19 N. Y. S., 406; Texas Standard Cotton Oil Co. *v.* Adone (Tex. Sup.), 19 S. W., 274; Urmston *v.* Whitelegg, 55 J. P., 453; Cummings *v.* Foss, 40 Ill. App., 523; and a combination of manufacturers, owners of patents, to regulate production and stifle competition, is void when the combination is to extend for fifty years beyond the legal existence of any patent: Strait *v.* National Harrow Co. (Sup.), 18 N. Y. S, 224.

Combinations of manufacturers to regulate their employees wages, hours of work, etc., in conformity to rules formulated by a majority of them, are void, and there can be no recovery upon a bond given to enforce the agreement: Hilton *v.* Eckersley, 6 El. & Bl., 46.

For the provisions of the National Anti-trust Act and the State statutes on "trusts" and combinations to restrict production and competition, see Stimson's American Statute Law, Vol. I, § 4130B; Vol. II, § 8252 and §§ 9900–9905.

In the following cases the courts were of opinion that the restraints on competition and production were for the necessary protection of the parties, and did not tend to create a monopoly: Wickens *v.* Evans, 3 Y. & J., 318; Collins *v.* Locke, 4 App. Cases, 674; Skainka *v.* Schaarenghausen, 8 Mo. App., 622; Ontario Salt Co. *v.* Merchants' Salt Co., 18 Grant's Ch. Rep., 540; Kellogg *v.* Larkin, 3 Chand., 133; *c. f.* Diamond Match Co. *v.* Roeber, 106 N. Y., 473, with Richardson *v.* Buhle, 77 Mich., 632.

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KIRSCHBAUM ET AL. *v.* SCOTT ET AL.[1] SUPREME COURT OF NEBRASKA.

Appearance of Unauthorized Attorney for Defendant not Served.

Where an attorney appears for a defendant who has not been served with process, his authority to do so will be presumed; but the defendant may deny and disprove his authority, and in that case will not be bound by the attorney's appearance.

[1] Reported in 52 N. W. Rep., 1112.

BINDING FORCE OF ATTORNEY'S APPEARANCE.

I. An appearance entered by a duly authorized attorney, and all acts done by him in pursuance of his authority and within its scope, are binding upon the party from whom he derives his authority; but when he has exceeded the limits granted him, or has acted wholly without authority, it then frequently becomes a difficult question to decide how far the person whom he claims to represent will be bound by his unauthorized acts, especially when the rights of third parties have intervened. There has been and is still a marked conflict of decision on this point.

The authority under which the attorney claims to act need not be express; it may be inferred from circumstances, as from the negotiations between him and his clients: Holden *v.* Greve (Minn.), 42 N. W. Rep., 861. When a defendant hands the copy of the summons served on him to his son, and the latter employs an attorney to act for both, authority from the defendant will be presumed: Wagener *v.* Swygert (S. C.), 9 S. E. Rep., 107. An attorney employed by the president of a corporation has authority to bind the corporation by his appearance for it: American Ins. Co. *v.* Oakley, 9 Paige (N. Y.), 496. An attorney employed by an agent who has been in the habit of conducting the suits of a non-resident, is the authorized attorney of the latter: Garrison *v.* McGowan, 48 Cal., 592, and when a committee of an association, of which a lot-owner is a member, employs counsel to defeat the collection of certain taxes claimed to be illegal, that being the object of the association, and the lot-owner pays the counsel a certain per cent. on all taxes defeated, the counsel will be held to have been authorized to appear for him: Neff *v.* Smyth, 111 Ill., 100. But the attorney of a decedent has no authority to appear for his personal representatives without special authority from them: Prior *v.* Kiso (Mo.), 9 S. W. Rep.. 898.

The Effect of an Unauthorized Appearance.

A.—For plaintiff.

As an attorney is a sworn officer of the Court, and amenable to its summary jurisdiction for any violation of his professional duty, the presumption is that he will not appear for any one without due authority; and, therefore, the entry of his appearance on the record is *prima facie* proof of such authority, and the opposite party has a right to rely and act upon it: Hamilton *v.* Wright, 37 N. Y., 502; Smith *v.* Bowditch, 7 Pick. (Mass.), 136. Of course, so long as the action is still pending, the party himself is not concluded by this presumption, but may apply to the Court to stay or set aside the proceedings: Anon. 11 Ill., 488, and that without payment of costs; Reynolds *v.* Howell, 8 L. R. Q. B., 398. But there is some conflict of opinion as to whether this will be done on motion of the defendant, in the absence of fraud or imposition: Hubbart *v.* Phillips, 2 Dowl. & L., 707; Frye *v.* Calhoun, 14 Ill., 132, and Magnolia & H. Fruit Cannery Co. *v.* Guerne (Cal.), 31 Pac. Rep., 363, support the affirmative of this proposition, while Stanhope *v.* Firmin, 3 Bing. N. C., 301, and Kelso *v.* Steiger (Md.), 24 Atl., 18, maintain the negative. The former would seem the better view, however, for otherwise great injustice might be done to a defendant by an unwarranted

action: and the argument based upon the sanctity of the record can have no application while the suit is still pending, and no judgment has been rendered.

After judgment, however, the case is different. The defendant will then be probably concluded in all cases; and it was the earlier doctrine that the plaintiff would be concluded likewise if judgment should be given against him, for he had his remedy against the attorney. (See cases cited in Denton *v.* Noyes, 6 Johns. (N. Y.), 296). If, however, the attorney should be insolvent, and unable to respond in damages, equity will interfere and enjoin the collection of a judgment in such case against the plaintiff for costs: Campbell *v.* Bristol, 19 Wend. (N. Y.), 101; Smyth *v.* Balch, 40 N. H., 363. In one English case, Mudry *v.* Newman, 1 Cromp. M. & R., 402, the Court held that it was no answer to a motion for judgment as in case of *non suit* (Americanicé, *non pros?*), that the action had been carried on without authority in plaintiff's name by an attorney who could not at the time be found; but that as the case was one of great hardship, the rule would be enlarged to give the plaintiff time to find the attorney, and take a rule upon him to show cause why he should not pay defendant's costs. So, too, if there is evidence of fraud or collusion, equity will relieve the plaintiff: De Louis *v.* Meek, 2 G. Greene (Iowa), 55.

B.—For defendant.

(1) As was said above, the authority of an attorney to enter an appearance will be presumed from the mere fact of his having done so: Kirschbaum *v.* Scott, (the principal case), (Neb.) 52 N. W. Rep., 1112; and the Court will have *prima facie* jurisdiction to proceed in the cause, whether or not the defendant has been served with process: Tally *v.* Reynolds, 1 Ark., 99; Cartwell *v.* Menifee, 2 Ark., 356; Osborn *v.* United States Bank, 9 Wheaton, 738; Handley *v.* Statelor, 6 Litt. (Ky.), 186; Kepley *v.* Irwin, 14 Neb., 300; Hayes *v.* Shattuck, 21 Cal., 51; Williams *v.* Butler, 35 Ill., 544; Bank *v.* Huntington, 13 Abb. Pr. (N. Y.), 402; England *v.* Garner, 90 N. C., 197. This rule, however, does not apply to a Court not of record, such as a justice's court; there authority to appear will not be presumed, but must be affirmatively shown: Sperry *v.* Reynolds, 65 N. Y., 179. Nor does it apply to the case of an attorney *ad litem*, appointed by the Court to look after the interests of a non-resident defendantwho has been constructively summoned. Such an attorney has no power, by virtue of his appointment, to enter defendant's appearance, or to waive any of his rights; and in the absence of affirmative proof of authority from the defendant himself, he is presumed to act only under that appointment: Bush *v.* Visant, 40 Ark., 124; Hill *v.* Bates (Ark.), 12 S. W. Rep., 874. But in all ordinary cases the mere entry of an appearance in a court of record by an attorney of the Court gives him *prima facie* authority to act for the defendant, and he may defend the suit, confess judgment, or do any other act within the scope of the general authority of a duly retained attorney, and these acts will be *prima facie* valid and binding on the person for whom he appears, provided that person is capable of acting for himself. If he is under tutelage, however, as an idiot, Rogers *v.* McLean, 31 Barb. (N. Y.), 304, an infant, a

lunatic, or an habitual drunkard, the unauthorized appearance of the attorney will be void; and the Court can acquire no jurisdiction thereby.

(2) It was the old rule of the common law, as laid down by Chief Justice HOLT in 1 Salk., 86, that the recital of the record was conclusive in all cases, and that the Court would not relieve the defendant by opening or setting aside the judgment, but would leave him to an action against the attorney who appeared for him. This, however, was so manifestly oppressive that it was soon so modified as to afford relief against a judgment obtained by the unauthorized appearance of an attorney, if the latter was insolvent and unable to respond in damages, if there was evidence of fraud or collusion, or if there were circumstances of peculiar hardship, as when the defendant was taken in custody by *ca. sa.* on the judgment: Hambidge *v.* De La Crouèe, 3 Man. Gr. & S., 742; Bayly *v.* Buckland, 1 Exch., 1. The rule was adopted in this form by the courts in this country: Tally *v.* Reynolds, 1 Ark., 1; Powers *v.* Trenor, 3 Hun (N.Y.), 3; Blodget *v.* Conklin, 9 How. Pr. (N. Y.), 442; Holmes *v.* Rogers, 13 Cal., 191; Baker *v.* O'Riordan, 65 Cal., 368. Even a court of equity has refused to relieve a defendant from a divorce obtained on the unauthorized appearance of an attorney for him, when no such equitable grounds of interference were alleged: Hoffmire *v.* Hoffmire, 3 Edw. Ch., 173.

This rule still prevails in New Hampshire, Bunton *v.* Lyford, 37 N. H., 512; (see note to S. C., 75 Am. Dec., 144); Everett *v.* Warner, 58 N. H., 340, and would seem to be the correct rule in all cases where the defendant has been served with process; for by the service the jurisdiction of the Court attaches to his person, and is not dependent solely upon the appearance of the attorney; the plaintiff, knowing of the fact of service, has a right to presume that he will take the proper steps necessary to defend himself; and if he fails to do so, after thus having notice of the suit, and an unauthorized appearance is entered for him, he has only his own negligence to complain of, and an innocent plaintiff ought not to be made to suffer for it. Furthermore, if an appearance was not entered, the defendant would be defaulted; and as an unauthorized appearance saves the default, Bodge *v.* Butler, 57 N. H., 204, he would seem to be really benefited by it, and the plaintiff to be the injured person. For these reasons, then, a judgment so obtained after the defendant has been served ought not to be set aside, unless there are strong grounds to appeal to the mercy of the Court: Rust *v.* Frothingham, 1 Ill. (Breese), 268; Schirling *v.* Scites, 41 Miss., 644; University *v.* Lassiter, 83 N. C., 38. Service by publication, however, is not sufficient: Vorce *v.* Page(Neb.), 44 N. W. Rep., 452.

(3) But when the defendant has not been personally served, and the jurisdiction of the Court depends solely on the appearance of the attorney, the presumption of authority is, or should be, far less strong, and it would not be far wrong to hold that the plaintiff should be put upon inquiry; and accordingly it has now become well settled that in such a case the Court will not merely relieve the defendant on proof of the grounds of relief already mentioned, but will always let him into a defence if he can

show a good one on the merits: Denton *v.* Noyes, 6 Johns. (N. Y.), 296; Lyon *v.* Boilvin, 2 Gilm., 629; Kepley *v.* Irwin, 14 Neb., 300; Critchfield *v.* Porter, 3 Ham. (Ohio), 518; Marvel *v.* Manouvrier, 14 La. An., 3; Ridge *v.* Alter, 14 La. An., 866; Macomber *v.* Peck, 39 Iowa, 351; Porter *v.* Bronson, 19 Abb. Pr. (N. Y.), 236; Adams *v.* Gilbert, 9 Wend., 499; Jones *v.* Williamson, 5 Coldw. (Tenn.), 371; Merced Co. *v.* Hicks, 67 Cal., 108; Anderson *v.* Hawhe, 115 Ill., 33. It has even been stated that a judgment rendered on an unauthorized appearance without service was absolutely void: First Nat. Bank of Newton *v.* Wm. B. Grimes Dry Goods Co., 26 Pac. Rep., 56; see Kirschbaum *v.* Scott, (the principal case), 52 N. W. Rep., 1112; but this view is opposed by an almost unbroken line of authority, and has very little in its favor, as it wholly ignores the claims to consideration which the plaintiff certainly possesses, and also those of *bona fide* purchasers, whose title under a merely voidable judgment would be good, under a void one worthless. This was very strongly put by Chief Justice KENT, in Denton *v.* Noyes, *supra:* "To carry our interference beyond this point [letting the defendant into a defence], would be forgetting that there is another party in the cause, equally entitled to our protection. . . . If his [the attorney's] client's denial of authority is to vacate all the proceedings, the consequences would be mischievous. The imposition might be intolerable." Every useful purpose is served by the rule above stated; and there is no sound reason for extending its bounds, except, as will be seen later, in the case of a non-resident defendant.

(4) To such a case this broader rule applies with peculiar fitness, the presumption of authority rising from the entry of appearance being nullified by the very fact of non-residence: Bodurtha *v.* Goodrich, 3 Gray (Mass.), 508; Harshey *v.* Blackmarr, 20 Iowa, 161; Kerr *v.* Kerr, 41 N. Y., 272; Nordlinger *v.* De Mier, 7 N. Y. Suppl., 463. Against such a defendant the plaintiff can have no equitable right to his judgment; and therefore it is the better opinion that a judgment so obtained against a non-resident defendant should be set aside, as between him and the plaintiff, as absolutely void: Vilas *v.* Plattsburgh & M. R. Co. (N. Y.), 25 N. E., 941. This question is most frequently raised in an action on the judgment against the defendant in the place of his residence; and it is settled by a now almost unanimous current of opinion that it is competent for the defendant in such an action to impeach the record of the judgment, in spite of the constitutional provision as to "full faith and credit," by showing that it was rendered on an unauthorized appearance for him: Starbuck *v.* Murray, 5 Wend., 148; Shumway *v.* Stillman, 6 Wend., 447; Harrod *v.* Barretto, 2 Hall (N. Y.), 302; Aldrich *v.* Kinney, 4 Conn., 380; Lawrence *v.* Jarvis, 32 Ill., 304; Thompson *v.* Emmert, 15 Ill., 415; Spaulding *v.* Swift, 18 Vt., 214; Arnott *v.* Webb, 1 Dill. C. Ct., 362; Price *v.* Ward, 1 Dutch. (N. J.), 225; Welch *v.* Sykes, 3 Gilm., 197; Gleason *v.* Dodd, 4 Metc. (Mass.), 333; Norwood *v.* Cobb, 24 Tex., 551. *Contra*, Newcomb *v.* Peck, 17 Vt., 302; see Scott *v.* Eaton, 26 Ark., 17.

(5) There is considerable difference of opinion on the question whether an appearance for co-defendants or partners, entered by an

attorney under authority derived from one defendant or partner only, will bind the others. That it will is the rule as to resident defendants in Pennsylvania: McCullough *v.* Guetner, 1 Binn., 214; Scott *v.* Israel, 2 Binn., 145; Hatch *v.* Stitt, 66 Pa., 264, in California: Suydam *v.* Pitcher, 4 Cal., 280, and in Vermont: Scott *v.* Larkins, 13 Vt., 112. Except in cases of exceptional hardship: Cyphert *v.* McClune, 22 Pa., 195; Compher *v.* Anawalt, 2 Watts (Pa.), 490; but elsewhere the contrary doctrine prevails: Reynolds *v.* Fleming, 30 Kans., 106; Heaps *v.* Hoopes (Md.), 12 Atl. Rep., 882; Leslie *v.* Fischer, 62 Ill., 118; Walworth *v.* Henderson, 9 La. An., 339; McBride *v.* Bryan, 67 Ga., 584; Hambidge *v.* De La Crouée, 10 Jur., 1096; Edwards *v.* Carter, 1 Stra., 473; Strangford *v.* Green, 2 Mod., 228; especially when the defendant or partner whose appearance was entered without authority is not served with process, or is a non-resident: Franks *v.* Lockey, 45 Vt., 395; Nordlinger *v.* De Mier, 7 N. Y. Suppl., 463; Hall *v.* Lanning, 91 U. S., 160.

(6) When the defendant seeks to open or vacate a voidable judgment on the sole ground of an unauthorized appearance, without any additional claims to equitable relief, he must show that he has a good defence on the merits, or the Court will be slow to grant the relief asked: Harris *v.* Gwin, 18 Miss., 563; Russell *v.* Pottawottamie Co., 29 Iowa, 256.

(7) If the defendant has been guilty of laches, the judgment will not be opened or set aside: Dey *v.* Hathaway Printing Telegraph and Telephone Co., 41 N. J. Eq., 419; Winters *v.* Means, 41 N. W. Rep., 157. It must be a strong case to warrant the interference of the Court eight years after the judgment was rendered: Munnikuyson *v.* Dorsett, 2 H. & J., 374. Similarly, delays of six, Weaver *v.* Jones, 82 N. C., 440, nine, O'Flanagan *v.* Case (Kans.), 21 Pac., 96; and twenty-eight years, Budd *v.* Gamble, 13 Fla., 265, have been held fatal to the defendant's application; but a lapse of five years will not necessarily defeat his claim to relief: Dobbins *v.* Dupree, 39 Ga., 394. The fact that the defendant knew of the unauthorized appearance before judgment was rendered will estop him from contesting its validity: Seale *v.* McLaughlin, 28 Cal., 668.

(8) If the defendant, either expressly or by implication, confirms or ratifies the acts of the attorney, he will be bound by the appearance; and a payment for the services rendered by the attorney will be a sufficient ratification of his assumed authority to make the judgment valid: Ryan *v.* Doyle, 31 Iowa, 53.

(9) When the rights of third parties have intervened, the Court, as a rule, will not set aside or open the judgment, but will protect the innocent, especially if a *bona fide* purchaser at an execution sale, and leave the defendant to his action against the attorney: Kenyon *v.* Schreck, 52 Ill, 382; Cyphert *v.* McClune, 22 Pa., 195; England *v.* Garner, 90 N. C., 197. Some of the courts claim an apparent exception to this rule in favor of a non-resident defendant not served with process, against whom it is urged not even the equities of a *bona fide* purchaser will prevail: Shelton *v.* Tiffin, 6 How. (U. S.), 163; Harshey *v.* Blackmarr, 20 Iowa, 161; Macomber *v.* Peck, 39

Iowa, 351; Vilas *v.* Plattsburgh & M. R. Co. (N. Y.), 25 N. E. Rep., 941; but this is a lonely exception to the general rule which upholds the validity of otherwise voidable judgments in favor of such purchasers, and should be most carefully limited, if allowed at all, to cases of marked injustice. It operates fully as harshly upon the innocent purchaser as the other rule would upon the defendant; and is derogatory to the dignity of the Court, upon the truth of whose records the purchaser had a right to rely. If they can be so impeached for one cause, where shall the line be drawn and what security can a purchaser have?

(10) The validity of a judgment rendered upon an unauthorized appearance, like other voidable judgments, may be attacked in a direct proceeding: Great West. Min. Co. *v.* Woodmas of Alston Min. Co., 20 Pac. Rep., 771, but not collaterally: Denton *v.* Roddy, 34 Ark., 642; Reed *v.* Pratt, 2 Hill (N. Y.), 64; Brown *v.* Nichols, 42 N. Y., 26; Wandling *v.* Straw, 25 W. Va., 692. *Contra*, Hess *v.* Cole, 23 N. J. L., 116. This rule, however, for manifest reasons, does not apply, as has been seen, to a foreign judgment, nor to one obtained by fraud or collusion: Martin *v.* Judd, 60 Ill., 78; Ferguson *v.* Crawford, 70 N. Y., 253; Buchanan *v.* Bilger, 64 Texas, 590. There is also some conflict of authority as to what is a direct and what a collateral attack; but it seems to be conceded in all the States except New York that a bill in equity to vacate the judgment is a direct attack upon it.

(11) The proceeding to relieve the defendant against such a judgment may be either by motion during the pendency of the cause: Roe *v.* Doe, Barnes, 39; Bradley *v.* Welch (Mo.), 12 S. W. Rep., 911; Dillon *v.* Rand (Col.), 25 Pac. Rep., 185; see Bodge *v.* Butler, 57 N. H., 204; or by writ of error after judgment: Bodurtha *v.* Goodrich, 3 Gray (Mass.), 508; Abbott *v.* Dutton, 44 Vt., 564. After judgment has been rendered, however, the proper practice is by motion in the cause to open or set aside the judgment, in which case the court can impose whatever terms and conditions it thinks proper in order to protect the plaintiff, in case he should subsequently recover on the merits: Bayly *v.* Buckland, 1 Exch., 1; Lyon *v.* Boilvin, 2 Gilm., 629; Critchfield *v.* Porter, 3 Ham. (Ohio), 518; Cleveland *v.* Hopkins, 55 Wis., 387; Leslie *v.* Fischer, 62 Ill., 118; Kepley *v.* Irwin, 14 Neb., 300; Reynolds *v.* Fleming, 30 Kan., 106; Heap *v.* Hoopes (Md.), 12 Atl. Rep., 882; Woods *v.* Dickinson, 7 Mackey (D. C.), 301; which protection is best effected by letting the defendant into a defence, but preserving the lien of the judgment: Bryant *v.* Williams, 21 Iowa, 329; Wiley *v.* Pratt, 23 Ind., 628; Blodget *v.* Conklin, 9 How. Pr. (N. Y.), 442; by bill in equity, in which case the court can pay full regard to the conflicting equities of all the parties in interest: Handley *v.* Statelor, 6 Litt. (Ky.), 186; Boro *v.* Harris, 13 Lea (Tenn.), 36; Shelton *v.* Tiffin, 6 How. (U. S.), 163; Harshey *v.* Blackmarr, 20 Iowa, 161; Jones *v.* Williamson, 5 Coldw. (Tenn.), 371; Coles *v.* Anderson, 8 Humph. (Tenn.), 489; or, when so provided by statute, by petition for review: McNamara *v.* Carr, 84 Me., 299; S. C., 24 Atl. Rep., 856. In New York the only remedy against the judgment, except in the case of a foreign judgment, or one obtained