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## Equitable Relief against Judgments

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## EQUITABLE RELIEF AGAINST JUDGMENTS

*Is Ignorance an Excuse?*

WHEN a person finds that a judgment has been rendered against him, either as plaintiff or defendant, and comes into a court of equity saying, "Let's start over," will the fact that he is old, illiterate, unfamiliar with the forms of legal procedure, or otherwise "underprivileged" touch the conscience of the court?

By the common law, a trial court retains control over its judgments during the term of their rendition.<sup>1</sup> It may amend them, or it may repudiate them completely and order a new trial. Statutes in some jurisdictions extend this power, subject to prescribed conditions, beyond the end of the term.<sup>2</sup> After the trial court loses power over a judgment, relief may yet be obtained in a proper case by a proceeding in equity—for an injunction to prevent the prevailing party from making use of his judgment, by a bill of review, or (under "blended" systems of law and equity) by what may be called a bill in the nature of a bill of review.

In order to qualify for this extraordinary type of relief, the disappointed litigant must show that he has a valid cause of action or defense, which he was prevented from asserting or properly presenting at the trial because of accident, mistake, misfortune, or the wrongful act of the opposing party, unattended by any wrong or negligence on his part.<sup>3</sup> Among the eventualities which may or may not, under the circumstances, be regarded as sufficient to warrant relief are sickness of a party, his attorney, or his wit-

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<sup>1</sup> 1 FREEMAN, JUDGMENTS (5th ed. 1925) 375-377. For special provisions governing finality of judgments and the time in which motions for new trial must be made in certain Texas district courts having consecutive terms, see TEX. RULES CIV. PROC. §§ 330, 330(k) and (l), construed and applied in *Dallas Storage & Whse. Co. v. Taylor*, 124 Tex. 315, 77 S. W. 2d 1031 (1934).

<sup>2</sup> *Id.* at 420.

<sup>3</sup> *Marine Ins. Co. v. Hodgson*, 7 Cranch 332 (U. S. 1813); *Johnson v. Templeton*, 60 Tex. 238 (1883); 1 JOYCE, INJUNCTIONS (1909) § 686. Even though all of the requirements enumerated have been satisfied, relief may be withheld where rights of innocent third parties have intervened. See *Ramsey v. McKamey*, 137 Tex. 91, 95, 152 S. W. 2d 322, 324 (1941).

nesses; errors in the record; misunderstandings as to stipulations; disqualification of the judge; mistakes, misconduct, or disqualification of the jury or its members; and extrinsic fraud on the part of the opponent.<sup>4</sup>

Equity favors the vigilant and will deny relief unless the applicant has been free of negligence at every stage in the proceedings. He must have devoted proper care and attention to the prosecution or defense of the case before judgment. After judgment his failure seasonably to invoke the power of the trial court to set aside the judgment and grant a new trial must not have been due to any want of diligence on his part. And he must have been prompt in pursuing the equitable remedy.

The subject of this inquiry is the question of whether or not, in determining the issue of diligence, the court will consider such personal deficiencies or handicaps of the applicant as advanced age, inferior intelligence, illiteracy, or unfamiliarity with the processes of litigation. In other words, the point under investigation is whether equity will apply a fixed and absolute criterion of diligence, whatever its stringency, to all comers, or will demand less of some than of others.

At the outset certain general principles may be noted which will influence the reviewing court, especially where the equities in a particular case seem to be fairly balanced. In such a case the court may deny relief, observing that the granting or withholding of equitable relief is within the sound discretion of the trial court and will be revised only upon a clear showing of abuse. If the judgment below was by default, consideration may be given to the policy of the law that every litigant is entitled to his day in court—that the law does not favor snap decisions but contemplates that controversies shall be determined according to their merits.

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<sup>4</sup> The grounds upon which equitable relief will be granted, and the various fact situations which have been held to authorize, or not to warrant, such relief, are discussed at length in 3 FREEMAN, JUDGMENTS (5th ed. 1925) 2441-2626; 3 GRAHAM AND WATERMAN, NEW TRIALS (1855) 1483-1547; 1 JOYCE, INJUNCTIONS (1909) 923-1004, 2 *id.* 1005-1025; 31 Am. Jur. 216-258, *Judgments*, §§ 633-701; 49 C. J. S. 706-751, *Judgments*, §§ 350-376.

In any event, the applicant is confronted with the settled precept that final judgments, solemnly rendered by courts of competent jurisdiction, are watched by courts of equity with extreme jealousy and will be disturbed only in exceptional cases. For, as is frequently stated in opinions refusing relief against judgments, the public good demands that there should be an end to litigation.

Aside from the question of whether the standard is absolute or relative,<sup>5</sup> judicial expressions vary as to the degree of diligence required of any litigant. It has been asserted by some tribunals that the "highest degree" of diligence is necessary,<sup>6</sup> but other courts demand only "ordinary diligence."<sup>7</sup> In some opinions may be found statements to the effect that the applicant must have exercised that degree of care which is requisite in "the ordinary business of life."<sup>8</sup> There are numerous declarations that "reasonable diligence" must be shown;<sup>9</sup> but such a standard is of little help, inasmuch as it could hardly be supposed that either law or equity would ever require that which is unreasonable.<sup>10</sup>

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<sup>5</sup> *I. e.*, relative to the mental capacities of the person whose conduct is under scrutiny.

<sup>6</sup> *Norman v. Burns*, 67 Ala. 248 (1880); *Goelitz v. Lathrop*, 286 Ill. App. 248, 3 N. E. 2d 305 (1936); *accord*, *Burnley v. Rice, Adams & Co.*, 21 Tex. 171 (1858), requiring "strictest diligence."

<sup>7</sup> *Hollister v. Sobra*, 264 Ill. 535, 106 N. E. 507 (1914); *Semple v. McGatagan*, 10 Smedes & March. 98 (Miss. 1848). "While courts of equity are not inclined to interfere with judgments in the absence of a strong showing to justify it, they do not require that a party should have exercised the highest possible degree of care in order that he may obtain relief. Reasonable and ordinary care considering the circumstances will suffice." 3 FREEMAN, JUDGMENTS (5th ed. 1925) 2502. *Cf. Laithe v. McDonald*, 12 Kan. 340 (1873), where the court expresses the opinion that a party must exercise "extraordinary diligence" in anticipating and preparing for errors on the part of the court or jury, but need show only "reasonable and ordinary" diligence in preventing fraud on the part of his opponent.

<sup>8</sup> *Boyd v. Blankman*, 29 Cal. 20 (1865); *Burton v. Perkins*, 26 Vt. 157 (1854).

<sup>9</sup> *Harding v. Hawkins*, 141 Ill. 572, 31 N. E. 307 (1892); 138 Ind. 363, 36 N. E. 1114 (1894); *Ayres v. Smith*, 76 N. E. 2d 274 (Ind. App. 1948), *aff'd*, 84 N. E. 2d 185 (Ind. Supr. Ct. 1949); *Van Norman v. Van Norman*, 205 Miss. 114, 38 So. 2d 452 (1949); *Mayor, Etc. of N.Y. v. Brady*, 115 N.Y. 699, 22 N. E. 237 (1889).

<sup>10</sup> Equally illusory is the test provided in *Spokane Co-operative Mining Co. v. Pearson*, 28 Wash. 118, 68 Pac. 165, 168 (1902), a suit to enjoin a judgment alleged to have been procured by fraud. There the court said that such relief could not be granted "unless it be shown that the information [of the fraud] could not have been obtained by the care and attention necessary in preparing a case for trial, and which one is bound to exercise when sued."

Neither the cases exacting extraordinary diligence nor those accepting ordinary care as sufficient settle the question here under consideration; for what would be a high degree of diligence in an uneducated foreigner, unable to speak or understand the English language, might conceivably be regarded as no more than ordinary or slight care when exercised by a man active and successful in matters of business.

Cases which can be cited as squarely holding either the affirmative or the negative of the proposition are not numerous. Even where the personal deficiencies of the applicant are urged in the bill and referred to in the court's statement of the case, a decision one way or the other may not necessarily mean an acceptance or a rejection of the relative standard. The judges may feel that the degree of diligence shown would have been enough even in the case of a person of average experience and intelligence; or, on the other hand, they may think that, conceding that less should be required of the particular litigant before them than of the average man, yet he has failed to pursue that course of conduct which might reasonably be expected even of a person of his meager faculties.

Thus, in the Louisiana case of *Miller v. Bearb*<sup>11</sup> the plaintiff in a suit to annul a decree of separation sought to excuse her failure to defend in the prior suit on the ground that she was ignorant and unable to read or write. While not denying that such factors might sometimes be relevant, the court rejected this excuse and withheld relief, it being apparent from the evidence that "she understood the purpose of the summons served upon her."

Conversely, in a case in a Texas court of civil appeals,<sup>12</sup> the court mentioned the fact that plaintiffs were "ignorant Negroes", in holding that there was evidence in support of the trial court's finding that they were not guilty of laches in filing their bill to review a judgment. This case approaches nearer, perhaps, to a definite commitment on the point than does the one first discussed;

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<sup>11</sup> 134 La. 893, 64 So. 822, 823 (1914).

<sup>12</sup> *Early v. Burns*, 142 S. W. 2d 260 (Tex. Civ. App. 1940) *er. ref.*

but it did not appear that the issue was raised by the pleadings, argued by counsel, or deliberately considered by the court, and the facts were such that the result might well have been the same although the plaintiffs had been more advantageously situated.

In *Ramirez v. Martinez*,<sup>13</sup> another Texas case, the plaintiff, suing in equity to set aside a default, alleged that he had attended two terms of court, that thereafter the legislature had changed the time of holding court, advancing it one month, that he had not resided in the county where the suit was brought for two years, and that he was unable to speak, read, or write the English language. The report is very brief, the court merely summarizing the allegations of the bill and approving the trial court's action in overruling defendant's demurrer.

On the subject of Texas cases, reference may be made to the recent and much discussed case of *Alexander v. Hagedorn*.<sup>14</sup> Hagedorn, against whom a default judgment had been taken, was an uneducated German immigrant, seventy-five years old and unable to read the English language. He went to the courthouse on the day named in the citation, was informed that there would be no court held that week, and returned home, relying upon his "understanding" that the clerk would notify him when to appear for trial.

Hagedorn sued in equity to set aside the judgment, and the trial judge granted the relief sought, reporting in his findings of fact that he would not have granted the default in the original action but for certain statements and testimony on the part of Alexander which subsequently were found to be false. In the supreme court the justices disagreed upon the question whether this fact could be considered in support of the decree, the majority being of the opinion that the fraud found was "intrinsic" and therefore not a ground upon which equitable relief could be awarded.

The only other express pronouncement by the majority was

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<sup>13</sup> 208 S. W. 380 (Tex. Civ. App. 1919).

<sup>14</sup> ——— Tex. ———, 226 S. W. 2d 996 (1950).

that a party is not entitled to rely upon promises by court officials and employees under the circumstances here presented. However, Justice Smedley, who, with Justice Taylor, dissented, contended so strenuously for the application of a relative standard<sup>15</sup> (without denominating it as such) that it is possible to interpret the decision as an implicit rejection of such a standard.

A disposition to judge all parties by the same standard of diligence was shown in the Florida case of *City of Gainesville v. Johnson*,<sup>16</sup> in which it was sought to set aside decrees *pro confesso* rendered against the defendants in the former suit. It appeared that the defendants were "ignorant, illiterate, colored people" and did not understand that a suit had been brought against them or that it would be necessary to have an attorney to represent them. The court reversed a decree granting the relief sought and, after setting forth the matters necessary to be shown in order to invoke the aid of equity against judgments and decrees, observed:

"The facts set forth may appeal to the sympathies of a judge reared in the atmosphere of that tender consideration so generally shown to the illiterate negroes by descendants of the slave-owner class, but they do not come up to the rule so frequently enunciated."<sup>17</sup>

To the same effect is the opinion in a case decided by the Supreme Court of Nevada, in which the plaintiff, a Pennsylvania farmer, poor and in ill health, sought to set aside a decree of distribution of an estate, consisting of property in Nevada, asserting a claim as heir. The court, in affirming the trial court's judgment denying relief, said:

"Courts 'can not obliterate the recognized rules of law, requiring of all persons the diligence and attention demanded of a prudent man

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<sup>15</sup> "...I am firmly convinced that the court, in deciding the question whether respondent was negligent, should take into consideration all of the facts, including respondent's handicaps, his age, his want of information and of education, and his inexperience with courts and litigation...."

"Respondent was diligent to the extent of his capacity, understanding and information." *Id.* at 1006.

<sup>16</sup> 59 Fla. 459, 51 So. 852 (1910).

<sup>17</sup> 51 So. at 853.

in the transaction of his own business, and establish a measure of care and diligence for each particular case.”<sup>18</sup>

A like test was applied in *Wood v. Lenox*,<sup>19</sup> a Texas case in which the applicant pleaded delicate health as an excuse for his inattention to a suit which he himself had instituted and wherein judgment had been rendered against him on a cross-action. “The diligence required,” the court asserted, “. . . is such as prudent and careful men would ordinarily use in their own cases of equal importance.”<sup>20</sup>

Language such as that used in the two cases last noted suggests the postulation by the court of a supposed “reasonable man,” with whose conduct in a given situation the acts of parties before the court must favorably compare. Similar, but distinguishable, are expressions sometimes found to the effect that litigants must exercise such “care and diligence, and prudence as is requisite in the ordinary business of life.”<sup>21</sup> Here no hypothetical paragon is contemplated, and the way remains open for the use of a relative standard, provided such a standard may be applied in appraising a person’s conduct in ordinary business transactions. On this point, in reversing a decree of rescission of a land transaction, the Texas Supreme Court said:

“Courts cannot measure the relative intelligence and business qualifications of parties to a transaction, unless it reaches the point

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<sup>18</sup> *Royce v. Hampton*, 16 Nev. 25, 33, 34 (1881), quoting *Boyd v. Blankman*, 29 Cal. 20, 44 (1865). The allegation of poverty, held in this case to be no excuse, was similarly dismissed in *Harn v. Phelps*, 65 Tex. 592, 598 (1886), where it was said: “That a party may be poor is no reason why he should not be held to the same rule of diligence in prosecuting suits instituted by himself as are other persons.”

When poverty is asserted as an excuse for an applicant’s failure to hire a lawyer (see text at note 39, *infra*), he may be answered, as was the petitioner in the *Royce* case, *supra*, by the court’s observation that his financial condition is not shown to have been any better after the judgment than before, and he “is now represented by able counsel.”

<sup>19</sup> 5 Tex. Civ. App. 318, 23 S. W. 812 (1893).

<sup>20</sup> *Id.* at 322, 23 S. W. at 813. As authority for this statement the court cited *Taylor, Knapp & Co. v. Fore*, 42 Tex. 256, 258 (1875), where similar language is used and attributed, without citation, to Justice Story.

<sup>21</sup> *Burton v. Perkins*, 26 Vt. 157, 158 (1854).



where it appears that one has overreached the other by reason of his incapacity."<sup>22</sup>

And the Supreme Court of Nebraska stated, in affirming a decree of foreclosure where the mortgagor had defended on the ground that she was "weak-minded in business matters," and "could not read English":

"The mere fact that a person is unlearned, and ignorant of legal proceedings, affords no ground for relief in equity, unless the person against whom relief is sought misrepresented the facts to him."<sup>23</sup>

The circumstance of an applicant's ignorance, illiteracy, *etc.* has frequently been urged in support of motions made in term time to vacate or to set aside judgments and for new trials. While these cases are not strictly in point as precedents where the same matters are asserted in applications for equitable relief, it may be pertinent to inquire as to the attitude taken by the courts in such cases toward the propriety of measuring a particular litigant with a shorter yardstick than that held up to another under similar circumstances.

Although there may be room for argument that a stricter showing of diligence should be required after the expiration of the term than while the judgment is still "within the breast" of the trial court,<sup>24</sup> its resolution, one way or the other, should not affect

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<sup>22</sup> Moore v. Cross, 87 Tex. 557, 562, 29 S. W. 1051, 1053 (1895).

<sup>23</sup> Meyer v. Schmidt, 135 Neb. 850, 284 N. W. 337, 339 (1939).

<sup>24</sup> In Goss v. McClaren, 17 Tex. 107, 121 (1856), after declaring that "no one would be heard to contend" that the excuse offered would have been sufficient if presented in support of a motion during the term, the court went on to say,

"Can it be supposed . . . that a new trial should be granted upon an original proceeding, for causes for which it could not legally have been granted, if timely application had been made? If there be anything which is perfectly clear, beyond all question, on principle and authority, it is the opposite of such proposition."

But compare the expression of the same court, two years later: "The application, whether made before or after the term, is addressed to the same court, having cognizance of both legal and equitable causes; and there can be no reason why it should not be governed by precisely the same principles in the one case as the other; only with this qualification, that as the rule of law requires that the application be made during the term at which the verdict is rendered, if this be not done, the party must show an equitable excuse to entitle him to a hearing of his application after the term." Varde-

the question at hand. For whether the standard be higher, lower, or the same, it may nevertheless be different as to one class of litigants from what it is when applied to another.

Cases dealing with motions made during the term as well as those concerning bills in equity are not in agreement on the point. In *Martin v. Curley*,<sup>25</sup> an appeal from an order vacating a default, defendant had failed to pay taxes and plaintiff had obtained a tax title. Defendant received a summons in plaintiff's action to determine the adverse claim, but thought it was "only another attempt" by plaintiff's attorney to exact a sum previously demanded for a settlement. The court, in affirming the order of the court below, said:

"Defendant's excuse for his neglect to appear and defend the action is certainly very scant, but, under all the circumstances, we cannot say that the court abused its discretion. . . . In the first place, it is a matter of common knowledge that a great many of the plain people, ignorant of the law, never entertain the idea that they can lose their property on a tax title. To them it means nothing more serious than the payment of interest and penalties, and possibly a bonus."<sup>26</sup>

*Byrne v. Alas*<sup>27</sup> was an appeal from an order vacating a default judgment in ejectment against defendants described as "mission Indians." The court sustained the action of the trial judge, saying of the defendants:

"They are very ignorant and helpless, totally unacquainted with our modes of judicial proceedings, and are utterly incapable of attending to their interest, if they have any, in regard to the land in controversy. The defendants are ignorant of the English language, with, perhaps, one or two exceptions. . . . Under these circumstances we do not think a very rigid rule should be applied to them on the question of default."<sup>28</sup>

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man v. Edwards, 21 Tex. 737, 741 (1858). See, to the same effect, *Burnley v. Rice, Adams & Co.*, 21 Tex. 171, 180 (1858), and *Boise Payette Lbr. Co. v. Idaho Gold Dredging Corp.*, 56 Idaho 660, 58 P. 2d 786, 789 (1936), *cert. denied*, 299 U. S. 577 (1936).

<sup>25</sup> 70 Minn. 489, 73 N. W. 405 (1897).

<sup>26</sup> 73 N. W. at 406.

<sup>27</sup> 68 Cal. 479, 9 Pac. 850 (1886).

<sup>28</sup> *Ibid.*

A different attitude was evinced by the Alabama Supreme Court in *Contorno v. Ensley Lbr. Co.*,<sup>29</sup> another case of a motion for new trial where judgment had been by default. There the court declared:

"Appellant had no sufficient excuse for failing to propound his defense upon the regular call of the case for trial. Ignorant foreigners as well as others must be held to a knowledge of the regular procedure in the courts."<sup>30</sup>

As has been stated, some jurisdictions have, by statute, extended the power of trial courts over their judgments beyond the ending of the term at which they were rendered.<sup>31</sup> These statutes commonly prescribe as prerequisites to the exercise of such power, substantially the same elements as are held to warrant the granting of motions during the term and of equitable relief after its close.

It should be noted that courts reviewing cases arising under these statutes may be encouraged to accord special deference to persons of little experience and meager intellectual endowments because of a view that the statutes are remedial in character and should be liberally construed and applied.<sup>32</sup> Their solicitude for the classes of persons here under consideration is not, however, entirely without significance in cases where such persons are seeking equitable relief. Liberality of statutory interpretation is no justification for treating one class of litigants differently from another—at least where the statute contains no hint that such discrimination was intended by the legislature.

Mr. Freeman, in his work on judgments,<sup>33</sup> expressly asserts the existence of a relative standard where such statutes are involved. He cites cases in which consideration was given by the courts to

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<sup>29</sup> 211 Ala. 211, 100 So. 127 (1924).

<sup>30</sup> 100 So. at 128.

<sup>31</sup> 1 FREEMAN, JUDGMENTS (5th ed. 1925) 420.

<sup>32</sup> *Rosebud Lbr. Co. v. Serr*, 22 S. D. 389, 117 N. W. 1042 (1908); *MacDonald v. Orton*, 99 Vt. 425, 134 Ail. 599 (1926).

<sup>33</sup> 1 FREEMAN, JUDGMENTS (5th ed. 1925) 476, 477.

the facts that the applicant or applicants were "foreigners, Italian-Swiss, and utterly unable to understand, read, or write the English language";<sup>34</sup> "over seventy years of age, totally blind, illiterate, and unable to write his name";<sup>35</sup> "an old man of seventy years";<sup>36</sup> "unable to read English," and "had no knowledge of court methods";<sup>37</sup> and "of foreign descent, and not familiar with the methods of commencing actions in our courts."<sup>38</sup>

There is general agreement among the authorities that, in order to discharge his duty of diligence, a party must employ counsel, provide him with the necessary information, and assist him in the procuring of evidence and otherwise conducting the case.<sup>39</sup> Since the litigant is responsible for the acts and omissions of his attorney, the right of the former in equity to review a judgment may depend upon the conduct of the latter in the original action. It might be thought that, while a relative standard may be reserved for appraising the industry of the party in assisting his lawyer, surely the counselor himself will be judged by an inflexible criterion. Yet at least one sympathetic court has been willing, upon appeal, to open a default "attributable to the inexperience of the defendant's attorney."<sup>40</sup>

It would seem that a better argument might be made for applying a relative standard to persons actually of inferior mental caliber than could be mustered in cases of mere unfamiliarity with the language or inability to read or write. Indeed, it might be said that persons suffering from the latter handicaps should be especially circumspect when involved in legal entanglements,

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<sup>34</sup> *Berri v. Rogero*, 168 Cal. 736, 145 Pac. 95, 96 (1914).

<sup>35</sup> *Stone v. McWilliams*, 43 Cal. App. 490, 185 Pac. 478, 479 (1919).

<sup>36</sup> *Banse v. Wells*, 44 Cal. App. 145, 186 Pac. 192, 193 (1919).

<sup>37</sup> *Wood v. Schoenauer*, 85 Minn. 138, 88 N. W. 411, 412 (1901).

<sup>38</sup> *Rosebud Lbr. Co. v. Serr*, 22 S. D. 389, 117 N. W. 1042, 1043 (1908).

<sup>39</sup> *Booker v. Coulter*, 151 S. W. 335 (Tex. Civ. App. 1912); 3 FREEMAN, JUDGMENTS (5th ed. 1925) 2504; and see cases cited in 31 L.R.A. 35, n. II, b (1896).

<sup>40</sup> *Kraus v. Comet Film Co.*, 139 N.Y.S. 306 (1913). Cf. *Delewski v. Delewski*, 76 Ind. App. 44, 131 N. E. 229, 230 (1921), an appeal from an order denying an application to set aside a default, where it was said, "... [T]he diligence required of an attorney is such as a man of ordinary prudence gives to his own important business."

since they should realize their disadvantage in such circumstances. Under this view, exceptional lenience should be shown, if at all, only toward those who are so ignorant as to be unaware of their shortcomings. Thus considered, the question is narrowed to one of whether a man's conduct should be judged in the light of his intelligence quotient.

The facts of each case, aside from the fact of what the applicant did or failed to do, are to be considered in determining the issue of diligence. In other words, was the action or omission of the party diligence or negligence in view of the circumstances surrounding such act or omission? It may be suggested that the ignorance, illiteracy, or similar deficiency of the party should be included among those circumstances.<sup>41</sup> When the question is so stated, perhaps the word "surrounding" is itself a clue to the answer—suggesting as it does external, extrinsic, or objective facts and circumstances as distinguished from the personal attributes and peculiarities of the individual.

To require less of one party to a lawsuit may be to demand more of his adversary. Must one who sues an illiterate foreigner or any ignorant person do more, to assure the inviolability of any judgment he may obtain, than the plaintiff who proceeds against a person outside the category of unfortunates? The law prescribes the manner of subjecting defendants to the jurisdiction of the court and the process by which default judgments may be obtained. A plaintiff could hardly be expected to go further and provide an interpreter, or personally to communicate with the defendant and explain to him just what is happening.

It may be argued in favor of a fixed criterion that it is simpler to apply. If the acts of all suitors are to be weighed upon the same scale, the court, upon being confronted with a case in which the applicant for relief neglected to read the summons, or relied upon a statement of a judge or clerk as to when a case was to be tried, can ascertain what the result was when another defendant

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<sup>41</sup> See excerpt from Justice Smedley's dissent in the *Hagedorn* case, quoted *supra* note 15.