Comments on Some Questions Put at the Bar Examinations on Practical Civil Procedure

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1. At the Bar examination which took place January 8, 1965, question No. 5 on Civil Procedure (practical) reads as follows: [1]

> "On March 1st, 1962, Paul Léger, accountant, subleased to Jacques Pesant the premises where he resided in Montreal, at No. 15 Panet Street. Léger then left Montreal to settle permanently in Miami.
>
> On December 30, 1964, Léger returns to Montreal for the first time since his departure and goes to see Pesant to inquire why the latter has not forwarded the December rent.
>
> Pesant explains that he was served with a writ of garnishment in November, 1964, and that he has deposited the rent at the office of the Clerk of the Magistrate's Court of Montreal. Léger also learns from Pesant that in May, 1963, a bailiff left at 15 Panet Street, for Léger, a copy of an action of $190.00, instituted by Euclide Salvail against Léger.
>
> Léger denies owing anything to Salvail and consults you today. You discover at the Clerk's office that judgment by default against Léger was rendered in favour of Salvail on June 20, 1963.
>
> What proceeding must you make to protect Léger's rights?
>
> Draft it."
>
> [The proceeding is a Petition in Revision].

First of all it should be pointed out that payment of the rent had to be demanded at Leger's former residence (now occupied by Pesant), as provided for in Art. 1155(2) C.C. Léger could not complain (as the question implies) that the rent for December 1964 was not forwarded to him. Rent, like any other debt, is 'quérable' and not 'portable', unless it is otherwise agreed upon. The Bar question, however, does not allege that the sublease contained such an agreement.

As regards the allegation that after Pesant had been served with a writ of seizure by garnishment in November 1964, he deposited the rent at the office of the Clerk of the Magistrate's Court at Montreal, it should be noted that such a deposit is not in accordance with Art. 689 C.P., reading as follows:

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[1] Published in (1965) 25 R. du B., pp. 113, 114.

> If the declaration of the garnishee is not contested and he has not declared that any other seizure has been made in his hands, the judge or the prothonotary, upon an inscription for judgment by either party, *orders him to pay to the seizing creditor* on account of or to the extent of his dept, the moneys seized, according to their sufficiency. Such judgment must be served and the delay for executing it is computed only from the day of such service.

The question does not allege the amount of the judgment debt and costs. If the rent deposited was sufficient to cover the debt, interest and costs of the judgment rendered against Léger, Pesant should have paid the debt direct to Salvail and the costs to Salvail's lawyer, presuming that the seizure by garnishment was maintained and that a certified copy of the judgment was served on Pesant.

The law distinguishes a seizure by garnishment of an ordinary debt, such as rent (due by a lessee of a judgment debtor) from a seizure of a judgment debtor's wages. In the latter case the garnishee must (even before a judgment is rendered declaring the seizure good, valid and binding) on making his first declaration, deposit *at court* the sum which he owes at that time, namely the seizable portion of the wages of the employee in question. (Art. 697(3) C.P.)

If the rent for December 1964 due by Pesant was not sufficient to pay the debt, interest and costs, and if a judgment was rendered in accordance with the provisions of Art. 690 C.P., only then would it have been necessary for Peasant to deposit the rent at court. The Bar question was therefore incomplete. If Pesant had paid direct to Salvail and his lawyer, a "Petition in Revision" would not be enough to protect Leger's rights, seeing that an action would also have to be taken by Léger against Salvail and his lawyer to order them to refund the money they have received from Pesant.

2. At the Bar examination held in January 1964 question No. 2 (Practical Civil Procedure)[2] reads as follows:

> Dame Louise Guay, wife of Zephirin Barbeau, consults you on January 6, 1964, in Quebec, where she is visiting her mother, who lives at 10 rue du Port. Her husband resides in Montreal at 10 Fleury Street. She wishes to sue her husband in separation from bed and board on the grounds of his adultery with Lise Chaplin. The spouses were married without a marriage contract and own household furniture worth $5,000. The husband works for ABC Company at a weekly salary of $200. Two children were born from this marriage: Peter, aged 3, and Paul, aged one. Your client wishes to obtain custody of the children. She is penniless and needs an alimentary allowance for her children and herself. Furthermore, she fears her husband will dispose of the furniture pending suit.
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> Draft in full the declaration for this action.

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[2] See (1964) 24 R. du B. at p. 110.

The statement is made that

(a) *the spouses* were married without a marriage contract;

(b) *they* own household furniture worth $5,000;

(c) Mrs. Barbeau *feared her husband would dispose of the furniture pending suit*;

First of all, the furniture is not the property of the spouses, but solely that of the husband, who is head of the community, (Art. 1272 C.P.), even if some of the items may have been bought in the wife' name.[3]

It may be pointed out that Art. 1292 C.C. (as amended by The Act Respecting the Legal Capacity of Married Women, which came into force on July 1, 1964) now reads as follows:

> The husband alone administers the property of the community.
>
> He cannot sell, alienate or hypothecate without the consent of his wife any immovable property of the community but he can, without such concurrence, sell, alienate or pledge any moveable property *other than* a business or than *household furniture in use by the family.*
>
> Saving the provisions of The Husbands' and Parents' Life Insurance Act, the husband cannot, without the concurrence of his wife, dispose by gratuitous title *inter vivos* of the property of the community, except small sums of money and customary presents.

The above Act also contained an amendment to Art. 1101 C.P., in order to bring it in line with the new wording of Art. 194 C.C., eliminating the necessity of a judge's authorization for the wife to sue in separation as to bed and board. However, she still needs permission to be allowed to withdraw pending the suit to a place indicated by her *and to seize the moveable property of the community*, for Art. 1102 C.P. was not amended. It reads as follows:

> If the wife thinks proper to demand an attachment of the moveable property of the community for the preservation of the share which she will have a right to claim when the partition takes place, she must likewise be autborized by a judge for that purpose.
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> The attachement is effected in the same manner as attachment for rent, but the husband remains judicial guardian of the property attached.
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> The judge may, according to circumstances, allow the seizure to be released or suspended, with or without security.

This Article is really a repetition of Art. 204 C.C., which also has not been touched by the 1964 Act. Neither Art. 204 C.C., nor Art. 1102 C.P., stipulate that wife common as to property must allege special reasons in the petition asking for permission to seize the

[3] See *Therrien* v. *Rioux* [1956] P.R. 36.

moveables of the community, as the Bar question would imply. Even if the wife does not fear that her husband will dispose of the furniture, she is still entitled to seize it, if she institutes an action in separation as to bed and board.

In *Chaput* v. *Choinière and the Treasurer of the Province of Quebec,*[4] *tiers-saisi,* Associate Chief Justice Challies went into the problem at length, citing numerous cases. He held as follows: [5]

> ...A wife common as to property, who takes a separation action, can, under art. 204 C.C. cause the movable effects of the community to be attached by means of a *saisie-gagerie conservatoire* which is assimilated to a *saisie-gagerie* rather than to a *saisie-conservatoire.* The writ of a *saisie-gagerie conservatoire* is obtained without the affidavit required for a *saisie-arrêt* or *saisie-conservatoire,* by a petition to the Court under arts. 1101 and 1102 C.P.
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> The words "movable effects of such community" in art. 204 C.C. and "movable property of the community" in arts. 1093 and 1102 C.P., comprise all the movable property of the community of whatever nature, including *inter alia* money in the bank or in the hands of other third parties and such movable effects in the hands of third parties can be be seized by *saisie-gagerie conservatoire* not supported by affidavit. A petition to quash a *saisie-gagerie conservatoire en mains tierces* for want of supporting affidavit does not lie.

A contrary opinion had been previously expressed by the Superior Court in *Dame Racine* v. *Boivin and C.N.R.,*[6] (in dealing with a seizure by garnishment by a wife common as to property suing in separation as to bed and board), the court holding being as follows:

> Pour saisir gager les biens mobiliers de la communauté, sous l'art. 204 C.C., l'épouse n'a besoin d'aucun affidavit préalable (952 à 954 C.P.): — il lui suffit d'y avoir été préalablement autorisée sur requête assermentée (1101 et 1102 C.C.).
>
> Mais, si elle veut recourir aux autres mesures provisionnelles, elle doit, alors, adopter les procédures requises en pareil cas.
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> Ainsi, si elle veut obtenir un arrêt en mains tierces, pour saisir le salaire de son mari, elle doit fournir l'affidavit spécifique requis par l'art. 931 C.P.

In *St. Germain* v. *Salvas,*[7] the Superior Court also made a distinction between a seizure of furniture garnishing the common domicile and a seizure of other assets of the community. The head notes read as follows:

> Pour saisir-gager les biens mobiliers de la communauté sous l'article 204 C. civ., l'épouse n'a besoin d'aucun serment préalable; il lui suffit d'avoir été autorisée sur requête assermentée suivant les articles 1101 et 1102, C. proc.

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[4] [1951] S.C. 318.

[5] *Ibid.,* at 322 and 323. See also *Dubois* v. *Leblanc* [1955] P.R. 410; *Brisebois* v. *Ashby* [1958] P.R. 173.

[6] (1928) 31 P.R. 85.

[7] (1940) 45 P.R. 88.

> Si cependant elle veut recourir aux autres mesures provisionnelles, elle doit fournir le serment spécifiquement requis par l'article 931 C. proc.; ainsi, il ne lui suffit pas de déclarer qu'elle perdra son recours, mais il lui faudra ajouter que son mari agit ainsi dans l'intention de frauder; la seule crainte de prerdre son recours sans énonciation des raisons de sa croyance n'est pas suffisante.

A similar decision was rendered in *Jones* v. *Laduke*,[8] where the Superior Court held as follows:

> L'autorisation à prendre une saisie-gagerie conservatoire sur les biens meubles de la communauté ne comprend pas celle de saisir-arrêter de l'argent déposé à la banque, lequel ne peut être arrêté que si le serment de la demanderesse répond aux exigences de l'article 931 C. proc.

The reporter, cites what the Codifiers said in their Report, as follows: [9]

> Comme il est à craindre que le mari, administrateur et en possession des biens communs, ne les dissipe ou ne se les approprie frauduleusement pendant la contestation, la femme commune peut, en tout état de cause, se faire autoriser à saisir-gager les biens mobiliers de la communauté, pour la conservation des droits qu'elle y pourra prétendre...

In *Patiris* v. *Arakinis*,[10] the Superior Court in commenting upon Art. 204 C.C. and Art. 1102 C.P., pointed out [11]

> ...that our laws give the wife common as to property who sues in separation a clear right to seize the moveable effects to the community, as a means of preserving "the share which she will have a right to claim, when the partition takes place", according to article 204 C.C., *which prescribes no particular allegations of fact or convenience to justify this step of security.*

Trudel, in discussing Art. 204 C.C., remarks that *no particular fact has to be proven* in order to be able to seize the movable effects of the community.[12]

3. At the December 1961 examination,[13] question No. 4 in Civil Procedure (practical) is quoted as follows:

> You are consulted by Amos Angers. He has just learned of a judgment, of which he hands you a copy, rendered two months ago in an action in the Superior Court, district of Quebec, maintaining Benoit Bélanger's action against Charles Cameron, to which Angers was not a party, based on the resolutory clause in a deed of loan. The judgment declared plaintiff absolute owner, free and clear of all encumbrances, of lot 192 of the parish of St. Polycarpe, whereas Angers has a prior hypothec on the property, as he

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[8] [1946] P.R. 289.
[9] *Ibid.*
[10] [1950] P.R. 67.
[11] *Ibid.*, at p. 68.
[12] *Traité de Droit Civil du Québec*, I, p. 638.
[13] See (1962) 22 R. du B., p. 60.

proves by a deed of loan from himself to Bélanger executed and registered before Cameron's deed.

a) What is Angers' recourse?

b) Draft the appropriate proceeding.

Both the English and French versions speak of a "resolutory clause" instead of a "giving-in-payment clause". This must have been an error. If the Deed of Loan had contained a resolutory clause, its enforcement would result in the deed being cancelled, the mortgage granted in favour of Belanger becoming null and void, and Belanger's only recourse then being to obtain a refund of the money he had loaned to Cameron, but not to be declared the owner of the immovable property in question, as the question says. (The writer of these notes cannot recollect having seen such a clause in a deed of loan).

The Court of Appeal in *Sunny River Investment Corp.* v. *Greenbelt Construction Corp.*[14] spoke of a *dation en paiement* clause in a *deed of sale,* which the court (surprisingly) said contained the usual stipulations of such a contract. A similar clause in a deed of sale was upheld by the Court of Appeal in *Val Morin Mountain Lodge Inc.* v. *Laperle.*[15] Mr. Justice Montgomery, however, dissented. He held as follows:

> In a deed of sale a resolutory clause does not cease to be such by being called a clause of *dation en paiement.* The sixty-day notice prescribed by art. 1537 and 1550 C.C. is a matter of public order and cannot be waived by a buyer, either expressly or by accepting a *dation en paiment* clause[16] in the form commonly used in deeds of loan.

Strictly speaking, although the judgment declared Belanger owner of the property in question, free and clear of all encumbrances, it did not affect the prior hypothec of Angers, for he was not a party to the action and therefore the judgment obtained by Belanger against Cameron was not *chose jugée* against Angers. (Art. 1241 C.C.).

The Bar question does not state that the Registrar was ordered to radiate Angers' hypothec, for it is doubtfut that such an order would have been given, seeing that Angers was not impleaded. In order to avoid any doubt as to Angers' rights in his prior hypothec, a third party opposition to judgment on his behalf would, of course, be the proper procedure.

4. Question No. 2, put at the June 1961 examination on Practical Civil Procedure,[17] reads as follows:

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[14] [1963] B.R. 479.
[15] [1961] B.R. 410.
[16] *Ibid.,* at p. 416.
[17] See (1961) 21 R. du B. 378.

Primus, an employee of La Cie du Pouvoir Ltée, received on June 2, 1961, a seizure by garnishment of his salary. The action has been brought by Secundus; the judgment, dated April 1, 1961, condemned Primus to pay Secundus $1,500.00 with interest and costs. It is an action on an account. Primus tells you that he was never served with the action. You go to court and you verify that judgment was rendered by default following service by publication in the newspapers. Primus owes Secundus nothing, having paid him in full before action was brought, and he holds a receipt.

Draft the appropriate proceeding.

(The appropriate proceeding is a petition in revision. Art. 1175 C.P.).

In the June 1954 examination on Practical Civil Procedure,[18] question No. 2 reads as follows:

Le 5 juin 1954, Jacques Brault vous consulte au sujet d'une saisie-arrêt qui vient de lui être signifiée le 3 juin 1954. Au greffe de la Cour vous vous informez si le bref d'assignation original fut signifié au domicile du défendeur, ce qui fut fait le 13 juillet 1953 à une personne raisonnable en charge du domicile du défendeur. La saisie-arrêt est en exécution d'un jugement par défaut de la Cour supérieure rendu le 20 juillet 1953. Le défendeur vous expose que du 1er au 31 juillet 1953 il était absent en vacances aux Etats-Unis avec toute sa famille. Par contre, durant cette période, il a laissé une servante en charge du domicile et cette dernière a quitté son emploi sans lui parler de la signification de l'action, ce en date du 31 juillet 1953. Il vous expose qu'il ne le connaît même pas. La saisie-arrêt est prise entre les mains de la Cie Eaton pour laquelle le défendeur travaille actuellement.

Redigez la procédure et indiquez toutes les formalités qui doivent l'accompagner.

(The answer to this question is an opposition to judgment.)

We must ask ourselves, however, why these questions mention the names of the garnishees. Is it because it was felt that the garnishee should be made a party to the petition in revision or opposition to judgment, if the said proceeding is served after the salary of the judgment debtor has been seized? Were the examiners of the opinion that after the reception of the opposition to judgment or petition in revision the garnishee may ignore the seizure and pay the debtor his salary without deducting the seizable portion thereof?

In *LaSalle Finance Corp.* v. *St. Jean*,[19] after an opposition to judgment was received by the Court, the defendant made a petition that the seizable portion of his wages (which the garnishee had deducted) be paid to him and that the garnishee abstain from making any deductions in the future, as long as his opposition to judgment was not adjudicated upon. The Superior Court maintained the defendant's petition, pretending that it did not come into conflict with the judgment of the Court of Appeal, in *Deslauriers* v. *Deslauriers*.[20]

[18] See (1955) 15 M. du B. 191.
[19] [1958] P.R. 385.
[20] (1930) 34 P.R. 75.

The law and the Deslauriers judgment, however, do not justify the stand taken in LaSalle & St. Jean.[21]

In *Deslauriers* v. *Deslauriers,* Mr. Justice Tellier of the Court of Appeal remarked as follows:

> Dans ces conditions, il ne peut être question de mettre de côté, ni déclarer illégales et nulles, soit leurs déclarations, soit leur consignations. La saisie-arrêt subsistant, les deniers saisis doivent rester sous la main de la justice, jusqu'à adjudication finale sur l'opposition. C'est cela que prescrit l'article 1172 cité ci-dessus. Le défendeur n'a pas à se plaindre. Son sort serait le même, si, au lieu d'une saisie-arrêt, il s'agissait d'une saisie-exécution: ses meubles saisis demeureraient sous saisie, tout comme dans le cas actuel.[22]

Mr. Justice Galipeault's remarks are also very much in point:

> Encore une fois, l'effet de l'opposition à jugement n'est que d'obtenir la suspension des procédures et ce jusqu'à l'adjudication finale sur icelle. Qui dit suspendre, ne dit pas annuler. Si la saisie-arrêt, dans les circonstances, devait ne pas être rapportée, elle serait devenue caduque et les fins de la justice n'auraient pas été servies, au cas où l'opposition à jugement serait rejetée à l'adjudication finale. Il peut y avoir des inconvénients pour l'opposant, s'il a une défense victorieuse à offrir à l'action, dans le fait que ses débiteurs ont été appelés au greffe pour y faire leur déclaration et y ont déposé les deniers dont ils étaient endettés envers lui. Il aurait pu facilement parer à telle éventualité en faisant signifier a chacun des tiers-saisis, au protonotaire de la Cour supérieure et au saisissant, une copie du certificat de production de l'opposition. (1171 c.p.c.). Mais, encore une fois, l'effet la saisie-arrêt n'aurait été que suspendue, les biens du défendeur seraient restés entiercés entre les mains des tiers-saisis et le saisissant n'aurait pas subi le danger d'être frustré de ses droits, si l'opposition à jugement était mal fondée.[23]

The Court of Appeal in *Deslauriers* v. *Deslauriers* reversed the Superior Court judgment which had ordered that all the proceedings on the seizure by garnishment subsequent to the service of the opposition to judgment should be rejected from the record. The Court based itself upon the fact that the opposition to judgment was received. Mr. Justice Galipeault's criticism of this order reads as follows:

> En ordonnant comme elle l'a fait, il n'y a aucun doute que la Cour supérieure a préjugé le jument sur l'opposition, a mis le demandeur dans une position défavorable, l'a frustré de ses droits et des avantages que devait et pouvait lui procurer son bref de saisie-arrêt émis dans les délais légaux, après le jugement et qui après l'adjudication finale sur l'opposition, si elle est renvoyée, aura toute sa force et son effet contre les parties à dater du jour de la signification qui leur aura été faite.[24]

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[21] [1958] P.R. 385.

[22] (1930) 34 P.R. 75, at 79.

[23] *Ibid* at p. 83.

[24] Ibid at p. 85. See to the same effect a judgment of Lamarre, J., in *Gelber* v. *Bergeron & Purity Ice Cream Co. Ltd.* [1958] P.R. 372.

In the above two Bar questions, it is the opinion of this writer that it would have been preferable not to mention the names of the garnishees, for an opposition to judgment or a petition in revision are matters to be decided between the plaintiff and the defendant. The garnishee should not be involved in this litigation. He has to continue to deduct the seizable portion of the wages and wait until judgment is rendered.

5. At the Bar examination on Civil Procedure (practical) held on December 16, 1959,[25] question No. 2 reads as follows:

> Emile François, marchand d'appareils électroniques, de Montréal, vous consulte. Le 1er décembre 1959, il a vendu à Clovis Doré, un appareil de haut fidélité qu'il a livré le même jour, sans s'en réserver le droit de propriété jusqu'à paiement. La facture qu'il a remise à Doré, en même temps que l'appareil, indiquait que le prix convenu, $650, serait payable dans les trente jours de la livraison (net: 30 days). Votre client vous exhibe copie de cette facture.
>
> Le 15 décembre 1959, Armand Brisebois, marchand de charbon de Montréal, qui avait obtenu jugement contre Doré pour le prix de marchandises vendues et livrées, fit saisir les meubles de celui-ci dont l'appareil en question.
>
> François qui n'a pas été payé de son prix, vous demande de faire les procédures utiles à la protection de ses intérêts.
>
> a) Dites quelle procédure s'impose et justifiez votre réponse; puis,
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> b) Rédigez cette procédure.

The question as put takes it for granted that François' interests can be protected by a procedure prior to the bailiff's sale, which sale could not have taken place before the expiry of eight days computed from the date of the publication of an advertisement stating the day and hour of the sale. Not having retained the right of ownership of the set in question, François could not make an opposition to the seizure. The set had become the common "gage" of Doré's creditors, (Art. 1981 C.C.). *On December 16, 1959* François could not have taken any proceedings to protect his rights, as he had no rights in the set which was sold to Doré outright on credit. François could of course attend the bailiff's sale, try and buy the set himself, or see to it that it is sold at a much higher price than the costs of the seizing creditor, which would enable him to make an opposition for payment as an unpaid vendor, within eight days after the bailiff's sale. Arts. 672 C.P.; 1994(3) and 1998(2) C.C.

François could not take an action to cancel the sale of the set and accompany it with a conservatory seizure. [as was done in *Morgan*

[25] Reported in 1960 20 R. du B. pp. 89 and 90.

Co. Ltd & Mt. Royal Lumber and Flooring Co. Ltd.[26] and in *Laflamme* v. *Dundas Lumber Co.*[27] in accordance with the provisions of Art. 1543 C.C. and Art. 955(1) C.P.] for two reasons, namely (1) the debtor was no longer in possession of the set, as it was under seizure and in the legal possession of the guardian (*saisie sur saisie ne vaut pas*), and (2) because the purchase price was not due yet.

Quaere: Would it not be advisable to publish the answers to the questions that the Bar examiners have drawn up ? These answers would be useful not only for students about to take the examinations but they would also act as a refresher course for many lawyers — for it is frequently said that there are very few members of the Bar who could pass the Bar examinations.

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[26] (1926) 41 K.B. 1.
[27] [1953] P.R. 13.