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Article 10

Unauthorized Appearance

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conditional sale contract is strengthened by considering the probable effect of the words 'before such purchase (mortgage)' found towards the end of the second sentence of Section 67 referring to the time before which the conditional sale contract must be filed. If these words mean 'before the mortgage is executed and delivered,' they obviously cannot refer to a *prior* mortgage, for it would be impossible for a subsequent conditional vendor to file his contract before the antecedent mortgage was made."[56]

Thus, in New York, a prior real property mortgage with a now or hereafter acquired personal property clause does not incorporate property sold by the conditional vendor notwithstanding his failure to file.

Conclusion

No greater single stride in the right direction has been made than that of the Court of Appeals in the *Bonac* case. By adopting this common-sense approach to the problem, rather than stringently adhering to the "rules" of fixtures or annexation, the court has given effect to the obvious intent of the parties. It is submitted that the continued use of such a criterion and the drafting of clearer recording provisions, so as to give sufficient notice to subsequent interested parties, will turn what was considered a nebulous and arbitrary segment of the law into a straightforward and understandable one.

UNAUTHORIZED APPEARANCE

The State of New York is committed to an anomalous rule of law by which the unauthorized acts of a responsible attorney at law may bind an unserved resident by a judgment rendered by a court of record. The rule is such that—in its extreme application—a solvent attorney at law *finding* a summons on the street and entering a general appearance for the defendant named therein could bind him to a final judgment although the party had never seen the summons, had never known of the action, and had never authorized the attorney to act.

Denton v. Noyes,[1] decided by the Court of Appeals in 1810, established this rule in New York. In that case, the defendants were *A* and *B*, acceptors, and *C*, drawer, of three several drafts. *C*, being unable to comply with the terms demanded by the plaintiff's attorney, offered other terms. The attorney agreed to discuss the counter offer with the plaintiff only if some attorney of the court would stipulate

[56] WHITNEY, *op. cit. supra* note 52, at 81.

[1] 6 Johns. 296 (N. Y. 1810).

for the defendants that the suits were to be deemed commenced as of a prior date. This, of course, was to be used in the event the settlement negotiations failed.

C then retained an attorney who gave the requested stipulation in all the causes. This action was approved by defendant *B* but was apparently unknown to defendant *A*. Subsequently the attorney confessed judgment in all the suits for the amount of the drafts. Defendant *A* moved to set aside the judgment as to him on the grounds that he had never authorized the attorney to represent him. By a four to three decision, the court denied the motion to vacate the judgment on the ground that an appearance by an attorney of the court, though without warrant, is good as to the court. They held, however, that the court would stay the proceedings and allow the party to come in and defend the action on the merits if he so desired.

By so holding, the court completely ignored the first principles of jurisdiction and agency, for, as stated in Prashker's *New York Practice*,[2] *in personam* jurisdiction is obtained generally by personal service of a summons [3] or by a voluntary appearance [4] filed by the prospective defendant. There being, in fact, no service on this defendant, jurisdiction over him would of necessity have to be founded upon his voluntary appearance.

A did not file an appearance himself but an appearance in his name was made. Therefore, it would seem necessary to establish the authority of the attorney at law who purported to act in *A*'s behalf. The court admitted that the attorney received no authorization from *A* and yet held *A* bound by the attorney's acts. Certainly such a holding violates the general law of agency.[5] Essential to that relationship is the delegation of authority by the principal to the agent. A principal is bound by the acts of his agent only when (1) he has expressly given the authority, or (2) he has impliedly conferred the authority by his acts or conduct, or (3) when, although

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[2] PRASHKER, NEW YORK PRACTICE § 76 (1947).

"Jurisdiction *in personam* may be acquired by (1) personal service of a summons upon the defendant in the state; or, (2) by service of a summons upon the designee of the defendant in the state; or, (3) by consent given in advance of the acquisition of personal jurisdiction; or, (4) by voluntary submission of the defendant to the jurisdiction of the court, effected commonly by the service of a general appearance; or, (5) by substituted service effected upon a resident of the state."

[3] N. Y. CIV. PRAC. ACT § 218.

"A civil action is commenced by the service of a summons, which is a mandate of the court. Rules may be made respecting requisites and form of a summons and notice and indorsements thereon."

[4] *Id.* § 237.

"The defendant's appearance must be made by serving upon the plaintiff's attorney, within twenty days after service of the summons exclusive of the day of service, a notice of appearance, a copy of an answer or a notice of motion raising objection to the complaint in point of law. A voluntary general appearance of the defendant is equivalent to personal service of the summons upon him."

[5] MECHEM, AGENCY § 210 (2d ed. 1914).

not intending to confer the authority, the principal's acts have, nonetheless, so clothed the agent with apparent authority that a third person was justified in relying upon it. In any case, it must be an act of the principal which is relied upon. No act of the agent or of a stranger can ever give the authority necessary to bind the principal.

The court sought to justify its total disregard of the elementary principles of jurisdiction and agency by basing its holding on English case law. Referring to the English decisions, the court observed, "Though the cases may not seem correct, if we were to reason from the first principles, yet if the rule appears to be settled, we are not at liberty to reason in that way . . ." [6] and ". . . it can be shown that the court is bound by a series of decisions, to preserve the judgment." [7]

An analysis and evaluation of the cases relied upon by the court is thus indicated to ascertain if it was in fact so bound.

The earliest case cited is *Alleley v. Colley* [8] which was decided in 1624. There the court would not relieve a party on a writ of *audita querela* [9] when an attorney put in an unauthorized appearance for him. This holding might well be explained on the ground that the petitioner sought relief by the wrong writ. It does not necessarily appear to be authority for holding that no relief against the judgment will lie.

The next case in point of time relied upon by the court and one which purportedly bound the court to deny the motion to vacate the judgment is an *Anonymous* case decided in 1662.[10] In its entirety it states:

> If an attorney without warrant appear, this is a good appearance as to the court, and the attorney only lyable to an action: an so if such an attorney mend an immaterial point contrary to the rule of Court, that is remediless, though a contempt punishable by the Court.

But *Chivers v. Fenn* [11] which was reported a few years later and which states an exactly opposite holding was dismissed in *Denton v. Noyes* as ". . . a brief and loose report." [12] For comparison it too is quoted in full:

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[6] 6 Johns. 296, 304 (N. Y. 1810).

[7] *Id.* at 301.

[8] Cro. Jac. 695, 79 Eng. Rep. 603 (C. B. 1624).

[9] 1 BACON, A NEW ABRIDGMENT OF THE LAW 307 (5th ed. Gwillim, 1798). "An *audita querela* is a writ to be delivered against an unjust judgment or execution, by setting them aside for some injustice of the party that obtained them, which could not be pleaded in bar to the action; for if it could be pleaded it was the party's own fault, and therefore he shall be relieved, that proceedings may not be endless."

[10] 1 Keb. 89, 83 Eng. Rep. 828 (K. B. 1662).

[11] 2 Show. 161, 89 Eng. Rep. 861 (K. B. 1682).

[12] 6 Johns. 296, 304 (N. Y. 1810). The court on page 305 also mentions that the holding was questioned in BACON, *op. cit. supra* note 9, at 297. Therein is found a statement of the facts of the case and then "*Qu.* If the courts would now set aside the judgment against the bail, if they were regularly

Debt on a bail-bond. The principal gives a warrant of attorney to appear for himself to Mr. Twyford, and his bail being his neighbours, he orders him to appear for them too, which Twyford does; and, for want of a plea, judgment is had against all three.

But upon motion judgment was set aside as to the bail, the principal's order not being a warrant to appear for more than himself; but it being by ignorance of the law, and not a wilful act, the Judges on motion discharged the attorney as to any contempt.[13]

It would seem to an objective observer that the *Chivers* case cannot be considered a "loose report" when it is compared with the report of the *Anonymous* case. For, in addition to stating the holding with equal clarity, it gives the factual situation upon which the holding is based. Furthermore, it reaches a conclusion consistent with the rules of agency and jurisdiction.

The next cases, chronologically, are two *Anonymous* reports[14] found in 1 Salkeld, both of which record merely the holdings. The first, succinctly states[15] that an unauthorized appearance by an attorney binds the party purportedly represented. The second case, as briefly stated,[16] holds that the judgment is valid *unless* the attorney appearing without authority be insolvent, in which case the judgment will be vacated.

Since the validity of any judgment should depend upon the jurisdiction over the defendant, the courts, in both cases, must have concluded that said jurisdiction had been conferred upon them by the appearances of the attorneys. Conceding that to be the fact, what then was the basis upon which the court in the second case vacated the judgment? It either had jurisdiction or did not have jurisdiction. If it had jurisdiction, the attorney's insolvency certainly should not have operated to divest the court of the jurisdiction which it had, or felt it had obtained in the first instance. In an attempt to add stature to these holdings the court in *Denton v. Noyes* noted that they are

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served with process, unless they had a good defence?" Since in the *Chivers* case as in the *Denton* case the defendant was not served, such a statement should not be construed as a criticism.

[13] 2 Show. 161, 89 Eng. Rep. 861 (K. B. 1682).

[14] 1 Salk. 86, 91 Eng. Rep. 81 (K. B. 1699); 1 Salk. 88, 91 Eng. Rep. 82 (K. B. 1704).

[15] 1 Salk. 86, 91 Eng. Rep. 81 (K. B. 1699). Chief Justice Holt said, "The course of this Court is, where an attorney takes upon him to appear, the Court looks no farther, but proceeds as if the attorney had sufficient authority, and leaves the party to his action against him."

[16] 1 Salk. 88, 91 Eng. Rep. 82, 83 (K. B. 1704). "An attorney appeared, and judgment was entered against his client, and he had no warrant of attorney; and now 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, and the plaintiff ought not to suffer, for there is no fault in him; 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."

cited by Lord Chief Baron Comyns as good law.[17] However, an inspection of Comyns discloses that also cited in the same section is a statement inconsistent with the holding of the Salkeld cases and consistent with the *Chivers* case.[18]

Three later cases were cited by the New York court as reaffirming its doctrine. Although these cases may be cited validly as so holding they can also be explained on other grounds.[19]

The latest English case dealing with unauthorized appearance which is mentioned in the *Denton* opinion is that of *Robson v. Eaton.*[20] There an attorney innocently acting under a forged warrant had a judgment entered in the plaintiff's name. On payment, made in accordance with an order of the court in that action, the attorney turned the money over to the person who had forged the warrant believing him to be the proper person. When the true plaintiff sued on the debt the defendant pleaded in bar the prior judgment and payment. The plea was rejected, the court holding the prior payment insufficient as a discharge. The eminent jurist, Lord Mansfield, stated: "There can be no doubt upon this case. The attorney, who trusted to the warrant of attorney, is liable, and Davis who committed the forgery is liable to him. The record of the Common Pleas amounts to no more than this, that the attorney prosecuted the suit in the plaintiff's name; but it does not state the authority given to him by the plaintiff for so doing." [21]

It would seem that this holding should serve unequivocally to overrule the previous English cases since the court reached the conclusion that, the acts of the attorney in the first suit being unauthorized, the judgment was a nullity. Judge Kent in the *Denton* case seems to decide arbitrarily that this case was not intended to overthrow the former decisions on this subject and states that it ". . . cannot be received here as sufficient authority for that purpose." [22] He gives no reason for being so persuaded. If Judge Kent based his distinction upon the difference in status between the un-

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[17] COMYNS, A DIGEST OF THE LAWS OF ENGLAND § B7.

"And if the attorney appears, the court does not inquire, whether he had a good authority. 1 Sal. 86(c)

And, if he be sufficient, does not set aside the judgment, though entered without warrant. 1 Sal 88(d)."

[18] *Ibid.* "So a warrant of attorney for the principal is not sufficient for the bail, in a *scire facias* against him; for they are distinct suits. R. [*Sic*] Sal. 603."

[19] Rex v. Addington, Sayer 259, 96 Eng. Rep. 873 (K. B. 1755) (on the question of the binding force of an *ultra vires* act of an attorney by which he exceeded his given authority); Bumfeild and James, 2 Barn. 232, 94 Eng. Rep. 469 (K. B. 1732) (on the duty imposed by the court on an attorney to complete an appearance once undertaken); Lorymer v. Hollister, 1 Str. 693, 93 Eng. Rep. 788 (K. B. 1726) (on the conclusive presumption of service by the bailiff).

[20] 1 T. R. 62, 99 Eng. Rep. 973 (K. B. 1785).

[21] *Ibid.*

[22] Denton v. Noyes, 6 Johns. 296, 305 (N. Y. 1810).

authorizedly represented parties, namely, the defendants in the Salkeld cases, and a plaintiff in the *Robson* case, it is submitted that the distinction is unfounded. Whether plaintiff or defendant, one who is made a party to an action without his authority or consent ought not to be bound by the judgment rendered. The plaintiff in the *Robson* case, as the defendant in the other cases, was represented without his authorization, and if the judgment be not binding on a plaintiff in such circumstances it logically follows it should not be binding on a defendant.

After analyzing the cases cited in the *Denton* decision, especially the *Robson* case, it is difficult to explain or to justify Judge Kent's flat statement that the "rule appears to be settled," [23] as to the validity of judgments obtained by means of an unauthorized appearance.

The New York courts, nevertheless, have uniformly followed the rule as enunciated in *Denton v. Noyes.* The subsequent cases can be separated into two groups. In the first group are those that adhere to the doctrine because of stare decisis,[24] and often with reluctance. The cases in the second group generally adopt as their own the arguments advanced [25] in the *Denton* case as to the unquestionable dignity of an attorney at law, the necessity for the certainty of judgments, the duty of the court to protect a plaintiff who has innocently relied on the unauthorized appearance, and finally, the infrequency with which the problem arises and the consequent absence of harm or inconvenience from so holding.

None of these arguments goes to the essence of the problem which, to reiterate, is jurisdiction. Moreover, even if these arguments were pertinent, they would still be open to attack.

Certainly, the importance of preserving the dignity of the attorney cannot be said to outweigh the importance of preserving the substantive rights of our citizens. Since the court would seem to feel that the appearance filed by an attorney creates a conclusive presumption of his authority, it should be noted that, by statute, if the same attorney were to appear in an action involving real property on behalf of a non-resident defendant, he is required to file proof of his authority.[26] Where then, is the presumption in such a case? Ultimately, the argument can amount to nothing more than a rationaliza-

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[23] *Id.* at 305.

[24] Bates v. Voorhees, 20 N. Y. 525 (1859) (construed the right to come in and defend as also giving the right to appeal); Ackar v. Ledyard, 8 N. Y. 62 (1853); Ingalls v. Sprague, 10 Wend. 672 (N. Y. 1833); Meacham v. Dudley, 6 Wend. 514 (N. Y. 1831) (the judgment was vacated because of the insolvency of an Oswego attorney).

[25] Mayor of City of New York v. Smith, 29 Jones & S. 374 (N. Y. 1892); Ferguson v. Crawford, 70 N. Y. 253 (1877); Sperry v. Reynolds, 65 N. Y. 179 (1875); Brown v. Nichols, 42 N. Y. 26 (1870) (decided "upon reasons of policy and justice which are discussed in the case of Denton v. Noyes . . ."); Hamilton v. Wright, 37 N. Y. 502 (1868).

[26] N. Y. CIV. PRAC. R. 55.

tion by the court of an attempt to preserve its own dignity by preserving the dignity of its officer, the attorney.

Manifestly, the attempt defeats itself, for there is no greater method of impairing the dignity of the court than by subordinating the traditional rights of litigants to a shallow glorification of attorneys.

Furthermore, to predicate the *Denton* rule on the necessity for the certainty of judgments, again seems to impinge upon the dignity of the court and indeed upon our entire system of jurisprudence. It cannot be said that what is desired is certainty of judgments, right or wrong, valid or invalid. Rather, what is sought is certainty of valid judgments. This is evident by the promptness with which the courts ordinarily vacate judgments when it is shown that there was a technical defect in the service of the summons. Judgments have been vacated for improper service of summons where, at defendant's direction, the process server handed the summons to defendant's husband in her presence; [27] where an infant was served, but no service was made upon his parent or guardian [28] as required by statute; [29] and where, by the method of service employed by plaintiff, the defendant was precluded from making a timely appearance.[30]

The infrequency with which the problem may arise neither mitigates the basic error of the rule nor affords much comfort to the luckless party to whom the injustice does occur.

Since, in any case, the court has a duty to protect the rights of all parties concerned, the court's solicitude for the plaintiff at the expense of the defendant seems unwarranted. Of the two, only the plaintiff has the knowledge and opportunity to ascertain whether an effective service or a valid appearance was made.

True, the court in *Denton v. Noyes* attempted to mitigate the severity of the holding by allowing the defendant to come in and defend. However, this is of no real benefit unless he has a meritorious defense, whereas defense or not, he should be entitled to the protection of our laws which require the *regular* commencement of an action. Also he is entitled to whatever protection he may receive from the statute of limitations. Even assuming that he has a defense he should not be called upon to plead it unless there is a proper exercise of jurisdiction.

Oddly enough, notwithstanding the less favorable treatment which non-residents customarily receive in most matters, a better rule has been reached in their case with respect to unauthorized appearance. The New York rule as to non-residents unauthorizedly repre-

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[27] Ives v. Darling, 210 App. Div. 521, 206 N. Y. Supp. 493 (3d Dep't 1924).

[28] Jacobson v. Krekell, 223 App. Div. 440, 228 N. Y. Supp. 371 (1st Dep't 1928).

[29] N. Y. Civ. Prac. Act § 225.

[30] Bulkley v. Bulkley, 6 Abb. Pr. 307 (N. Y. Sup. Ct. 1858).

sented was laid down in the case of *Vilas v. Plattsburgh.*[31] The court, in that case, modified the *Denton* rule and allowed the non-resident defendant to vacate the judgment. It implied further that relief was available in a collateral as well as in a direct action. Judge Andrews made the distinction that in *Denton v. Noyes,* the judgment had been against a citizen of the state within its jurisdiction while in the *Vilas* case the defendant was at all times a non-resident and without the court's jurisdiction.

While it is true that residence is one of the bases of jurisdiction,[32] it is also true that a court cannot properly exercise this general jurisdiction until notice and opportunity to be heard have been given to the defendant[33] and, therefore, there is no real ground for the distinction drawn between residents and non-residents. In either case, the jurisdiction necessary for a court to render a valid judgment had not been obtained.

The mere fact that a non-resident is in a much more advantageous position than a resident seems to establish the incongruity of the entire situation and since the result of the *Vilas* case is the desirable one, the root of the trouble is with the reasoning in the *Denton* opinion.

A correct application of the legal principles involved would have resulted in the judgments in *Denton v. Noyes* being vacated. This reasoning has been adopted by the English courts in a similar case.[34] The Court of Exchequer in 1847 (subsequent to the *Denton* case) vacated a judgment so obtained because the defendant had not been served. When so holding, the Court of Exchequer certainly had available for its consideration the English authorities cited in the New York case. Since the English courts have led the way in de-

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[31] 123 N. Y. 440, 25 N. E. 941 (1890).

[32] RESTATEMENT, CONFLICT OF LAWS § 77 (1934).

"(1) The exercise of jurisdiction by a state through its courts over an individual may be based upon any of the following circumstances:

(a) the individual is personally present within the state,

(b) he has his domicile within the state,

(c) he is a citizen or subject owing allegiance to the nation,

(d) he has consented to the exercise of jurisdiction,

(e) he has by acts done by him within the state subjected himself to its jurisdiction.

(2) In the absence of all these bases of jurisdiction, a state through its courts cannot exercise jurisdiction over individuals."

[33] *Id.* § 75. "A state cannot exercise through its courts jurisdiction over a person, although he is subject to the jurisdiction of the state, unless a method of notification is employed which is reasonably calculated to give him knowledge of the attempted exercise of jurisdiction and an opportunity to be heard."

[34] Bayley v. Buckland, 1 Exch. 1, 154 Eng. Rep. 1 (Ex. 1847).

fining the correct doctrine,[35] no reason can be perceived why New York should not now follow suit.

The lack of jurisdiction according to accepted principles is so obvious that the sole remaining arguments seem to be those generally classified under the caption "public policy." If public policy is the only basis for validating a judgment based upon an unauthorized appearance then it is submitted that the New York courts have forsaken their duty to decide cases in accordance with sound legal principles and have usurped the function of the legislature, to which should be left the task of enacting legislation in the interest of public policy.[36] Such judgments should be vacated, and the plaintiff, not the defendant, should be made to look for relief to the attorney whose acts caused the judgment to be entered.

[35] *In re* Browne's Estate, 19 Ir. L. R. 183, 187 (1887). "Thus reason, principle, and the most recent authority, all seem to me to be opposed to the doctrine that a man might be involved in heavy costs by a solicitor instituting proceedings in his name, of whose existence he had been previously unaware."

[36] Thus when the need for a conclusive presumption of consideration for a negotiable instrument was seen, the result was achieved by legislation. See N. Y. NEG. INSTR. LAW § 54.