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When petitioner and his wife were divorced in 1959 she received custody of their minor daughter, and he was ordered to contribute fifty dollars per month toward the child's support. The wife remarried and, two years after the divorce, joined in proceedings initiated by her new husband in a Texas court to adopt the child.[1] The adoption petition alleged that, during the two-year period, petitioner had failed to support the child in a manner commensurate with his ability.[2] Under Texas law, proof of such a charge

* 380 U.S. 545 (1965).

1. The wife joined the proceedings to indicate her consent to the adoption. Armstrong v. Manzo, 380 U.S. 545 n.1 (1965) (hereinafter cited as principal case). Prior to commencement of the adoption proceedings, the wife filed an affidavit with the juvenile court of appropriate jurisdiction alleging that petitioner had not contributed to the support of his minor daughter for a period of two years. Upon the basis of this statement, the juvenile-court judge issued his consent to adoption. Evidence of this fact was filed along with the request for adoption later the same day in the District Court of El Paso County, Texas. Petitioner knew neither of the pendency of the adoption proceeding nor of his wife's action in obtaining the juvenile court judge's consent. Principal case at 547-48; see generally note 3 *infra*.

2. At the time of the divorce, petitioner was ordered to pay fifty dollars per month into the Child Support Office of Tarrant County, Texas, for his daughter's maintenance until she reached eighteen years of age or until the divorce court directed otherwise. Apparently only two hundred dollars was so paid during the twenty-eight months between the rendition of the divorce decree and the commencement

against a natural father makes his consent to the adoption of his child unnecessary.[3] Petitioner, however, knew nothing of the proceedings until immediately after a final decree of adoption had been entered, whereupon he moved to vacate the judgment.[4] His motion was denied because of his failure to demonstrate that he had supported his daughter to the extent required to preserve the right to withhold consent to her adoption.[5] The Texas Court of Civil Appeals affirmed, holding that any defect in the adoption proceeding caused by petitioner's lack of knowledge was cured when his motion to vacate came on for hearing and he was then afforded the opportunity to show that he had supported the child and that, therefore, his consent to adoption was in fact necessary.[6] On appeal to the United States Supreme Court, *held,* reversed. If one is not bound by a judgment because he had no knowledge of the proceeding in which it was rendered, he is denied due process of law if his right to reopen that decree is conditioned upon his carrying a burden of proof greater than that which would have been imposed on him in the original proceeding.

The due process clauses of the fifth and fourteenth amendments

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of the adoption proceeding. See *In re* Armstrong, 371 S.W.2d 407 (Tex. Civ. App. 1963).

3. TEX. REV. STAT. ANN. art. 46(1)(6) (1956): "[N]o adoption shall be permitted except with the written consent of the living parents of the child; provided, however, that if a living parent . . . shall voluntarily abandon and desert a child sought to be adopted, for a period of two (2) years . . . or . . . shall have not contributed substantially to the support of such child during such period . . . commensurate with his financial ability, . . . it shall not be necessary to obtain the written consent of the . . . parent . . . in such default, and in such cases adoption shall be permitted on the written consent of the Judge of the Juvenile Court of the county of such child's residence . . . ." In the principal case, the consent of the juvenile-court judge was apparently obtained without any hearing, solely on the basis of an affidavit filed by petitioner's wife alleging that he had failed to support his daughter. See note 1 *supra.*

4. The terms "decree" and "judgment" are used interchangeably herein to refer to the final decisions of both law and equity courts.

Texas procedure permits a judgment to be vacated upon a motion for a new trial filed with the court of rendition within thirty days after the judgment is rendered. Thereafter, unless a defendant obtains a writ of error preparatory to an appeal, relief from a judgment must be obtained in an action in equity by way of a bill of review. TEX. R. CIV. P. 329(b). This procedure apparently applies regardless of whether the defect in the judgment under attack is apparent on its face, although the procedure is limited to cases in which the rendering court had "jurisdictional power" to enter the judgment. See McEwen v. Harrison, 162 Tex. 125, 345 S.W.2d 706 (1961), noted in 40 TEXAS L. REV. 905 (1962).

5. The procedure followed by the trial court in considering petitioner's motion for a new trial was consistent with the Texas rule that a judgment not invalid on its face will be set aside only upon a petitioner's showing that he has a meritorious defense to the cause of action upon which the decree was entered. McEwen v. Harrison, *supra* note 4; see generally notes 21-30 *infra* and accompanying text.

6. *In re* Armstrong, 371 S.W.2d 407 (Tex. Civ. App. 1963); *accord,* Carpenter v. Forshee, 103 Ga. App. 758, 120 S.E.2d 786 (1961); Farnham v. Pierce, 141 Mass. 203, 6 N.E. 830 (1886); *In re* Davis, 141 Misc. 681, 255 N.Y. Supp. 416 (Surr. Ct. 1932); DeWitt v. Brooks, 182 S.W.2d 687 (Tex. Civ. App. 1944).

prohibit the taking of property by judicial action unless its owner has been afforded a fair opportunity to defend his interest.[7] Thus, a final decree purporting to affect the property of one who did not have sufficient knowledge of the pendency of the proceeding in which it was rendered is not binding upon him.[8] If it is a judgment at law it can be attacked in the court which entered it or in equity in the same jurisdiction as well as at law or in equity in any jurisdiction where some step is taken to enforce it.[9] Similarly, an equity decree is always subject to attack in some manner in the jurisdiction where it was rendered or where it is sought to be enforced.[10] Although children cannot be classified as "property,"[11] adoption proceedings, which can permanently deprive a natural parent of all rights over his child, are subject to due process limitations; thus, a final adoption order does not bind a parent who had no knowledge of the pendency of the proceeding in which it was rendered.[12]

A person purportedly affected by a judgment which cannot con-

7. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); Milliken v. Meyer, 311 U.S. 457 (1937); Grannis v. Ordean, 234 U.S. 385 (1913).

8. Milliken v. Meyer, *supra* note 7.

9. A distinction is generally drawn between attacks on judgments initiated in the court which entered a decree and instituted specifically to avoid enforcement of the decree and those raised in a court other than the one rendering the judgment and not instituted for the express purpose of defeating it. The former are termed "direct attacks"; the latter are called "collateral." See generally 1 BLACK, JUDGMENTS § 252 (2d ed. 1902); 1 FREEMAN, JUDGMENTS § 306 (5th ed. 1925); RESTATEMENT, JUDGMENTS § 11, comment *a* (1942); Note, 66 YALE L.J. 526 (1957). When a domestic judgment is valid on its face, collateral attack may not be permitted. See, *e.g.*, Lampson Lumber Co. v. Hoer, 139 Conn. 294, 93 A.2d 143 (1952); Johnson v. Hayes Cal. Builders Inc., 60 Cal. 2d 572, 35 Cal. Rptr. 618, 387 P.2d 394 (1963); Bynum v. Davis, 327 S.W.2d 674 (Tex. Civ. App. 1959); Prewitt v. Prewitt, 397 Ill. 178, 73 N.E.2d 312 (1947). *But see* Steffens v. Steffens, 408 Ill. 150, 96 N.E.2d 458 (1951) (exception to the general rule; defendant prevented from appearing by fraud or wholly without fault on his part); Porter v. Orient Ins. Co., 72 Conn. 519, 527, 45 Atl. 7 (1900) (exception to the general rule in Connecticut prohibiting collateral attack on judgments regular on their face where defendant against whom default judgment was entered is a nonresident). *Contra*, Ross v. Ross, 215 N.Y.S.2d 905 (Sup. Ct. 1961); State v. Wilson, 181 Ark. 683, 27 S.W.2d 106 (1930). The limitation on collateral attack does not extend, however, to foreign judgments, which may be attacked collaterally at any time whether or not void on their face. See Milliken v. Meyer, 311 U.S. 457 (1940).

If a jurisdiction forbidding collateral attack upon a domestic judgment valid on its face also prohibits vacation of such judgments after a given statutory period (see note 17 *infra*) relief may be available only by way of a bill in equity to enjoin enforcement of the decree, or by way of a bill of review. A distinction is sometimes made between equitable relief by way of a bill of review and that by means of an injunction, the former being characterized as a direct attack, and the latter as collateral. See generally 1 FREEMAN, *op. cit. supra* § 312.

10. See Corbett v. Craven, 196 Mass. 319, 82 N.E. 37 (1907). Of course an attack upon an equity decree will normally be made in an action in equity. An exception to this rule might arise if a judgment creditor by virtue of an equity decree granting money damages sought to enforce it in an action at law in another jurisdiction.

11. See May v. Anderson, 345 U.S. 528 (1952) (dissenting opinion).

12. See Child Sav. Institute v. Knobel, 327 Mo. 609, 37 S.W.2d 290 (1931); *cf.* May v. Anderson, *supra* note 11.

stitutionally bind him, but who does not know of its existence or chooses not to challenge the decree until the alleged judgment creditor attempts to satisfy it, normally attacks the judgment either by moving to prevent the discovery or attachment of his assets for execution or, if the would-be creditor brings a suit to enforce the judgment in a jurisdiction other than that in which it was rendered, by demonstrating that the judgment is unenforceable.[13] To attack successfully in either situation, the alleged judgment debtor generally must only prove that the proceedings in which the decree was handed down were constitutionally defective.[14]

No action is necessary to satisfy a judgment in some instances, as for example in the principal case, where the petitioner's ex-wife and her new husband had custody of the child even before the unenforceable adoption decree was entered. Sometimes an apparent judgment debtor does not wish to wait for his alleged creditor to commence enforcement proceedings but prefers to remove the record lien upon his property created by the docketed but impotent decree as quickly as possible. In these situations the party purportedly bound by the judgment must set the stage for attack. A motion to vacate, filed in the court which entered the decree, is one common means toward this end.[15] If such a judgment is challenged because of a jurisdictional defect in the proceeding from which it arose (including lack of sufficient notice to the one purportedly bound) and the infirmity appears on the face of the decree, it is deemed *void*, and the motion to vacate is generally granted at any time as a matter of course.[16] When no jurisdictional defect is apparent on the face of the judgment, and the decree is thus merely *voidable*, relief by way of a motion to vacate is often available only

13. See generally 1 FREEMAN, *op. cit. supra* note 9, §§ 306-16; Note, 66 YALE L.J. 526 (1957). For a summary of the methods of enforcing a judgment in a jurisdiction other than that in which it was rendered, as well as a discussion of the difficulties raised where an unenforceable judgment is sought to be executed in another jurisdiction in the manner provided by the Federal Judicial Code, see Note, 64 MICH. L. REV. 521 (1966).

14. See, *e.g.*, Jones v. Watts, 142 F.2d 575 (5th Cir. 1944) (by implication); Cochran v. Whitworth, 21 Ga. App. 406, 94 S.E. 609 (1917); Kennedy v. Boden, 241 Mo. App. 86, 231 S.W.2d 862 (1950) (by implication). In a few jurisdictions a motion to quash an attachment for execution is treated similarly to a petition for equitable relief from a judgment. See, *e.g.*, Davis v. Bank of Atkins, 205 Ark. 144, 167 S.W.2d 876 (1943). In these states one seeking to prevent attachment may have to show that he has a meritorious defense to the claim upon which the judgment sought to be executed was based. See generally note 21 *infra* and accompanying text.

15. Relief from equity decrees is treated in much the same manner as that from judgments at law. See generally 1 FREEMAN, *op. cit. supra* note 9, § 212; 3 *id.* § 1191.

16. See, *e.g.*, Wise v. Herzog, 144 F.2d 486 (D.C. Ct. App. 1940); Preston v. Denkins, 94 Ariz. 214, 219, 382 P.2d 686, 689 (1963); Meyers v. Washington, 211 Cal. App. 2d 767, 27 Cal. Rptr. 778 (Dist. Ct. App. 1963); Clark v. Clark, 191 Kan. 95, 379 P.2d 240 (1963) (statute so providing); Langer v. Wiehl, 207 Misc. 826, 140 N.Y.S.2d 198 (Sup. Ct. 1955).

if the motion is made within a reasonable time, or within a limited period prescribed by statute.[17] When relief cannot be obtained by way of a motion to vacate, equity may provide the only effective forum for the alleged judgment debtor who wishes to take the first step toward bringing to issue the question of the enforceability of the decree against him even if it were rendered at law.[18] His relief would then come either by way of an injunction against enforcement of the judgment or, if he began the equitable proceeding by filing a form of a bill of review, by way of an order "setting aside" the judgment.[19]

Except when a void judgment is attacked on a motion to vacate,[20] one who challenges a final judgment before an attempt is made to satisfy it can generally obtain legal or equitable relief only if he presents a "meritorious defense" to the cause of action upon which the decree was rendered, in addition to demonstrating the deficiency in the proceeding from which it arose.[21] The meritorious-defense pre-

17. See, *e.g.*, *In re* Estrem's Estate, 16 Cal. 2d 563, 107 P.2d 36 (1940) (reasonable time); Prather v. Loyd, 86 Idaho 45, 382 P.2d 910 (1963) (reasonable time); Corporate Loan & Sec. Co. v. Peterson, 64 Wash. 2d 241, 391 P.2d 199 (1964) (one year statutory period whether judgment void or voidable). The status of the law in Texas is discussed in note 4 *supra*.

18. In a few states it may also be necessary for one wishing to prevent attachment of his assets for execution to get equitable relief. See note 14 *supra*. In these jurisdictions the textual discussion relative to the rules for equitable relief for one who takes the first step in bringing the question of the enforceability of judgment against him to issue would be applicable to the party seeking relief from an attachment, even though the would-be judgment creditor, by attaching, took the initial step in bringing the enforceability of the judgment into question.

19. There is some diversity of opinion as to whether the legal remedy must be inadequate before equitable relief will be granted. In some instances, equitable relief has been granted despite the existence of an adequate legal remedy. See, *e.g.*, Watkins v. Perry, 25 Colo. App. 425, 139 P. 551 (1914); City of Chicago Heights v. Public Serv. Co. of No. Ill., 345 Ill. App. 393, 103 N.E.2d 519, transf. 408 Ill. 310, 97 N.E.2d 268 (1952); Shinn v. Shinn, 148 Neb. 832, 29 N.W.2d 629 (1947). The majority of courts, however, require that the legal remedy be inadequate or unavailable before equitable relief will be granted. See, *e.g.*, Harpke v. Lankerskin Estate, 101 Cal. App. 2d 49, 224 P.2d 889 (Dist. Ct. App. 1950); Denning v. Van Meter, 281 P.2d 758 (Okla. 1955).

Where a petitioner was negligent or at fault in failing to appear in the original proceeding equitable relief may be denied despite the fact that he was not adequately served with process. Kibbe v. Benson, 84 U.S. (17 Wall.) 624 (1873). Moreover, a prior adverse decision on a motion to set aside a judgment made in the court which entered the decree in which the court determined it had jurisdiction in the original proceeding may preclude relief. See American Surety Co. v. Baldwin, 287 U.S. 156 (1932).

20. See notes 15 and 16 *supra* and cases cited.

21. See, *e.g.*, Murphree v. International Shoe Co., 246 Ala. 384, 20 So. 2d 782 (1945); Alexander v. Jones, 233 Ark. 708, 346 S.W.2d 692 (1961); Nasti v. Cook City, 348 Ill. 342, 180 N.E. 847 (1932); Braun v. Quinn, 112 Neb. 483, 199 N.W. 828 (1925); Gray v. Cholodenko, 34 N.J. Super. 190, 111 A.2d 918 (1955); Gibbons v. Sommers, 155 N.E.2d 528 (Ohio C.P. 1957). *Compare* Ray v. Carr, 71 App. D.C. 37, 107 F.2d 238 (D.C. Ct. App. 1940), *with* Wise v. Herzog, 72 App. D.C. 335, 114 F.2d 486 (D.C. Ct. App. 1940). A substantial minority of courts, however, do not require a meritorious defense. See, *e.g.*, Stafford v. Dickison, 374 P.2d 665 (Hawaii 1962); Johnson v. J. A. Barrett Auto Co., 51 Idaho 95, 4 P.2d 344 (1931); Holcomb v. Creech, 247 Ky. 199, 56 S.W.2d 998 (1933); Monroe v. Niven, 221 N.C. 362, 20 S.E.2d 311 (1942). The authors of the *Restate-*

requisite is a logical outgrowth of two traditional assumptions: that a petition for relief from a final judgment is addressed to the court's discretion, and that if relief is granted a new trial on the merits of the underlying claim will follow.[22] The courts reason that if a petitioner has no meritorious defense to the allegations in his would-be judgment creditor's original complaint, the new trial following annulment of the challenged decree would again terminate in a judgment adverse to him. Therefore he is not prejudiced, and the judicial process is not employed toward a futile end, if the original judgment is permitted to stand.[23]

Generally a defense is deemed meritorious when it is such that, had it been raised prior to the entry of the judgment under attack, the litigation from which that decree arose might have ended favorably to the attacking party.[24] If this test were applied literally where the challenged judgment was obtained by default—and many constitutionally unenforceable decrees are taken by default[25]—the issue

ment prefer the minority position. See RESTATEMENT, JUDGMENTS § 130, comment *d* (1942). Some courts require a meritorious defense only when extrinsic evidence is necessary to show the invalidity of the challenged judgment. See, *e.g.*, Honneycutt v. Severin, 186 Okla. 509, 98 P.2d 1093 (1940); Nail v. Gene Biddle Feed Co., 347 S.W.2d 830 (Tex. Civ. App. 1961) (limiting opinion to motion to vacate).

22. See Marine Ins. Co. v. Hodgson, 11 U.S. (7 Cranch) 331 (1813) (Marshall, C.J.); Anderson v. Coker, 364 S.W.2d 482 (Tex. Civ. App. 1963); Lake v. Lake, 63 Wyo. 375, 182 P.2d 824 (1947). These assumptions evidently have no validity when an alleged judgment debtor files a motion to vacate a decree on the basis of a defect apparent on its face or when he seeks to prevent the would-be judgment creditor from enforcing it. See notes 14-16 *supra* and accompanying text.

23. See Carpenter v. Forshee, 103 Ga. App. 758, 120 S.E.2d 786 (1961); Braun v. Quinn, 112 Neb. 485, 199 N.W. 828 (1925).

24. A defense is usually considered "meritorious" if it raises a genuine issue of material fact bearing upon the respective rights of the parties. See, *e.g.*, Lake v. Lake, 63 Wyo. 375, 182 P.2d 824 (1947); Elstermeyer v. City of Cheyenne, 57 Wyo. 421, 120 P.2d 599 (1942). Some courts require a defense which would "probably" have prevailed had it been presented at trial. See, *e.g.*, Tootle v. Ellis, 63 Kan. 422, 65 P. 675 (1901); Murrell v. Sapulpa, 148 Okla. 16, 297 P. 241 (1931); Anderson v. Coker, 364 S.W.2d 481 (Tex. Civ. App. 1963). In some jurisdictions, the allegations of a defense can be meritorious only if they are supported by evidence. See Davis v. Bank of Atkins, 205 Ark. 144, 167 S.W.2d 876 (1943); McEwen v. Harrison, 162 Tex. 125, 345 S.W.2d 706 (1961).

25. The term "constitutional unenforceability" is used herein in reference to a decree which is not binding under the federal constitution. Denial of due process in civil proceedings is a common cause of constitutionally unenforceable judgments. See, *e.g.*, Hanson v. Denckla, 357 U.S. 235 (1958); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); Wuchter v. Pizzutti, 276 U.S. 13 (1928); Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569 (1958). Lack of due process in such cases generally arises from want of notice of judicial proceedings to a defendant purportedly bound by them or an attempted extension of a court's jurisdiction over the person of a defendant beyond that permitted under the Constitution. See, *e.g.*, Mullane v. Central Hanover Bank & Trust Co., *supra*; Milliken v. Meyer, 311 U.S. 457 (1940). See generally KAUPER, CONSTITUTIONAL LAW 984-98 (2d ed. 1960, Supp. 1965). Where the constitutional defect is want of notice to a defendant, his default is the logical result. When a court improperly attempts to extend its jurisdiction over his person, a defendant may appear and contest jurisdiction and, if his contention should fail, a judgment

in the principal case would not arise. If a defendant fails to appear, the plaintiff can normally obtain a default judgment on the basis of his complaint alone, without introducing evidence to support its allegations. Only when the defendant does appear, even if merely to deny the charges in the complaint, must the plaintiff usually go forward with some evidence to substantiate his assertions.[26] Therefore, as the situation exists at the moment a default decree is entered, with the basis of plaintiff's recovery lying only in the allegations of his pleadings, defendant's mere denial may be adequate to alter the outcome of the litigation and thus sufficient to meet the test of a meritorious defense. His denial at the time he seeks to reopen puts him in the same position in relation to his adversary as he would have been in had he denied the allegations of the complaint prior to the default.

Some courts, following this strict interpretation of the meritorious-defense test, hold that a denial of a material portion of the complaint upon which a default judgment was entered does constitute a sufficient ground for granting relief to the defaulting party who seeks to reopen the decree after showing that the proceedings from which it arose were constitutionally defective.[27] Many courts, however, are apparently willing to presume that, had the attacking party appeared in those proceedings and denied the allegations of the complaint, the plaintiff would have come forward with at least some evidence to substantiate them. Doubtless this assumption would be valid in many cases. Nevertheless, according to the teaching of the principal case this supposition may not serve, as it traditionally has, as an excuse for deviating from the strict interpretation

entered by that court is constitutionally enforceable. See Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522 (1931). If his objection is sustained, the court will dismiss the case against him. *Cf.* Salmon Falls Mfg. Co. v. Midland Tire & Rubber Co., 285 Fed. 214 (6th Cir. 1922). If a defendant appears and does not contest the court's jurisdiction over him, he waives any right to complain later. Union Bond & Mortgage Co. v. Brown, 64 S.D. 600, 269 N.W. 474 (1936); see FED. R. CIV. P. 12(h). *But see* Muscek v. Equitable Sav. & Loan Ass'n, 25 Wash. 2d 546, 171 P.2d 856 (1946).

26. See, *e.g.*, Haller v. Walczak, 347 Mich. 292, 79 N.W.2d 622 (1956); Irving v. Rodriguez, 27 Ill. App. 2d 75, 169 N.E.2d 145 (1960); Steiner v. Roberts, 131 N.E.2d 238 (Ohio App. 1955). *But see* Douglas v. Harris, 35 N.J. 270, 173 A.2d 1 (1961) (requirement of evidence discretionary with the court). *Contra*, Associates Discount Corp. v. Downs, 162 So. 2d 758 (La. App. 1964); Imperial Discount Corp. v. Aiken, 238 N.Y.S.2d 269, 38 Misc. 2d 187 (Civ. Ct. 1963). Evidence is generally necessary, however, to fix the amount of recovery in an action for unliquidated damages, despite a complete default by the defendant. See, *e.g.*, Rappazzo v. Nardacci, 198 N.Y.S.2d 357, 20 Misc. 2d 301 (Sup. Ct. 1959); Leach v. Cassity's Estate, 279 S.W.2d 630 (Tex. Civ. App. 1955). Evidence is also required before a plaintiff in an action to quiet title may obtain a default. See cases cited note 33 *infra*.

27. Blair v. Blair, 48 Ariz. 501, 62 P.2d 1321 (1936) (specific denial); Ferrier v. Morris, 109 Colo. 154, 122 P.2d 880 (1942) (general denial); Tawney v. Blankenship, 150 Kan. 41, 90 P.2d 1111 (1939) (general denial); Savage v. Cannon, 204 S.C. 473, 30 S.W.2d 70 (1944) (general denial); Smalley v. Lasell, 26 S.D. 239, 128 N.W. 131 (1910) (specific denial).

of the meritorious-defense test where a challenged judgment is constitutionally unenforceable.[28] Under the most prevalent type of deviation, a defaulting party is not permitted to rest upon a mere denial of the assertions in the original complaint when attacking a decree entered on the basis of these charges, but rather is required to "show the nature of his defense" by setting out the facts which cause him to deny the allegations.[29] The procedure condemned in the principal case involved an even more dramatic deviation. In a hearing upon his motion to vacate the adoption decree entered after proceedings of which he had no knowledge prior to their conclusion, petitioner was forced to demonstrate that he had supported his daughter to such an extent that his consent was a prerequisite to her adoption. He therefore introduced oral and written evidence, not merely to show that he had good cause to believe that he had properly maintained the child, but to prove that he had in fact supported her to the best of his ability. In other words, he sought to *disprove* a significant allegation in the request for adoption to the effect that he had not met his obligation to contribute. Yet, if petitioner had appeared in the adoption proceedings, his ex-wife and her new husband, as the moving parties, would have been charged with the burden of proof on the support issue.[30]

The holding in the principal case is merely a refinement of the well-settled constitutional doctrine that a judgment which was rendered in a proceeding the pendency of which was not known to the alleged judgment debtor is not binding upon him. The Supreme Court simply made it clear that such a judgment cannot even put him in a "position [different from that which] he would have occupied had due process [*i.e.*, notice] been accorded to him in the first place."[31] Followed strictly, this rationale would prohibit resort to the procedure discussed above whereby an apparent judgment debtor seeking to set aside a default judgment obtained in constitutionally defective proceedings is required to allege some facts to

28. In holding that a mere denial of the allegations of the complaint in the action upon which the challenged judgment was entered does not constitute a meritorious defense, courts speak of the need for factual assertions or evidence to support the denial, so that it can be ascertained whether the attacking party would have prevailed in the original proceedings. See Roy v. Scales, 77 Ind. App. 619, 133 N.E. 924 (1922); Lott v. Owyang, 90 N.E.2d 604 (Ohio App. 1949). Such a requirement makes sense only if the court is presuming that, had the attacking party appeared in the original proceedings and denied the allegations in his adversary's complaint, the latter would have introduced enough evidence to avoid a nonsuit.

29. *E.g.*, Murphree v. International Shoe Co., 246 Ala. 384, 20 So. 2d 782 (1945); Davis v. Bank of Atkins, 205 Ark. 144, 167 S.W.2d 876 (1943); Gray v. Moore, 172 S.W.2d 746, 751 (Tex. Civ. App. 1943).

30. See *Ex parte* Payne, 301 S.W.2d 194 (Tex. Civ. App. 1957); Jones v. Willson, 285 S.W.2d 877 (Tex. Civ. App. 1955); Lee v. Purvin, 285 S.W.2d 405 (Tex. Civ. App. 1955).

31. Principal case at 552.

support his denial of the charges in his would-be creditor's original complaint, when a mere denial in the original proceeding would have sufficed to force the creditor, as plaintiff, to go forward with evidence. Although the Court's language could be limited to the facts of the principal case, which indicate that petitioner was called upon to do much more than simply indicate his reasons for denying a material allegation in the request for adoption, an important consideration suggests that it should indeed be applied literally. An apparent judgment debtor who moves to annul a decree entered after constitutionally defective proceedings as soon as he learns of the decree may not know the precise facts upon which he can or will rely in defending his adversary's claim, but may feel confident that the claim is invalid and that it can be successfully opposed after a time-consuming investigation. His credit should not be impaired in the interim by a seemingly valid judgment of record.

On the other hand, a hearing on a motion to reopen, vacate, or set aside a judgment or to enjoin its execution would only be governed by the rule of the principal case if the proceedings in which it was entered were constitutionally deficient. Thus, where a party attacks a judgment on the ground that the service of process was defective as a matter of local law, if the service was nevertheless sufficient to apprise him of the pendency of an action against him, a court would not be precluded from requiring him to allege or prove facts of his case in order to gain relief from a default. Similarly, when an attacking party cannot honestly deny the allegations of the complaint upon which the challenged judgment rests, but instead offers an affirmative defense to the charges, a court could weigh the legal sufficiency of his pleading. It could do as much on a demurrer or a motion to strike if the same defense had been asserted in the proceedings from which the decree arose.[32]

In some proceedings, such as suits to quiet title, a plaintiff generally cannot obtain a default solely on the basis of his complaint but must introduce some evidence to support his claim.[33] It is arguable that a party seeking relief from a constitutionally unenforceable default decree entered in such an action could be required to produce sufficient evidence to meet that introduced by the plaintiff prior to judgment. However, the attacking party who was absent from the hearing at which the evidence of his adversary was proffered had no opportunity to object to its admissibility or to cross-examine the witnesses who gave it. Unless he is afforded the chance

32. See, *e.g.*, Huff v. Flynn, 48 Ariz. 175, 178, 60 P.2d 931, 933 (1936); Gutierrez v. Cuellar, 236 S.W. 497 (Tex. Civ. App. 1922).

33. See, *e.g.*, LeVasseur v. Roullman, 93 Mont. 552, 20 P.2d 250 (1933); Murphy v. Missouri & Kan. Land & Loan Co., 28 N.D. 519, 531, 149 N.W. 957, 961 (1914). *Contra*, Barton v. Moline Properties, Inc., 121 Fla. 683, 164 So. 551 (1935).

to do so in the later proceeding, he is clearly not in the same position he would have occupied in the original proceeding.[34]

Those courts which find their previous practices curtailed by the doctrine of the principal case can take comfort in the fact that modern summary judgment procedure is available by which one party to any new trial following the annulment of a constitutionally unenforceable judgment can determine whether the contentions of his adversary really present a material issue of fact—the very question supposedly answered by deviating from the strict interpretation of the test for a meritorious defense.[35]

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34. There is some authority suggesting that a party to a non-criminal proceeding who has been deprived of an opportunity to challenge the evidence or witnesses used against him may have been denied due process of law. See ICC v. Louisville & Nashville R.R., 227 U.S. 88 (1913).

35. See generally 3 BARRON & HOLTZOFF, FEDERAL PRACTICE & PROCEDURE § 1231 (Rules ed. 1958); note 24 *supra*.