *Robson v. Eaton*, 1 T. R. 62; *overturning, in effect, the early English rule: case stated and the principle extracted.*

Such a doctrine could not impose upon the fine understanding and solid judgment of Lord MANSFIELD; and the case of *Robson v. Eaton* (K. B. 1785), 1 Term Rep. 62, without professedly overruling the case in Salkeld, does so in effect, by proceeding upon directly opposite principles. In illustration of our subject,

we give for convenience a brief statement of this interesting case. The action was for money had and received. The defendant pleaded that the plaintiff, by one *William Hodgson*, his attorney, had before sued the defendant, and recovered a judgment for the same cause of action; that the defendant by the order of court paid the amount of such recovery into court, and the same had been received by the plaintiff's said attorney. This was apparently a good defence. But the plaintiff replied that he never retained the said *Hodgson* to sue the defendant or authorized him to receive the money. Both parties were innocent of fraud. The warrant of attorney, purporting to be executed by the plaintiff and under which *Hodgson* acted, was forged: *Hodgson*, ignorant of the forgery, collected the money from the defendant and in good faith paid it to the forger. And the question was, Could the defendant rely upon the former recovery, or must he pay the money twice? And it was decided that he must again pay. And the ground of the decision was, that the "attorney who prosecuted the former suit in the plaintiff's name, had no authority given him by the plaintiff for so doing."

Now, if on grounds of *public policy* (the only basis of the rule in *Salkeld*), a *defendant* is bound by the act of an unauthorized attorney who appears for him, a *plaintiff* ought likewise to be bound by the act of an unauthorized attorney who appears for him. It may be said, that in *Robson v. Eaton*, there was no motion by the plaintiff to set aside the judgment, and that the court would, perhaps, have refused the motion, if the attorney (*Hodgson*) was solvent. It is true, there was no such motion. But surely if the court in a collateral action held the judgment as to the plaintiff a *nullity*, it surely could not have refused to set it aside. In short, it seems impossible to reconcile *Robson v. Eaton* with the prior cases in *Salkeld*.

SEC. 7. *Denton v. Noyes*, the leading early American case, adheres to, but modifies early English rule,—criticised and doubted by subsequent cases, so far as it makes the right to relief depend upon attorney's pecuniary responsibility.

While this was the state of the law in England, the case of *Denton v. Noyes*, 6 Johns. Rep. 296 (1810), arose for decision. It is the leading New York, if not also the leading early American, case on this subject. The court (KENT, C. J., delivering the judgment

of the majority, and VAN NESS, J., an able dissenting opinion) adhered, in general, to rule laid down in *Salkeld*, but added another essential qualification. After approving of the above-quoted case (1 Salk. 88), KENT, C. J., adds: "I am willing to go further, and in every such case (*i. e.*, where there has been an unauthorized appearance) to let the defendant in to a defence of the suit."¹

It will thus be perceived that *Denton v. Noyes* so far recognises the early English rule, as to hold that want of authority of an attorney for the defendant to appear (the plaintiff being innocent), is not alone sufficient cause for setting aside the judgment, if the attorney who appeared and acted be responsible and able to

¹ The points ruled by the majority of the court in *Denton v. Noyes* are correctly stated in the syllabus, and are as follows:—

1. Where "an attorney of this court appeared for a defendant against whom a writ had been issued, *but not served*, and without authority from the defendant, confessed judgment, which was entered in vacation, the judgment was held regular. An appearance by an attorney of the court without warrant, is good as to the court, and the defendant has an action against the attorney. *Aliter*, if there be fraud or collusion between the plaintiff's attorney and the attorney for the defendant; or, if the attorney for the defendant be not responsible or perfectly competent to answer to his assumed client, the court will relieve against the judgment."

2. Where there is no fraud, "the court, in order to protect the plaintiff from suffering by the act of the attorney, and at the same time to save the defendant from injury, will let the judgment stand, but stay all proceedings, and let in the defendant to plead if he has any defence."

In explanation of the decision KENT, C. J., observes: "If there had been any collusion between the plaintiffs and the attorney [who assumed to act] for the defendant, it would have altered the case; but there is none shown or pretended, and my whole opinion proceeds upon the ground that the plaintiffs have acted with good faith. I am disposed, therefore, to prevent all possible injury to the defendant, and at the same time save the plaintiffs from harm. This can be done only by preserving the lien, which the plaintiffs have acquired by their judgment, and giving the defendant an opportunity to plead, if he has any plea to make to the merits." 6 Johns. Rep. 301.

This case has since been adhered to upon the principle of *stare decisis*, and is yet the law in New York: but the common-law rule, even as thus modified and shorn of its severity, has frequently been sharply criticised and pronounced a hard one by subsequent judges in that state, as will be seen by reference to the following cases: *Meachum v. Dudley*, 9 Wend. 514; *Williams v. Van Valkenberg*, 16 How. Pr. Rep. 144 (1858); *Ellsworth v. Campbell*, 31 Barb. 134 (1860); *Allen v. Stone* (strongly dissenting from, but following principal case), 10 Barb. 547 (1851). And see *Oakley v. Insurance Co.*, 9 Paige 496 (1842). Compare *Campbell v. Bristol*, 19 Wend. 101 (1838); *Bayley v. Buckland*, and *Shelton v. Tiffin*, referred to at large in subsequent sections of this article.

indemnify the defendant. As a matter of practice, it may be well enough for the court in many cases where the plaintiff is innocent, to allow the judgment to stand as security. And unless the defendant has been injured, even a court of equity would not relieve him.

But when the defendant is innocent, guiltless of negligence, and has a good defence on the merits, it is certainly unjust and illogical to make his right to relief depend upon the question of the attorney's responsibility.

And it will be seen by reference to the later New York cases, cited in the note, that the prevailing opinion, were the question in that state *res nova*, is, that on principle, the responsibility or otherwise of the attorney has nothing to do with the question, and that no person, not guilty of negligence, should be bound by the act of another, which was clearly and undisputably unauthorized, and which remains unratified by acquiescence or otherwise.

SEC. 8. *Modern English decisions. Bayley v. Buckland essentially modifies early English rule, and lays down a doctrine which would overrule Denton v. Nojles. Distinction, where the attorney appears without authority, between cases where the defendant has, and where he has not, been served.*

And in England, in the Court of Exchequer, the rule as laid down in *Salkeld* has quite recently been reviewed, and upon great consideration, partially, at least, overturned by the case of *Bayley v. Buckland*, 1 Exch. (1 Wels., H. & G.) 1, 1847, 16 L. J. (N. S.) Exch. 204, where ROLFE, B., alluding to 1 Salk. 88, says: "the non-responsibility or suspiciousness of the attorney is but a vague sort of criterion of safety to the defendant, and by the hypothesis the defendant is wholly without blame, and may notwithstanding be ruined. It is true that the plaintiff is equally blameless, but then the plaintiff, if the judgment be set aside, has his remedy against the defendant as before, and suffers only the delay and the possible loss of costs."

And the court, where the appearance for the defendant is unauthorized, proceed to make a distinction between cases where process has been served and cases where it has not.

"If," says the court, "the *process has been served*, and the plaintiff be innocent of any fraud or collusion and the attorney is responsible, the party for whom the attorney appeared is confined

to his remedy against him." [This would overturn *Denton v. Noyes*, as, in that case, no process was served, and it makes another exception to the early rule.] The reason given is, that the plaintiff is without blame, and the defendant is guilty of negligence by not appearing and making defence by his own attorney, if he has any defence, on the merits.

But, on the other hand, "if the plaintiff, *without serving the defendant*, accepts the service of an unauthorized attorney for the defendant, he is not wholly free from the imputation of negligence; the law requires him to give notice to the defendant by serving the writ, and he has not done so. The *defendant*, therefore, is wholly free from blame, and the plaintiff not: so we must set aside the plaintiff's judgment."

This case (*Bayley v. Buckland*) was very fully considered, and the prior cases called to the attention of the court. The distinction taken is a reasonable one; and if any part of the early rule shall stand, it should, in our judgment, do so only as thus modified.

Those inclined to pursue the subject further in the light of modern English adjudications, may consult *Doe v. Eytton*, 3 B. & Ad. 785; *Hubbard v. Phillips*, 13 M. & W. 702 (1845), 14 L. J., N. S. 103, Exch.; *Williams v. Smith*, 1 Dowl. P. C. 632, 5 Id. 305; *Murdy v. Newman*, 1 Cr., M. & Ros. 402 (1834); *Morgan v. Thome*, 7 M. & W. 400; *Hambridge v. De La Crouée* (follows 1 Salk. 88, but engrafts another exception), 3 M., G. & S. 742 (1846) (E. C. L. R. vol. 54); *Stanhope v. Firman* (where the C. B. recognises 1 Salk. 88), 3 Bing. N. C. 303; s. c. 32 E. C. L. 145, and 5 Dowl. P. C. 357, A. D. 1836, prior to *Bayley v. Buckland*.

SEC. 9. *The true view on principle and modern authority. In Shelton v. Tiffin, the United States Supreme Court practically overturns the early English rule and Denton v. Noyes. That case stated. Injured party relieved, not only from the judgment, but from sales under it.*

On principle, and in view of the tendency of modern judicial opinion, we have but little hesitation in stating the true rule of law to be that a party not served, who has been represented by an unauthorized attorney, has a right to be relieved against the judgment on motion or by bill in equity, and that this right does not

depend upon the ability of the attorney to respond in damages. (See authorities cited at end of Section 4, *supra*, and especially *Shelton v. Tiffin* and *Harshey v. Blackman*.)

A yet more difficult question is whether such a judgment is, as to all persons and for all purposes, an absolute nullity. Suppose property has been sold under it to third persons for value and without notice, is the party whose property has been sold entitled, as to them, to have the judgment treated as a nullity? In our opinion he is thus entitled, in case he has not been negligent and can clearly establish that there was no notice or service, and that the attorney's act in representing him was wholly without his knowledge, and totally without his authority. We base this conclusion upon the following reasons:—

1. Such would be the rule of the civil law. As applicable to this question, the civil law acts upon the maxim or principle, *Inter alios acta vel judicata aliis non nocere*. That a judgment or decree under such circumstances would be an absolute nullity, see Code, VII., tit. LX., LVI.; Dr. Linde's *Lehrbuch* of German Civil Proceedings, sec. 116; Code de Proce. Civ., tit. XXIII.; Poth. Cour. de Mand., sec. 130; 6 John. 314, 315, per VAN NESS, J.; *Ridge v. Alter*, 14 La. Ann. 866; Id. 3.

2. This conclusion is fully warranted and supported by the decision of the Supreme Court of the United States in the important case of *Shelton v. Tiffin*, 6 How. U. S. Rep. 163, A. D. 1848.¹

¹ In this case the facts were briefly these: Two citizens of Virginia (Mosely and Bouldin), sued in the Circuit Court of Louisiana, John M. Perry, a citizen of Louisiana, and who was served, and also Lilburn P. Perry, a citizen of Missouri, and who was *not served*. One Crawford, a regularly admitted attorney of the court, employed by John M. Perry, filed an answer for *both* Perrys, but was *not authorized* to do so by Lilburn P. Perry. His filing an answer for Lilburn was by mere inadvertence, and not through intentional fraud. The plaintiffs in that action (Mosely and Bouldin) were innocent of any fraud or of any collusion with Crawford, and on a regular trial obtained a judgment for \$7560, on which execution issued, and certain property of Lilburn P. was seized and sold to one Anderson. This property consisted of notes secured by mortgage, and of which Anderson was the maker. The cause was brought in equity in the Federal Court of the same state (Louisiana), for relief against the judgment and sheriff's sale. The court held, 1st. That the proper remedy was in equity and not necessarily at law. 2d. That Crawford's (the attorney) evidence that he had no authority from Lilburn P. Perry to appear for him was competent. The court observing "This evidence does not contradict the record, but explains it. The appearance was the act of the

This latter case has recently been approved and its doctrine followed in *Harshey v. Blackman*, 19 Iowa Rep., where the subject underwent a full examination; and it was held that a sale, though to a purchaser without notice, under a void judgment, did not have the effect to validate it. See also authorities cited in Section 4 of this article.

It is admitted that a large degree of sanctity must be attached to the records of courts; that it is incumbent on a party assailing them, on the ground of the want of authority in the attorney to appear, to make out a clear and unmixed case. Public policy requires this, in view of the fact that it is easy for one party, especially after the lapse of time, to deny the attorney's authority, and difficult for the other party to show the authority, even if it existed. The inference from this, however, is, not to hold the unauthorized judgment valid, but to require the party assailing it to show clear merits, to take prompt action, and to establish his right by cogent and strong evidence. A judgment itself is a mere *chose in action*. A purchase of it before a sale under execution, like the purchase of any other *chose in action*, puts the

counsel, and not of the court. Had the entry been that L. P. Perry came personally into court and waived process, it could not have been controverted." [See as to recitals in record, well reasoned judgment of MARCY, J., in *Starbuck v. Murray*, 5 Wend. 148 (1848); *Dozer v. Richardson*, 25 Geo. R. 90; *Kimball v. Merrick*, 20 Ark. 12; *Hess v. Cole*, 3 Zab. 116; *Watson v. The Bank*, 4 Met. (Mass.) 343; Id. 333. Compare *Holbert v. Montgomery*, 5 Dana 11.] "But an appearance by counsel who had no authority to waive process, or to defend the suit for L. P. Perry, may be explained." The court held 3d. That the judgment, and sale under it, were *absolute nullities*.

Respecting this point the language of the court is clear, and decided:—"An appearance by counsel under such circumstances to the prejudice of a party subjects the counsel to damages: but this would not sufficiently protect the rights of the defendant. He is not bound by the proceedings, and there is no other principle which can afford him adequate protection. The judgment, therefore, against L. P. Perry must be considered a nullity, and consequently did not authorize the seizure and sale of his property. An execution sale under a fraudulent judgment is valid, if the purchaser has no knowledge of the fraud. But in this case L. P. Perry was not amenable to the jurisdiction of the Court, and did not act to authorize the judgment. He cannot, therefore, be affected by it, or by any proceedings under it. In this view it is unnecessary to consider the objection to the procedure under the execution." * * * * "The judgment being void for want of jurisdiction in the Court, no right passed to Samuel Anderson under the marshal's sale." (6 How. pp. 163, 186-7). This case practically overturns *Denton v. Noyce*, and accords with *Robson v. Eaton* and *Bayley v. Buckland*.