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COMMENT

THE ACTION OF NULLITY UNDER LOUISIANA CODE OF CIVIL PROCEDURE ARTICLE 2004

Article 2004 of the Louisiana Code of Civil Procedure states in part, "A final judgment obtained by fraud or ill practices may be annulled."¹ The comments to article 2004 state that its source provisions are articles 607 and 613 of the 1870 Code of Practice, which were reenactments of corresponding articles in the 1825 Code of Practice.² Comments in the Projet of 1825 indicate that the purpose of the rule was to redress injustices in the rendering of judgments that could not be remedied through new trials or appeals.³ But the sweeping language of article 2004 does not suggest limits to the application of the rule, and a literal interpretation of its terms could lead to misapplication.⁴ This comment will attempt to clarify the scope of the article by reviewing the legislation and jurisprudence from which the current provision is derived and by analyzing the two requirements which the Louisiana Supreme Court utilizes to assess the validity of claims under article 2004. Additionally,

1. LA. CODE CIV. P. art. 2004 provides:

A final judgment obtained by fraud or ill practices may be annulled.

An action to annul a judgment on these grounds must be brought within one year of the discovery by the plaintiff in the nullity action of the fraud or ill practices.

2. La. Code of Practice art. 607 (1870) provided:

A definitive judgment may be annulled in all cases where it appears that it has been obtained through fraud, or other ill practices on the part of the party in whose favor it was rendered; as if he had obtained the same by bribing the judge or the witnesses, or by producing forged documents, or by denying having received the payment of a sum, the receipt of which the defendant had lost or could not find at the time, but has found since the rendering of the judgment.

La. Code of Practice art. 613 (1870) provided:

When a judgment has been obtained through fraud on the part of the plaintiff, or because the defendant had lost or mislaid the receipt given to him by the plaintiff, the action for annulling such judgment must be brought within the year after the fraud has been discovered, or the receipt found.

3. Projet of La. Code of Practice 1825, at 97 (Official Reprint, 1938).

The redactors determined that such articles were needed to provide the corrective function served by the courts of cassation in France and the courts of chancery in England. *Id.* This corrective function is met by the common law states and the federal government through the equitable action to annul unfair judgments. *E.g.*, *Crim v. Handley*, 94 U.S. 652 (1876). In some cases it is done through statutes concerning this problem. *E.g.*, FED. R. CIV. P. 60(b); MASS. RULES OF CIVIL PROCEDURE 60(b). *See Note*, 32 IND. L.J. 205 (1956) for a look at the equitable and statutory remedies in a common law state.

4. This was the result of a literal interpretation of article 2004 in *Johnson v. Jones-Journet*, 306 So. 2d 827 (La. App. 4th Cir. 1974), discussed in text at notes 41-47, *infra*.

this comment will survey those general types of activities that the courts have determined to fall within the ambit of actionable fraud and ill practices.

Early Interpretations

The action for nullification is an extraordinary remedy⁵ and the courts very early determined that this remedy must be granted with "great circumspection."⁶ This caution results from the conflict between the goal of rendering justice and the precept that there must be an end to litigation.⁷ Since there is a presumption in favor of the validity of a judgment,⁸ the plaintiff in a suit to nullify a judgment must make a strong showing to prevail.⁹

However, the courts' interpretation of the rule was not as restrictive as a literal reading of article 607 would have permitted. Repeatedly the courts refused to limit the action of nullity to the examples specifically enumerated in article 607,¹⁰ finding that the examples were included by way of illustration.¹¹ Additionally, the decisions indicated that the courts recognized a distinction between fraud and ill practices in that ill practice is broader and contemplates innocent acts which result from such things as accident, mistake, or ignorance.¹² Any improper procedure which enabled a party to obtain a definitive judgment came within the meaning of the article,¹³ and such practice need not be accompanied by fraud.¹⁴

5. *Chinn v. First Municipality of New Orleans*, 1 Rob. 523 (La. 1842).

6. *Norris v. Fristoe*, 3 La. Ann. 646, 647 (1848).

7. *E.g.*, *First Nat'l Life Ins. Co. v. Bell*, 174 La. 692, 699, 141 So. 379, 381 (1932); *Norris v. Fristoe*, 3 La. Ann. 646, 647 (1848); *McMicken v. Millaudon*, 2 La. 180, 182 (1831).

8. *E.g.*, *Moss v. Drost*, 130 La. 285, 287, 57 So. 929, 930 (1912); *Heroman v. Louisiana Inst. of Deaf & Dumb*, 34 La. Ann. 805, 814 (1882); *Horney v. Scott*, 171 So. 172, 177-78 (La. App. 2d Cir. 1936).

9. See text at notes 30-34, *infra*, on the burden of proof.

10. See note 2, *supra*, for the text of La. Code of Practice art. 607 (1870).

11. *E.g.*, *Miller v. Miller*, 156 La. 46, 51, 100 So. 45, 46 (1924); *City of New Orleans v. LeBourgeois*, 50 La. Ann. 591, 592, 23 So. 542, 542 (1898); *Lazarus v. McGuirk*, 42 La. Ann. 194, 201, 8 So. 253, 255 (1890). In one case, *Derbigny v. Peirce*, 18 La. 551 (1841), the court did hold the list to be restrictive but this decision was considered as overruled in *Perry v. Rue*, 31 La. Ann. 287, 288 (1879).

12. *E.g.*, *Succession of Gilmore*, 157 La. 130, 133, 102 So. 94, 95 (1924); *Norris v. Fristoe*, 3 La. Ann. 646, 647 (1848); *Beauchamp v. McMicken*, 7 Mart. (N.S.) 605, 607-08 (La. 1829); *St. Mary v. St. Mary*, 175 So. 2d 893, 896 (La. App. 3d Cir. 1965); *Tapp v. Guaranty Fin. Co.*, 158 So. 2d 228, 233 (La. App. 1st Cir. 1963), *cert. denied*, 245 La. 640, 160 So. 2d 228 (1964).

13. *Alonso v. Bowers*, 222 La. 1093, 1098, 64 So. 2d 443, 444 (1953).

14. *Schneckenberger v. John Bonura & Co.*, 130 So. 870 (La. App. Orl. Cir. 1930). See

Although the courts gave a broad meaning to the rule, they imposed one firm limitation upon its application—the plaintiff could not substitute an action in nullity for an appeal.¹⁵ The purpose of the article was to provide relief against defects not appearing in the record and for which an appeal would afford no remedy.¹⁶ Consequently, that a judgment was merely erroneous was no ground for a suit in nullity.¹⁷

Aside from this restriction the decisions recognized that the trial judge had great discretion in applying the rule¹⁸ and that the texts of equity were the principal guide in determining when annulment was proper.¹⁹ Thus article 607 was interpreted to give Louisiana courts the power to annul judgments “where a case present[ed] facts, on which, in the other states of the Union, a court of equity would interfere.”²⁰

The courts of equity, in addition to fraud, recognized mistake, inadvertence, surprise, and excusable neglect as grounds for relief.²¹ The essential elements of a cause of action for equitable relief have been described as follows: (1) a judgment which ought not, in equity and good conscience, be enforced; (2) a good defense to the alleged cause of action on which the judgment is founded; (3) fraud, accident, or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense; (4) the absence of fault or negligence on the part of the de-

St. Mary v. St. Mary, 175 So. 2d 893, 896 (La. App. 3d Cir. 1965); Tapp v. Guaranty Fin. Co., 158 So. 2d 228, 233 (La. App. 1st Cir. 1963). *But see* Adams v. Perilloux, 216 La. 566, 576, 44 So. 2d 117, 120 (1950); Dixon v. Carter, 138 So. 2d 227 (La. App. 4th Cir. 1962).

15. *E.g.*, Accardo v. Dimiceli, 226 La. 435, 440, 76 So. 2d 521, 522 (1954); Walsh v. Walsh, 215 La. 1099, 1114, 42 So. 2d 860, 864, *cert. denied*, 339 U.S. 914 (1949); Pelletier v. Sommerville, 112 La. 1091, 1100, 36 So. 864, 867 (1904).

16. Pelletier v. Sommerville, 112 La. 1091, 1100, 36 So. 864, 867 (1904); Hall v. Hall, 127 So. 2d 347, 351 (La. App. 2d Cir. 1961); Romero v. Galley, 79 So. 2d 625, 627 (La. App. 1st Cir. 1955).

17. *E.g.*, Walsh v. Walsh, 215 La. 1099, 1113, 42 So. 2d 860, 864, *cert. denied*, 339 U.S. 914 (1949); Conery v. His Creditors, 118 La. 864, 870, 43 So. 530, 532 (1907); Fidelity & Cas. Co. v. Clemmons, 198 So. 2d 695, 698 (La. App. 1st Cir.), *cert. denied*, 251 La. 27, 202 So. 2d 649 (1967).

18. *E.g.*, Miller v. Miller, 156 La. 46, 52, 100 So. 45, 46 (1924); Pelletier v. Sommerville, 112 La. 1091, 1100, 36 So. 864, 867 (1904); Lazarus v. McGuirk, 42 La. Ann. 194, 201, 8 So. 253, 255 (1890); Thomas v. Beaseley, 295 So. 2d 213, 215 (La. App. 3d Cir. 1974).

19. *E.g.*, Succession of Gilmore, 157 La. 130, 133, 102 So. 94, 95 (1924); Lazarus v. McGuirk, 42 La. Ann. 194, 201, 8 So. 253, 255 (1890); Swain v. Sampson, 6 La. Ann. 799, 800 (1851).

20. Chinn v. First Municipality of New Orleans, 1 Rob. 523, 524-25 (La. 1842). *Accord*, Alonso v. Bowers, 222 La. 1093, 1098, 64 So. 2d 443, 444 (1953); Lazarus v. McGuirk, 42 La. Ann. 194, 201, 8 So. 253, 255 (1890).

21. 3 A. FREEMAN, JUDGMENTS §§ 1246-48, 1253 (5th ed. 1925). See 46 AM. JUR.2d *Judgments* §§ 792-882 (1969) for a general summary of the equitable remedy.

fendant; (5) the absence of any adequate remedy at law.²² Interpreting article 607, Louisiana courts adhered to the more general principle set out in Story's *Equity Jurisprudence*²³ and fashioned from it two criteria to determine whether a judgment had been obtained by actionable fraud or ill practices. The two standards are that (1) the circumstances under which the judgment was rendered show the deprivation of legal rights of the litigant seeking relief, and (2) the enforcement of the judgment would be unconscionable and inequitable.²⁴

The 1960 Revisions

In the Code of Civil Procedure the redactors combined articles 607 and 613 of the Code of Practice to produce one article providing the grounds of the action as well as the time within which the action must be brought.²⁵ The redactors omitted the illustrations in the source article but explained in the comments that no change in the law was thereby effected and that judicial discretion in accordance with the prior jurisprudence was still applicable.²⁶ The one year prescriptive period²⁷ was maintained as well as the jurisprudential rule that the action for nullity must be asserted in a direct action²⁸ in the trial court.²⁹ Since no change in the law was intended, the prior jurisprudence on burden of proof and

22. J. FLEMING, CIVIL PROCEDURE § 11.8 (1965). See generally 3 A. FREEMAN, JUDGMENTS §§ 1178-1253 (5th ed. 1925); 3 J. POMEROY, EQUITY JURISPRUDENCE §§ 822-974a (5th ed. 1941).

23. 2 J. STORY, EQUITY JURISPRUDENCE § 887 (2d ed. 1839) provides: "In regard to injunctions after a judgment at law, it may be stated, as a general principle, that any fact, which proves it to be against conscience to execute such judgment, and of which the injured party could not have availed himself in a Court of Law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will authorize a Court of Equity to interfere by injunction, to restrain the adverse party from availing himself of such judgment."

24. E.g., *Johnson v. Jones-Journet*, 320 So. 2d 533 (La. 1975); *Succession of Gilmore*, 157 La. 130, 102 So. 94 (1924); *City of New Orleans v. Le Bourgeois*, 50 La. Ann. 591, 23 So. 542 (1898).

25. LA. CODE CIV. P. art. 2004, comment (a).

26. *Id.*, comment (b).

27. The burden of proving that the fraud or ill practice was discovered within a year rests upon the plaintiff. E.g., *Emuy v. Farr*, 125 La. 825, 51 So. 1003 (1910); *Succession of Dauphin*, 112 La. 103, 36 So. 287 (1904); *Thomas v. Beasley*, 295 So. 2d 213 (La. App. 3d Cir. 1974); *St. Mary v. St. Mary*, 175 So. 2d 893 (La. App. 3d Cir. 1965).

28. E.g., *Pontchartrain Park Homes v. Sewerage & Water Bd.*, 246 La. 893, 168 So. 2d 595 (1964); *Bruno v. Oviatt*, 48 La. Ann. 471, 19 So. 464 (1896).

29. LA. CODE CIV. P. art. 2006. The action must be brought in the trial court even though the judgment sought to be annulled may have been affirmed on appeal, or even rendered by the appellate court.

defenses attends the article. In order to establish a cause of action under article 2004, the petitioner must allege facts from which fraud or ill practice may be unmistakably concluded.³⁰ The petitioner seeking to annul a judgment must also have used reasonable diligence and all available means to prevent the wrong he suffered.³¹ Early decisions established the policy that matters which could have been asserted as a defense to the original suit cannot be urged in an action of nullity,³² and that a petition which does not allege the absence of negligence and the exertion of diligence is defective.³³ Where the alleged fraud or ill practice is not concealed but is open to contradiction and discreditation, lack of diligence will defeat a suit in nullity.³⁴ Likewise, where the defendant makes no appearance and suffers a default judgment to be taken against him, he must show a valid and sufficient reason for his failure to defend the suit;³⁵ for "there is certainly as much negligence in failing to appear and make any defense at all, as in failing to present the defense, having appeared."³⁶

30. *Latham v. Latham*, 216 La. 791, 797, 44 So. 2d 870, 871 (1950); *Horney v. Scott*, 171 So. 172, 177 (La. App. 2d Cir. 1936). *Cf. In re Phoenix Bldg. & Homestead Ass'n*, 203 La. 565, 14 So. 2d 447 (1943) (mere conclusions of pleader unsupported by facts fail to state a cause of action); *First Nat'l Life Ins. Co. v. Bell*, 174 La. 692, 141 So. 379 (1932) (must allege and prove that plaintiff has been guilty of no laches and that it would be against good conscience to enforce the judgment).

31. *Jouet v. Mortimer*, 29 La. Ann. 206, 212 (1877). *Cf. Perry v. Rue*, 31 La. Ann. 287, 288 (1879) (party applying for relief must be guilty of no laches or negligence).

32. *Garlick v. Reece*, 8 La. 101, 104 (1835); *McMicken v. Millaudon*, 2 La. 180, 181 (1831).

33. *Norris v. Fristoe*, 3 La. Ann. 646, 647 (1848). *Cf. Chinn v. First Municipality of New Orleans*, 1 Rob. 523, 524 (La. 1842) (in addition to stating that petitioner has a valid defense the petition must show that the petitioner has been guilty of no laches).

34. *E.g.*, *First Nat'l Life Ins. Co. v. Bell*, 174 La. 692, 695, 698, 141 So. 379, 380 (1932); *Moss v. Drost*, 130 La. 285, 288, 57 So. 929, 930 (1912); *Perry v. Rue*, 31 La. Ann. 287, 288 (1879); *Wadsworth v. Wadsworth*, 328 So. 2d 719, 721 (La. App. 4th Cir. 1976). Louisiana courts have never differentiated between intrinsic fraud and extrinsic fraud in annulment suits. Intrinsic fraud is one which occurred in the course of the trial upon a subject on which both parties presented evidence. It usually consists of perjury or the offering of forged evidence. Extrinsic fraud is the fraud of a kind which prevents a party from having his day in court on one or more issues. F. JAMES, *CIVIL PROCEDURE* § 11.7 (1965). In *United States v. Throckmorton*, 98 U.S. 61 (1878), the Court held that under equity, annulment is available in cases of extrinsic fraud only. The redactors, by providing examples of intrinsic fraud in the 1870 Code of Practice, article 607, ruled out the distinction in Louisiana.

35. *E.g.*, *Swain v. Sampson*, 6 La. Ann. 799, 800 (1851); *Lyons v. Fontenot*, 344 So. 2d 1068, 1071 (La. App. 3d Cir. 1977); *GECC Leasing Corp. v. Lakeside Rambler Sales, Inc.*, 277 So. 2d 249, 251 (La. App. 1st Cir. 1973).

36. *Swain v. Sampson*, 6 La. Ann. 799, 800 (1851).

The redactors did change the law by deleting a provision of article 607 requiring actionable fraud on the part of the party who obtained the judgment, thus overruling *Clark v. Delta Tank Manufacturing Co.*³⁷ which had required culpability on the part of the prevailing party.³⁸ Most importantly, official revision comment (b) cited the language of *City of New Orleans v. LeBourgeois*³⁹ to the effect that courts should afford relief without regard to inattention or neglect "when the circumstances under which the judgment is rendered show the deprivation of the legal rights of the litigant who seeks relief, and when the enforcement of the judgment would be unconscientious and inequitable."⁴⁰

The Johnson v. Jones-Journet Decision

This language in comment (b) of article 2004 brought about a conflict with the equitable defenses of negligence and laches which was resolved in *Johnson v. Jones-Journet*.⁴¹ In *Johnson*, the plaintiff secured a default judgment against two of six co-makers of a note bearing the language: "We promise to pay."⁴² The default judgment casting the defendants as solidarily liable was not appealed.⁴³ When the plaintiff filed a motion to examine one of the judgment debtors, the defendant in the original action sought to annul the judgment as not being obtainable at law.⁴⁴ The trial court dismissed the petition on an exception of no cause of action.⁴⁵

The court of appeals, declaring that solidary liability was unquestionably absent, held that the assertion of an insupportable claim of solidarity, even if accidental or made in ignorance, was an ill practice justifying annulment.⁴⁶ The court of appeals cited the language of official revision comment (b) in reaching its conclusion and stated: "Art. 2004 is clear; 'A final judgment obtained by fraud or ill practices may be annulled.' The default judgment here in question was obtained by what

37. 28 So. 2d 62 (La. App. 1st Cir. 1946).

38. LA. CODE CIV. P. art. 2004, comment (c).

39. 50 La. Ann. 591, 23 So. 542 (1898).

40. *Id.* This language reflects the initial application of the "two requirements" test which the courts have continued to apply to actions under article 2004. See text at notes 23-24, *supra*, and at notes 51-70, *infra*.

41. 320 So. 2d 533 (La. 1975), *reversing* 306 So. 2d 827 (La. App. 4th Cir. 1974).

42. 306 So. 2d at 828.

43. *Id.*

44. 320 So. 2d at 535.

45. *Id.* at 538.

46. 306 So. 2d at 828.

is objectively ill practice. Nothing else matters."⁴⁷ The dissenting judge stressed the equitable background of the rule and argued that the defendant had failed to meet the equitable conditions that one seeking relief come before the court with clean hands and with a willingness to do equity.⁴⁸ He pointed out that the defendant and his attorney chose not to answer after determining the defendant to be judgment-proof and that the defendant became concerned only after assets left him by his deceased father came to the attention of his creditor.⁴⁹ The dissenting opinion interpreted article 2004 in light of its treatment in the jurisprudence and criticized the majority's decision as prohibiting the enforcement of any final judgment against any litigant who failed to assert a valid defense because of his own inaction or because of incompetent counsel.⁵⁰

Applying a two step analysis, the Louisiana Supreme Court reversed. The court found that the prayer and judgment of solidary liability were substantially errors of law⁵¹ and that the defendant could not use an action of nullity as a substitute for appeal by raising such errors of law.⁵² The court held that the defendant had not met the two tests for annulment because he did not claim a deprivation of his right to appear and defend and because his failure to defend after personal service negated the unconscionability of the erroneous judgment.⁵³

47. *Id.* at 828 n.1. The court also stated in the footnote: "[C.]C.P. art. 2004 does not deny its relief to the non-answerer or the non-appealer: if there must be a hierarchy of legal principles, art. 2004's unqualified rule plainly outranks. The reason is evident: government does not provide courts to abet fraud or ill practice; uprightness in courts of justice is more important than swiftness or technical correctness in pleadings or procedure." *Id.*

48. 306 So. 2d at 829.

49. *Id.*

50. *Id.* at 830. The dissenting opinion stressed that unconscionability in itself is insufficient to constitute ill practice and that two elements must concur to support annulment: (1) some circumstance (either contrived or accidental) deprived the party cast in judgment of an opportunity to present a defense; and (2) enforcement would be unconscionable and inequitable. *Id.*

51. 320 So. 2d at 538.

52. *Id.* at 537.

53. *Id.* Jones-Journet argued that a judgment stipulating greater liability than he should bear under the law deprived him of his legal rights. The court disagreed and stated that erroneous judgments are the objects of appeals, not nullity actions. *Id.* If a new trial or the appellate process does not rectify an erroneous judgment the aggrieved party may be without a remedy and must bear the result in the interest of stability of judgments. *Cf.* Fidelity & Cas. Co. v. Clemmons, 198 So. 2d 695, 699 (La. App. 1st Cir.), *cert. denied*, 251 La. 27, 202 So. 2d 649 (1967) (the court disclaimed any factual or legal error on its part in its original judgment in the case).

*The Two Requirements Test**a) Deprivation of Legal Rights*

The court's application of the two step analysis in *Johnson* is consistent with the prevailing jurisprudence. The decisions have repeatedly recognized that "deprivation of legal rights" involves the denial of the opportunity to appear or to assert a defense.⁵⁴ Some decisions have characterized the deprivation of legal rights as an issue of improper advantage⁵⁵ while others have spoken of the litigant's right to his day in court regardless of the availability of an absolutely valid defense.⁵⁶ Despite differences in language, these decisions reflect a recognition that a deprivation of legal rights occurs when a litigant is denied a fair chance to control the suit, notwithstanding that he might not prevail in a second trial. For instance, in *Alonso v. Bowers*⁵⁷ the plaintiff was able to secure a default judgment on an open account by not serving a supplemental and amended petition on the defendant's attorney. Although the defendant's only defense was a denial of the correctness of the account, the court held that Alonso was "entitled to his day in court to urge *any* defense that he may have"⁵⁸ Decisions which suggest that annulment is

54. *E.g.*, *GECC Leasing Corp. v. Lakeside Rambler Sales, Inc.*, 277 So. 2d 249, 251 (La. App. 1st Cir. 1973); *Estelle J. Wilson Mortuary, Inc. v. Walker*, 244 So. 2d 630, 632 (La. App. 4th Cir. 1971); *Romero v. Galley*, 79 So. 2d 625, 627 (La. App. 1st Cir. 1955).

55. *Succession of Gilmore*, 157 La. 130, 133, 102 So. 94, 95 (1924); *Millaudon v. Gordon*, 18 La. Ann. 280 (1866).

56. *Alonso v. Bowers*, 222 La. 1093, 64 So. 2d 443 (1953); *Leidig v. Leidig*, 187 So. 2d 201 (La. App. 3d Cir. 1966). Some cases contain language indicating that a deprivation of legal rights occurs in judgments which are legally or factually erroneous. *E.g.*, *St. Mary v. St. Mary*, 175 So. 2d 893, 897-98 (La. App. 3d Cir. 1965); *Bell v. Holdcraft*, 196 So. 379, 382 (La. App. 2d Cir. 1940). But in these cases the erroneous and unfair result followed from a deprivation of the opportunity to appear and defend. The demand for a valid defense—which appears to be related to the equity rule requiring a meritorious defense—overlooks the principle that if the original judgment was factually or legally erroneous the proper remedy is a new trial or appeal. It is only because the litigant was deprived of his right to appear that the court now gives him a second chance. The outcome in a second suit is not a consideration if there was no opportunity for a fair contest in the first proceeding.

57. 222 La. 1093, 64 So. 2d 443 (1953).

58. *Id.* at 1101, 64 So. 2d at 445 (emphasis added). In this case the supplemental petition had been served on Alonso but he failed to inform his attorney of this fact. The court excused the neglect of Alonso because of the statutory rule on service of pleadings on counsel of record. In *Leidig v. Leidig*, 187 So. 2d 201 (La. App. 3d Cir. 1966), the court, without any discussion of defenses to the suit, overturned a dismissal of a petition to annul a divorce judgment secured through the ill practices of the plaintiff husband. The husband's false allegations as to the wife's last known address and his failure to furnish the attorney-curator with information that the wife could be served in St. Landry Parish effectively deprived the wife of notice of the suit and any real chance to defend.

improper unless a new trial would produce a different result⁵⁹ are questionable because the requirement of a valid defense presupposes that the petitioner knowingly had the opportunity for his day in court.⁶⁰ In instances where the petitioner appeared and later wishes to assert a defense not offered in the original suit because it was either unknown at the time or not discoverable with reasonable diligence, courts have recognized that the requirement of a meritorious defense does not mean that the petitioner must demonstrate that a new trial would produce victory.⁶¹

The equation of the deprivation of legal rights with the availability of a valid defense may derive from the redactors' comments to article 2004 which cite *Bell v. Holdcraft*⁶² and *Sandfield Oil and Gas Co. v. Paul*⁶³ as support for *City of New Orleans v. LeBourgeois*. From these cases one could conclude that the deprivation of legal rights entails the deprivation of an absolutely valid defense.⁶⁴ In *Bell*, the plaintiff secured a default judgment on an unpaid account due to the failure of the defendant's attorney to answer and assert the defense of payment supported by receipts. The attorney failed to answer because of a misunderstanding concerning the payment of his fee. The defendant had no knowledge that he was not represented until his property was seized under a writ of fieri facias.⁶⁵ In *Sandfield*, the confirmation of a preliminary default which had been abandoned after five years of inactivity was the cause for nullification.⁶⁶

The requirement of deprivation of legal rights appears to have been

59. *E.g.*, *Tarver v. Quinn*, 149 La. 368, 373, 89 So. 216, 218 (1921); *Chinn v. First Municipality of New Orleans*, 1 Rob. 523, 524 (La. 1842); *St. Mary v. St. Mary*, 175 So. 2d 893, 897 (La. App. 3d Cir. 1965). See the discussion in note 56, *supra*.

60. *Isaacs v. Shoreland Hotel*, 188 N.E.2d 776, 780 (Ill. App. 1963); *Lichter v. Scher*, 123 N.E.2d 161, 164 (Ill. App. 1954). *Cf.* 5 J. POMEROY, EQUITY JURISPRUDENCE § 2069 (4th ed. 1919) (when the fraud relates to the conduct of the suit, as where it prevents a party from asserting his rights, there is no fair adversary proceeding and equity will interfere).

61. *Gordon v. Halstead*, 219 So. 2d 629, 631 (Ala. 1969); *Olivera v. Grace*, 122 P.2d 564, 569 (Cal. 1942). *Cf.* 3 A. FREEMAN, JUDGMENTS § 1188 (5th ed. 1925) (it must reasonably appear that if a new trial were granted the result would be other or different from that already reached).

62. 196 So. 379 (La. App. 2d Cir. 1940).

63. 7 So. 2d 725 (La. App. 2d Cir. 1942).

64. *See St. Mary v. St. Mary*, 175 So. 2d 893, 896-97 (La. App. 3d Cir. 1965).

65. 196 So. at 381.

66. 7 So. 2d at 726. The decision was not based on the equity rule for annulment but on 1870 Code of Practice article 606 (Louisiana Code of Civil Procedure article 2002) providing for annulment where a defendant has not had a regular default judgment taken against him. The court determined that an abandoned suit lapses as a matter of law and there can be no regular default where the suit is no longer pending. 7 So. 2d at 728.

initially adopted in *City of New Orleans v. LeBourgeois*.⁶⁷ The supreme court cited article 607 and three cases⁶⁸ as authority for this requirement. In *LeBourgeois* the court did not discuss the need for a valid defense and held that a judgment secured against an opponent who has had no notice of the demand or opportunity to defend should be annulled.⁶⁹ The qualification, that there must be a deprivation of legal rights, appears to clarify the distinction between judgments which are unconscionable and inequitable because of an improper advantage, and those judgments which are merely harsh.

b) Unconscionability

The determination of a deprivation of legal rights is the first and less difficult of the two inquiries. The question of unconscionability involves assessing the harm done the petitioner and weighing his neglect against this harm. The equity principles which influenced the early decisions on nullification stipulated that negligence or laches on the part of the petitioner destroyed the title to relief.⁷⁰ The amplification of these equity principles in *LeBourgeois* softened this harsh restriction and the court openly admitted that it was comparing the equities.⁷¹ In *LeBourgeois* the parties had attempted to bring a long-pending suit to trial. A date was finally fixed but the city, having another case to try, sent an affidavit for continuance and did not attend the trial. The opponent insisted on proceeding and filed a reconventional demand on which judgment was rendered in the absence of counsel for the city.⁷² Although the city was not free of negligence, the court determined that the general principles of the adversarial system dictated annulment.⁷³ Hence, excusable neglect will not defeat recovery under article 2004 if one side achieves an advantage in the procurement of a judgment which it would be against good conscience for him to keep.

The jurisprudence reveals no rules on when neglect may be excusable, but generally, annulment will not be proper where one litigant in-

67. 50 La. Ann. 591, 23 So. 542 (1898).

68. *Swain v. Sampson*, 6 La. Ann. 799 (1851); *Norris v. Fristoe*, 3 La. Ann. 646 (1848); *Chinn v. First Municipality of New Orleans*, 1 Rob. 523 (La. 1842).

69. 50 La. Ann. at 593, 23 So. at 543. The court stated: "[T]he city has had no hearing or opportunity of defense. Our decree simply secures that opportunity, and the delay can work no injury comparable to that which the litigant sustains whose rights are adjudged without that notice and means of defense, on general principles, the law secures to all."

70. 2 J. STORY, EQUITY JURISPRUDENCE § 887 (2d ed. 1839); J. STORY, EQUITY PLEADINGS § 414 (10th ed. 1892).

71. 50 La. Ann. at 593, 23 So. at 543. See note 69, *supra*.

72. *Id.* at 592, 23 So. at 542.

73. *Id.* at 593, 23 So. at 543.

excusably failed to appear, or, having appeared, was not sufficiently diligent in contesting the issues.⁷⁴ Also, even if the party seeking annulment be found faultless, the case may not meet the test of unconscionability if the rights of third parties could be affected adversely by relitigation, or if the parties have acted to their substantial detriment in reliance upon the judgment.⁷⁵

Even so, the possibility exists that although a litigant behaves so negligently that his right to relief under article 2004 should be denied, annulment may be granted. There is occasion for such relief if maintenance of the judgment would violate a clear expression of public policy or if the judgment constituted an intolerable abuse of the courts.⁷⁶ In *Tapp v. Guaranty Finance Co.*,⁷⁷ the court annulled a deficiency judgment predicated upon a sale under executory process which was null for lack of authentic evidence. The court found a strong legislative policy prohibiting deficiency judgments without legal appraisal and determined that an illegal order for executory process could not serve as the basis for a legal appraisal and sale.⁷⁸ In *Mid-Continent Refrigerator Co. v. Williams*,⁷⁹ the court held that it was contrary to public policy for a lessor to secure judgment condemning the lessee to pay the principal sum of the lease while permitting the lessor to retake the leased property.⁸⁰ The court granted annulment even though the petitioner, in both instances, had neglected to protect his interests until his creditor sought execution on the judgment.⁸¹

74. See text at notes 31-36, *supra*.

75. *St. Mary v. St. Mary*, 175 So. 2d 893, 897 (La. App. 3d Cir. 1965). *Accord*, *Walsh v. Walsh*, 215 La. 1099, 1114, 42 So. 2d 860, 864, *cert. denied*, 339 U.S. 914 (1949).

76. *Mid-Continent Refrigerator Co. v. Williams*, 285 So. 2d 247, 251 (La. App. 3d Cir. 1973) (judgment contrary to public policy); *Johnston v. Smith*, 284 So. 2d 149, 152 (La. App. 2d Cir. 1973) (intolerable abuse of the court); *Tapp v. Guaranty Fin. Co.*, 158 So. 2d 228, 232-33 (La. App. 1st Cir. 1963) (judgment contrary to public policy).

77. 158 So. 2d 228 (La. App. 1st Cir. 1963), *cert. denied*, 245 La. 640, 160 So. 2d 228 (1964).

78. 158 So. 2d at 232-33, *citing* LA. R.S. 13:4106 (Supp. 1960). The Louisiana Supreme Court applied the rationale of *Tapp* in *League Central Credit Union v. Montgomery*, 251 La. 971, 207 So. 2d 762 (1968).

79. 285 So. 2d 247 (La. App. 3d Cir. 1973).

80. *Id.* at 251, *citing* LA. CIV. CODE art. 2692 and determining a contrary holding would produce unjust enrichment.

81. How clear must the expression of public policy be before annulment is justifiable? The judgment in *Mid-Continent Refrigerator Co. v. Williams* did not accord with the Civil Code but this was also true in *Johnson v. Jones-Journet* and the judgment in *Johnson* was arguably as offensive to public policy as the result in *Mid-Continent*. While the court in *Johnson v. Jones-Journet* did not consider when public policy dictates annulment, the court

In *Johnston v. Smith*⁸² an intolerable abuse of the court occurred in a suit for attorney fees owed for representation in a separation proceeding. The parties agreed to a fee of between \$400 and \$500, later raised to \$1000, but judgment was rendered in default for \$3200 in attorney fees plus costs. In confirming the default the attorney did not advise the court of his earlier arrangements with his client.⁸³ The court admonished that an attorney should not practice deceit upon his client and that as an officer of the court, the attorney's actions in confirming the default constituted an imposition on the legal system.⁸⁴

Equitable Annulment Outside of Article 2004

Circumstances may arise after a judgment's rendition which make its enforcement inequitable. This was the situation in *Mack Trucks, Inc. v. Martens*.⁸⁵ Mack Trucks had sued Martens on a note for a deficiency judgment of \$8,745.49.⁸⁶ Martens filed a petition in bankruptcy but reached a compromise agreement with Mack Trucks to discharge the deficiency in full by paying \$3500 in installments. Counsel for both sides then prepared and signed a deficiency judgment which was to be reconveyed to Martens if the \$3500 was timely paid or which could be presented to the court for signing and recordation. Martens was tardy in making payments but paid the agreed sum within three weeks of the due date. In the meantime, without notification and after Martens had paid \$1000, Mack Trucks had submitted the deficiency judgment to the court.⁸⁷ Only later did the attorney for Mack Trucks inform Martens' attorney that the compromise agreement was cancelled and that his client expected Martens to pay the entire deficiency judgment.

did make clear that erroneous judgments, in themselves, are not sufficiently offensive to justify annulment.

82. 284 So. 2d 149 (La. App. 2d Cir. 1973).

83. *Id.* The husband and wife reconciled after a trial on the merits but before briefs were filed or the case submitted for a decision. After the termination, the attorney stated he would accept \$1000 in full payment of his fee, costs, and expenses. But he later billed his client for \$2400 attorney fees, courts costs of \$125, and cost of transcript of \$50. In the filing of the suit, the attorney increased his fee to \$3220 and the amount of costs, including transcript fee, to \$361.98. The attorney is alleged to have made only three appearances in court on behalf of his client on a case which did not require any special skill or training on the part of the attorney who had been in practice for about one year.

84. *Id.* at 152. The court relied in part on the fiduciary relationship between an attorney and client. However, it cannot be pretended that at the time of the original suit the relationship between the parties was one of trust.

85. 192 So. 2d 879 (La. App. 4th Cir. 1966).

86. *Id.* at 881.

87. *Id.* at 882.

The court found no fraud or ill practice on the part of Mack Trucks because it had a right to proceed to judgment under the agreement. The court recognized, however, that the agreement inured to the benefit of both parties and that Martens had been misled, and therefore decided that upon the general equity powers of articles 862 and 2164 of the Code of Civil Procedure it would hold the deficiency judgment to be inoperative and unenforceable.⁸⁸

Application of the Rule

Instances in which petitioners succeed in nullity actions are numerous, but generally the cases fall into four broad categories: nonappearance, fraudulent testimony and pleadings, circumvention of procedural law, and imposition on the court.

a) Non-appearance

Non-appearance is a frequent factual background in an action for nullification. Violations of agreements not to prosecute a suit,⁸⁹ promises to notify the opponent of the date set for trial,⁹⁰ and understandings that no action would be taken until the opponent files an answer⁹¹ have all been deemed sufficient grounds for nullification when they resulted in non-appearance. In *Southern Discount Co. v. Williams*,⁹² the loan company took a default judgment twelve calendar days after agreeing to give

88. *Id.* at 884. The court also relied on *Denis v. Gayle*, 40 La. Ann. 286, 4 So. 3 (1888). *Cf.* *Davidson v. City of New Orleans*, 32 La. Ann. 1245 (1880) (judgment enjoined where occurrences subsequent to the judgment render execution of the judgment illegal and inequitable). In *Licoho Enterprises, Inc. v. Succession of Champagne*, 270 So. 2d 139 (La. App. 3d Cir. 1972), the court applied the rationale of *Mack Trucks* and Louisiana Civil Code article 21 to declare inoperative a judgment that was clearly the result of fraud. But since suit was brought in a parish of improper venue the court could not utilize Code of Civil Procedure article 2004. The Louisiana Supreme Court reversed, determining that to render a judgment inoperative and unenforceable was of the same effect as a declaration of nullity and under Code of Civil Procedure articles 44 and 2006, the court was without jurisdiction to render judgment. *Licoho Enterprises, Inc. v. Succession of Champagne*, 283 So. 2d 217 (La. 1973). The court did not comment on the propriety of the inherent power of a court to do justice.

89. *E.g.*, *Estelle J. Wilson Mortuary, Inc. v. Walker*, 244 So. 2d 630 (La. App. 4th Cir. 1971); *Engeran v. Consolidated Cos.*, 147 So. 743 (La. App. 1st Cir. 1933). *Cf.* *Lazarus v. McGuirk*, 42 La. Ann. 194, 8 So. 253 (1890) (violation of a release).

90. *Schneckenberger v. John Bonura & Co.*, 130 So. 870 (La. App. Orl. Cir. 1930).

91. *Collins v. Collins*, 325 So. 2d 773 (La. App. 2d Cir. 1976); *Southern Discount Co. v. Williams*, 226 So. 2d 60 (La. App. 4th Cir. 1969). *But cf.* *Stout v. Henderson*, 157 La. 169, 102 So. 193 (1924) (plaintiff failed to prove that opposing counsel had acted contrary to custom in confirming a default without notice to his opponent).

92. 226 So. 2d 60 (La. App. 4th Cir. 1969).

its debtor reasonable additional time to file an answer. The action, commenced without notifying the debtor and without advising the court of the extension agreement, allowed the debtor only five judicial days beyond the statutory entitlement.⁹³ The court, pretermittting whether lack of professional courtesy is grounds for nullification,⁹⁴ determined that, absent the agreement, the opponent could have easily secured an extension of the time to answer and thereby prevented the default. The debtor relied to his detriment on the agreement and its violation was a sufficient ground for annulment.⁹⁵ In *Engeran v. Consolidated Companies*,⁹⁶ an agreement to dismiss a suit against the defendant was violated and a default judgment resulted. The plaintiff had admitted its mistake in suing Joseph Engeran over a debt owed by a partnership bearing the name Engeran Bros. but completely unrelated to Joseph Engeran.⁹⁷ Since Joseph Engeran was not liable for the debt the court held that enforcement of the judgment would be unconscionable.⁹⁸

Where the defendant's counsel fails to file an answer, however, annulment may likely be denied.⁹⁹ In *Johnson v. Welsh*,¹⁰⁰ the Louisiana Supreme Court held that the failure of the defendant's attorney to answer the petition or make any appearance did not constitute a ground upon which a judgment of default could be set aside.¹⁰¹ But in *Hall v. Hall*,¹⁰² wherein the plaintiff had secured a default judgment by utilizing false documents and fraudulent testimony,¹⁰³ the neglect of the defend-

93. *Id.*

94. *Id.* at 61.

95. *Id.* at 62. The court did not discuss any defense the debtor may have had to the suit on the note and chattel mortgage.

96. 147 So. 743 (La. App. 1st Cir. 1933).

97. *Id.* at 744.

98. *Id.* at 746. *Accord*, *Estelle J. Wilson Mortuary, Inc. v. Walker*, 244 So. 2d 630 (La. App. 4th Cir. 1971) wherein the court annulled a default judgment secured in violation of an agreement not to prosecute. Mrs. Walker was deprived of her right to assert what appeared to be a valid defense through the violation of an agreement not to prosecute if she would aid the mortuary in locating the other named defendants. Mrs. Walker fulfilled her part of the agreement but the mortuary secured a default judgment against her in spite of the agreement.

99. *Johnson v. Welsh*, 334 So. 2d 395 (La. 1976); *Adams v. Perriloux*, 216 La. 566, 44 So. 2d 117 (1950). *Cf.* *Community Constr. Co. v. Scott*, 235 So. 2d 168 (La. App. 4th Cir. 1970) (appeal of a default judgment rendered when attorney did not timely file an answer).

100. 334 So. 2d 395 (La. 1976).

101. *Id.* at 397. The court was unmoved by the "equitable" argument of the defendant husband against whom a default separation was granted for cruel treatment.

102. 127 So. 2d 347 (La. App. 2d Cir. 1961).

103. *Id.* at 349.

ant's attorney did not defeat the action of nullity.¹⁰⁴

Misunderstandings on the defendant's part regarding his own representation may result in nullification. Where the defendant reasonably believes that he has arranged for representation the courts have annulled default judgments.¹⁰⁵ But in *Stanley v. Miller*,¹⁰⁶ the defendant had relied on his insurer to defend for him and took no personal action in his defense. The court refused to annul the default judgment, maintaining that cases involving misunderstandings between client and attorney were inapposite because attorneys are officers of the court and their actions are subject to judicial inquiry.¹⁰⁷ The courts have also denied annulment where the defendant failed to retain new counsel after the withdrawal or death of his original counsel,¹⁰⁸ but where the attorney withdraws without notice to the client the courts have granted annulment.¹⁰⁹ Annulment after non-appearance has also been granted where the plaintiff told the defendant, who was ignorant of her rights, that the suit papers served upon her were inconsequential and that no legal steps on her part were required.¹¹⁰

Even if the non-appearance is voluntary, the court may grant annulment. In *Vegas v. Cheramie*¹¹¹ the defendants permitted a default judgment in a suit to fix boundary lines because they were satisfied with the boundary lines fixed by the surveyor in accordance with the parties' titles as prayed for in the pleadings.¹¹² However, after the preliminary default the judge ordered the surveyor to establish the boundaries according to the boundary fixed in a former suit. The court held that the judge's action in the trial court was improper and an ill practice sufficient for

104. *Id.* The case presents a situation wherein the court overlooked the defendant's neglect in the face of an abuse of the judicial process.

105. *St. Mary v. St. Mary*, 175 So. 2d 893 (La. App. 3d Cir. 1965) (uneducated defendants relied on assurances of chief deputy sheriff that the suit was being handled by an attorney). *Cf.* *Bell v. Holdcraft*, 196 So. 379 (La. App. 2d Cir. 1940) (appeal of a default judgment secured against a defendant who thought he was being represented in the suit).

106. 211 So. 2d 793 (La. App. 2d Cir. 1968).

107. *Id.* at 794.

108. *Yeatman v. Louisiana State Bank*, 25 La. Ann. 461 (1873); *Millaudon v. Gordon*, 18 La. Ann. 280 (1866).

109. *Sterling v. Jones*, 255 La. 842, 233 So. 2d 537 (1970) (dictum, nullification being granted under LA. CODE CIV. P. art. 2002, invalid default judgment); *Pertuit v. LeBlanc*, 216 So. 2d 863 (La. App. 2d Cir. 1969).

110. *Quinn v. Brown*, 159 La. 570, 572, 574, 105 So. 624, 625 (1925).

111. 80 So. 2d 880 (La. App. 1st Cir. 1955).

112. *Id.* at 883.

nullification.¹¹³

b) Fraudulent Testimony and Pleadings

Louisiana courts will annul judgments secured through the use of false testimony and fraudulent documents.¹¹⁴ However, a simple failure to disclose evidence, when unaccompanied by concealment, will not suffice in an action of nullity.¹¹⁵ In *First National Life Insurance Co. v. Bell*,¹¹⁶ the plaintiff in a nullity action alleged that the plaintiff in the original suit had pretended to be unable to rise or to take the witness stand in order to make the court believe that she was permanently disabled.¹¹⁷ Additionally, the plaintiff alleged that Mrs. Bell's failure to call her attending physician and her reliance on the testimony of the physician who had treated her some sixteen months prior to trial amounted to a further fraud.¹¹⁸ The court refused to annul the judgment and pointed to the lack of diligence of the counsel for the insurance company:

[T]he acts complained of were performed openly, . . . and were apparent to the representatives of the insurance company and all other observers. The insurance company was represented by experienced counsel

If the insurance company was not satisfied that the injuries of Mrs. Bell were of a permanent nature, it was its duty to ascertain and establish that fact on the trial of the case. This it failed to do, and we do not think that it ought to be permitted to have the case reopened . . . to engage in a retrial of that issue.¹¹⁹

A related rule holds that the plaintiff does not commit an ill practice in confirming a default if he fails to disclose possible defenses available to his adversary or if he presents merely his own version of the controversy so long as he does not use false testimony.¹²⁰ Also, allegations in

113. *Id.* at 884. *Cf.* LA. CODE CIV. P. art. 1703 (a judgment by default shall not be different in kind from or exceed in amount that demanded in the petition).

114. *E.g.*, *Quinn v. Brown*, 159 La. 570, 105 So. 624 (1925); *Spence v. Spence*, 158 La. 961, 105 So. 28 (1925); *Bryant v. Austin*, 36 La. Ann. 808 (1884).

115. *First Nat'l Life Ins. Co. v. Bell*, 174 La. 692, 141 So. 379 (1932); *Succession of Elrod v. Elrod*, 253 So. 2d 694 (La. App. 4th Cir.), *cert. denied*, 260 La. 140, 255 So. 2d 358 (1971).

116. 174 La. 692, 141 So. 379 (1932).

117. *Id.*

118. *Id.*

119. *Id.* at 696, 698, 141 So. at 380.

120. *Chauvin v. Nelkin Ins. Agency*, 345 So. 2d 132 (La. App. 1st Cir. 1977). *Accord*, *Alleman v. Guillot*, 225 So. 2d 607 (La. App. 1st Cir.), *cert. denied*, 254 La. 858, 227 So. 2d 596 (1969).

the plaintiff's petition which may be partially or completely inaccurate do not constitute grounds for annulment.¹²¹ Where the petition is served upon the opponent, he cannot complain when he fails to appear and controvert the questionable allegations.¹²²

c) Circumvention of Procedural Law

If the plaintiff deprives his opponent of the full protection which the procedural law accords him, annulment is justified.¹²³ A clear ill practice occurs whenever the plaintiff falsely alleges that the defendant is an absentee and thereby denies him the opportunity to defend personally.¹²⁴ Other irregularities are also sufficient to justify nullification. For instance, in one case the court annulled a judgment procured after the plaintiff notified an unrepresented defendant that the case was fixed for trial the next morning.¹²⁵ These instances, like most others wherein annulment is granted, involve procedural violations which prevent the opponent from appearing and defending in the suit,¹²⁶ whereas mere technical violations are inadequate grounds for nullification.¹²⁷

d) Imposition on the Court

Imposition on the court occurs when the plaintiff makes the court an unwitting instrument of injustice.¹²⁸ The typical setting in which the court finds an imposition involves the taking of a default judgment after an expressed agreement not to proceed or to delay action.¹²⁹ In *Spitzkeit*

121. *E.g.*, *Royal Furniture Co. v. Benton*, 260 La. 527, 256 So. 2d 614 (1972); *Lyons v. Fontenot*, 344 So. 2d 1068 (La. App. 3d Cir. 1977); *Wadsworth v. Wadsworth*, 328 So. 2d 719 (La. App. 4th Cir. 1976).

122. *Lyons v. Fontenot*, 344 So. 2d 1068, 1071 (La. App. 3d Cir. 1977); *Vinson v. Pico*, 15 So. 2d 778, 780 (La. App. Or. Cir. 1943) (McCaleb, J., concurring).

123. *E.g.*, *Alonso v. Bowers*, 222 La. 1093, 64 So. 2d 443 (1953); *City of New Orleans v. LeBourgeois*, 50 La. Ann. 591, 23 So. 542 (1898); *Bryant v. Austin*, 36 La. Ann. 808 (1884).

124. *Spence v. Spence*, 158 La. 961, 105 So. 28 (1925); *Bryant v. Austin*, 36 La. Ann. 808 (1884); *Leidig v. Leidig*, 187 So. 2d 201 (La. App. 3d Cir. 1966).

125. *Duncan v. Pesnell*, 219 So. 2d 846 (La. App. 2d Cir.), *cert. denied*, 254 La. 16, 222 So. 2d 67 (1969). *But cf.* *Caraway v. Caraway*, 321 So. 2d 405 (La. App. 2d Cir.), *cert. denied*, 323 So. 2d 479 (La. 1975) (the court determined that the plaintiff was familiar with legal proceedings and chose not to appear).

126. *E.g.*, *Succession of Menendez*, 238 La. 488, 115 So. 2d 829 (1959); *Alonso v. Bowers*, 222 La. 1093, 64 So. 2d 443 (1953); *City of New Orleans v. LeBourgeois*, 50 La. Ann. 591, 23 So. 542 (1898).

127. *Accardo v. Dimicelli*, 226 La. 435, 76 So. 2d 521 (1954); *Tarver v. Quinn*, 149 La. 368, 89 So. 216 (1921).

128. 2 J. STORY, EQUITY JURISPRUDENCE § 885 (2d ed. 1839).

129. *E.g.*, *Lacoste v. Robert*, 11 La. Ann. 33 (1856); *Spitzkeit v. Robinson*, 289 So. 2d

v. Robinson,¹³⁰ the plaintiff filed suit for past due rent, but after the filing of the suit and service of process the plaintiff advised the lessee that he had no intention of proceeding in the action against her.¹³¹ The court annulled even though notice of trial was served upon the lessee's counsel who nonetheless did not appear at trial.¹³²

Conclusion

The action for nullity under Louisiana Code of Civil Procedure article 2004 serves to prevent injustices which cannot be corrected through new trials and appeals.¹³³ Although a full categorization of the instances in which the remedy is proper would be impossible, the two requirements test aids the court in the exercise of its discretion. There must be a deprivation of the basic right of the adversarial system: the opportunity to appear and defend. The deprivation must also be unconscionable and inequitable. This consequence will normally follow from the first requirement unless the complaining party, through his own negligence and delay, has contributed to the harm which he now protests. However, complete absence of fault is not a requirement for relief, and neglect, if excusable, will not defeat an action for annulment if after a balancing of the equities, enforcement of the judgment appears unconscionable. Although public policy requires that opposing litigants accept primary responsibility for the protection of legal rights,¹³⁴ occasionally the adversarial system proves inadequate because of factors which deprive a litigant of the opportunity to appear or which prevent a litigant from presenting defenses which may produce a different result. In these instances the prevention of injustice transcends the need for stability in judgments.

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846 (La. App. 4th Cir. 1974); *Estelle J. Wilson Mortuary, Inc. v. Walker*, 244 So. 2d 630 (La. App. 4th Cir. 1971). Cases of imposition though usually associated with non-appearance are distinguishable because the failure to appear is the result of a more palpable deception than in other instances of non-appearance. Compare *Spitzkeit v. Robinson*, 289 So. 2d 846 (La. App. 4th Cir. 1971) with *Southern Discount Co. v. Williams*, 226 So. 2d 60 (La. App. 4th Cir. 1969).

130. 289 So. 2d 846 (La. App. 4th Cir. 1974).

131. *Id.*

132. *Id.*

133. *Projet of La. Code of Practice of 1825 at 97 (Official Reprint, 1938).*

134. *RESTATEMENT OF JUDGMENTS § 126, Comment a (1942).*