FREQUENTLY-USED PROVISIONS OF THE CODE OF CIVIL PROCEDURE:

An Analysis of their Contents and Implications

by Solomon W. Weber, Q.C.*

The purpose of this article is to analyze briefly some of the more ambiguous or incompletely detailed articles of the Code of Civil Procedure and, respectively, to clarify or to elaborate upon their provisions. For convenience of reference, the article's division into parts corresponds with that of the Code itself, except that Part IV commences at art. 518 C.C.P.

PART I

Arts. 10, 15 C.C.P.: Rules re Summer Vacation

Arts. 10 and 15 contain the rules to be followed in the vacation period, namely, the months of July and August. In an ordinary action, if the defendant appears and the plea becomes due during the months of July and August, it is not necessary to file it during these two months. Thus, in the Superior Court, if three of the six days given to the defendant to plead have elapsed prior to July 1, then the plea can be filed on September 3, seeing that the delays do not run during those two months. In summary matters, if the appearance is due in July and August and it is accompanied by an affidavit (which need not necessarily be that of the defendant himself) stating that the appearance is filed in good faith and without intent unjustly to delay the proceedings, the delays to plead are suspended until the beginning of September.

Art. 15 also states that the courts cannot sit between the thirtieth day of June and the first day of September. It does not speak of the "judge". There is, however, a distinction between the terms 'court' and 'judge' throughout the Code of Civil Procedure and the Civil Code. Art. 537 C.P. says that in matters not within the jurisdiction of a judge in chambers, judgment must be rendered in open court. The conclusion therefore is that whenever the law gives the judge certain powers, he has jurisdiction to hear the matter in July and August, even in open court, seeing that the court has the powers of a judge (Art. 24 C.P.) but that a judge has not the same powers as the court. In the Court of Appeal the distinction between a judge and the court is clearer, for the court is composed of more than one judge.

---

*Lecturer in Civil Procedure, McGill University.

PART II

Art. 105 C.C.P.: Rules of Pleading

Art. 105 C.P. lays down the basis for all pleadings and contains two essential rules; *viz.*

(a) that the facts only need be stated and therefore the evidence by which the facts are to be proved need not be detailed, and

(b) that pleadings need not contain arguments.

It is not proper to say, "the whole will be proved at the proper time and place", as, of course, the facts will have to be proved, unless they are admitted by the opposite party.

The dividing line between facts and evidence is sometimes difficult to see, but an example will illustrate the point. Thus, in an action in damages resulting from one automobile colliding with another, it is sufficient to allege that it cost the plaintiff $150.00 to repair the damages (which damages should be detailed), without producing a receipted bill, as the bill is only proof of the fact that the repairs cost $150.00, which proof will have to be made in open court, or at an examination on discovery. At the hearing it is necessary to have the party who made the repairs (or who gave the estimate, if the repairs had not yet been made) present as a witness to prove that the repairs were a result of the accident.

Examples of arguments in proceedings are the statements in declarations that the "plaintiff's action is well founded" or that "the plaintiff is entitled to claim from the defendant" and the allegation contained in many pleas that "the plaintiff's action is unfounded in fact and in law" or that "there is no *lien de droit* between plaintiff and defendant". Should an action for personal injuries be taken after it is prescribed the allegation in the declaration that the plaintiff is entitled to claim the amount from the defendant cannot, of course, avail against a total inscription-in-law asking that the action be dismissed, for only allegations of fact are taken into consideration when a demurrer is made against a pleading.

Art. 108 C.C.P.: One Allegation per Paragraph

Art. 108 C.P. contains a very useful rule, namely, that each paragraph of a pleading should contain as nearly as possible only one allegation. It enables the defendant to admit some of the paragraphs of the declaration and thus shorten the enquête and the costs thereof. If, on the other hand, several allegations are contained in one paragraph, the defendant finds himself in the position of having to deny the whole paragraph, although some of the allegations therein are true. The defendant may, however, deny the paragraph as drawn, and explain what part of the paragraph he admits and what part he denies. For example, in the case of a pedestrian suing the owner of an automobile for damages suffered by the former when he was struck by an

automobile driven by a chauffeur of the latter, it is best to allege, in separate paragraphs, the details of the fault imputed to the chauffeur — the defendant might be ready to admit that he is the owner of the motor vehicle and that the chauffeur was driving for and on his behalf, without admitting any fault on the part of the chauffeur, a fact of which he may really not have any cognizance if he were not in the car at the time of the accident. The defendant thus saves himself the costs of a useless enquête on these points, should he be condemned to pay damages to the plaintiff.

Art. 113 C.C.P.: Conclusions

Art. 113 C.P. deals with conclusions of a declaration or of a plea. The conclusions of a pleading are very important, as no matter what the allegations are, the court is guided by the conclusions when giving judgment. In claims for money, all that the plaintiff need ask is that the defendant be condemned to pay a certain amount with interest and costs. Insofar as the demand for interest is concerned, it is advisable to add up the interest wihch has become due up to the institution of the action and include it in the amount claimed. If the interest is asked for only in the conclusions, the real amount of the claim may be in a different class than that mentioned in the fiat, *e.g.* in an action on a note amounting to $390.00, where the interest at the date of the issue of the writ amounts to more than $10.00. The conclusions cannot be alternative but may be subsidiary; that is to say that the decision should not be left to the court as to which of the conclusions it can grant, but it can be asked that, in the event of the court's finding that the principal conclusion cannot be maintained, judgment be given in accordance with the subsidiary conclusion. Thus, in an action to have a sale of movables cancelled, the court can be asked that, if it finds that the sale cannot be cancelled, the defendant be condemned to pay the price, assuming the goods have been delivered but have not yet paid for. The conclusions should be very carefully drawn; for example, in an action to eject a tenant for non-payment of rent, it is important to ask in the conclusions for the annulment of the lease for the future. There is a difference between void contracts and those that are merely voidable. In the first case the court is asked to declare that the nullity exists, and in the latter case that the contracts be annulled.

The conclusions should not ask for something that the judgment cannot have executed. For example in the case of a singer who contracts with a theatre but who refuses to perform, it is useless to ask that he be compelled to sing — the proper thing is to ask that the contract be annulled and that he be condemned to pay damages; the damages, of course, have to be proved, unless the contract contains a clause stipulating a fixed amount in the event that the singer fails to perform.

As regards the plea, its conclusions are generally simple and to the effect that the plaintiff's action be dismissed with costs, or, in the event that a tender

or confession of judgment has been made re part of the claim, that the tender or confession be maintained and plaintiff's action for the balance be dismissed with costs. There are cases, however, where the conclusions in the plea have to contain more than the above words, as the defendant may have to ask for the annulment of a contract invoked by the plaintiff.

The answer to the plea should not contain the conclusion that is often found, namely that the action be maintained. While it is true that, strictly speaking, the defendant suffers no prejudice by the said conclusions and therefore, under the general principle of "no prejudice — no interest," he cannot have it struck out, it is, however, irregular and unnecessary, as only the allegations in the declaration can give rise to the maintenance of the plaintiff's action and not the allegations in the answer to plea.

PART III

Art. 122 C.C.P.: Description of Parties in a Writ

Art. 122 C.P. deals with the description of the parties. Very often we come across a party called "Mis-en-cause". He is generally a party against whom no condemnation for costs is asked, unless he contests, but he is summoned, as he has an interest in the proceedings. For example, in an action against a tenant accompanied by a seizure of his movables within eight days after he has moved out, the new landlord has to be a party to the action. Such is also the case in an action by a workman accompanied by a demand that his claim be declared privileged on an immovable on which he has worked but where he was not employed by the proprietor — in this case the proprietor has to be made a party to the suit.

When a husband takes an action for damages suffered by his wife common as to property, it is incorrect to describe the plaintiff as taking the action in his quality as head of the community existing between himself and his wife and to conclude in the declaration that the defendant be condemned to pay to the plaintiff in his said quality; the latter qualification can be used only by a tutor or curator taking an action on behalf of a minor or an interdict, respectively.

As to the description of the defendant, his occupation need not be given. When suing a female, if she is unmarried, it is not necessary to say so, as a woman is deemed to be capable of being sued unless she proves to the contrary, namely that she is married and needs the authorization of her husband. In suing on behalf of a married woman, if she needs the authorization of her husband, it is better to describe her husband as being a party to the action for the purpose of authorizing his wife, for then it is not necessary to produce any proof of the authorization, seeing that the attorney is deemed to be authorized to act for the husband and wife unless and until the attorney is disavowed. If, however, it is simply mentioned that the wife is duly authorized by her husband, the authorization should be produced with the fiat.

Art. 123 C.C.P.: Causes of Actions

Art. 123 C.P. deals with an action on an account. In actions for goods sold and delivered or for services rendered, if the account consists of many invoices, it is advisable to attach them to the fiat. If, however, the account is a small one, it can be attached to the declaration to be served on the defendant at the same time as the writ of summons. If there be only one or two items in the account, the details can be set out in the declaration itself. These details must show the dates and exactly what was sold and delivered, or what work was done. If a grocer wants to sue one of his customers, but is not in possession of a detailed account, the declaration can allege that the defendant bought groceries from such a date to another date for a total amount of $000.00, which he frequently acknowledged to owe. Interrogatories on articulated facts can then be served on the defendant, and, if he defaults, or answers affirmatively, judgment can be obtained by having the interrogatories declared admitted.

Art. 150 C.C.P.: Service of Writ

Art. 150 C.P., which provides that a plaintiff can be forced to serve a writ, indirectly teaches us that a writ should be taken out after the declaration is drawn up and not, as is the practice in some offices, be taken out prior to the drawing up of the declaration, for very often, when the declaration is drawn up, it is found that the amount mentioned in the fiat is wrong or that the action is prescribed.

Whilst all pleadings must be served, an appearance need not be served. However, a copy of the appearance should be mailed to the attorney for the plaintiff, as a matter of courtesy. An appearance should be made as soon as possible, firstly because, should the plaintiff decide to desist from his action, the attorney for the defendant would not be entitled to the costs of his appearance, if the desistment is served before the appearance is filed; secondly, because, should the appearance be mislaid in the prothonotary's office and thus not be entered in the plumitif, if the copy of the appearance is not mailed to the attorney for the plaintiff, judgment may be rendered by default, thus necessitating an opposition to judgment. If the appearance is filed before the due date, the plumitif can be checked in order to make sure that it has been entered. It is also advisable to examine the plumitif the day after the writ is supposed to be returned, to see if the return has been made, and to look at the exhibits which should have been filed with the return of the action.

Art. 191 C.C.P.: Inscription in Law

What is meant by an inscription-in-law, dealt with in articles 191 C.P. *et seq.*? A simple example would be an action by one brother against another for alimentary support. As the law does not provide that one brother can be forced to support another, the defendant can have the action dismissed by

making an inscription-in-law; another example would be an action in damages which is served after the claim is prescribed.

What is a *partial* inscription-in-law? This is an attack on a pleading only in part, *e.g.* in the case where a plaintiff claims damages resulting from having been struck by a public motor vehicle conveyance — or bus — and alleges that at the place of the accident many other accidents have happened. The defendant can ask that this allegation be struck out as irrelevant.

Up to 1928 the judge to whom an inscription-in-law was presented could refer it to the trial judge, who would hear the evidence before giving his decision on the inscription-in-law. This option has since been abolished, except, however, in unappealable summary cases. (Art. 1157 C.P.)

Art. 198 C.C.P.: Answer to Plea

Art. 198 C.P. deals with the answer to plea. It should not contain any allegations that are essential to the maintenance of the action and which should have been included in the declaration. It must only contain facts which are necessary to refute the allegations in the plea. For example, if an action is taken on a note against the maker and endorser, it is necessary to allege in the declaration, and not in the answer to plea, the protest of the note or a waiver of protest. If a defendant joins issue with the answer to plea without objecting to allegations which should have been included in the declaration, the court cannot, *proprio moto*, refuse to receive evidence in support of the said allegations.

If an answer to plea contains allegations which should have been included in the declaration, a motion to have these allegations stricken is sufficient. An inscription-in-law would be necessary only if the answer to the plea contains facts which do not give rise to the conclusion that the plea be dismissed.

Art. 214 C.C.P.: Joinder of Issue

Art. 214 C.P. speaks of joinder of issue. Contrary to the practice of many, it is not necessary to join issue with paragraphs that deny or ignore.

Arts. 279 C.C.P. *et seq.*: Peremption

Peremption is covered by arts. 279 C.P., *et seq.* If an action is perempted the plaintiff cannot sue again if the claim is prescribed. Must the defendant wait for the plaintiff to proceed, and, if he does not proceed, must the defendant wait until two years elapse from the last useful proceeding before taking steps to have the action disposed of? The answer is in the negative, for the defendant can, even when he has not filed a plea, inscribe the case himself. However, if the defendant is not certain that the plaintiff's action is unfounded, it is better for him to adopt a policy of watchful waiting and let the plaintiff's action be perempted. The Code of Civil Procedure says that the court may condemn the plaintiff to pay the costs, if his action is perempted. The plaintiff is generally

condemned to pay the costs, unless the circumstances are out of the ordinary and justify the dismissal of plaintiff's action without costs.

Art. 286a C.C.P.: Examination on Discovery

As regards art. 286a C.P., which deals with the examination on discovery before the defendant files his plea, the purpose of this examination is not merely to obtain details, but to see whether the statements in the declaration will be supported under oath.

Art. 339 C.C.P.: Examination of Witnesses

Art. 339 C.P. lays down one of the most important rules in connection with the examination of witnesses, *viz.* that a witness can be examined only on the facts in issue and that the questions must not be leading, that is, they must not be formulated in such a way as to suggest the answer unless the witness manifestly tries to elude the question or to favour the adverse party, or unless the witness who is being examined is the other party. In other words, the attorney for the plaintiff cannot, in examining the plaintiff or his witnesses — let us say in an action in damages — ask the witness the following question: "Was the defendant driving his car fast or slow?" Instead he must ask the witness: "At what speed was the defendant driving his car?" Introductory questions are permitted to be leading, as they are generally not in dispute and they are asked only in order to lead on to the important questions. In an action in damages resulting from a collision between two motor vehicles, where the collision and the date of the accident are admitted, it is not objectionable to ask the plaintiff the following question: "Can you tell the court what happened on the morning of July 16, 1960 when your vehicle was damaged at the corner of Sherbrooke and Mansfield Streets, Montreal?" If the plaintiff finds it necessary to call the defendant as his own witness, an exception is, of course, made in this case, and the defendant can be asked: "Is it not true that you were driving at a speed of 40 miles per hour?", or: "Is it not true that you did not stop at the intersection although there is a 'Stop' sign there?"

Art. 340 C.C.P.: Cross-examination

Art. 340 C.P. states that a witness can only be cross-examined on the facts which come out in the examination-in-chief; in other words, the defendant cannot try to prove his plea and the facts contained therein by cross-examining the plaintiff's witnesses, but he must call them as his own witnesses. The plaintiff suffers prejudice if his witnesses are cross-examined on matters which did not come out in the examination-in-chief and which should really form part of the defendant's evidence: firstly, in cases where the evidence has to be taken by stenography the plaintiff's disbursements are increased; secondly, the plaintiff's evidence should only be used to prove the allegations in his declaration, and the evidence of the defendant should be used to support the allegations in the latter's plea.

In an objection to a question, the reason for the objection should be given, unless it is absolutely clear that the question is illegal or irrelevant. Objections should be made in the language of the stenographer, as he has to take them down. Arguments on the objection are not taken down, however.

Art. 344 C.C.P.: Examination by Judge

Art. 344 C.P. says that a judge can ask a witness the questions he — the judge — deems necessary. There is no restriction as to leading questions, since the judge cannot be accused of trying to help the witness to answer the question by formulating it in such a way as to suggest the answer. A judge, however, cannot ask a witness a question which will enable him to prove a contract by verbal testimony, if such a contract would otherwise need a writing to be proved.

Art. 359 C.C.P.: Interrogatories on Articulated Facts

Art. 359 C.P. deals with interrogatories on articulated facts. When a defendant admits liability in an accident case, but disputes the amount of the damages, it is not a good practice to send him interrogatories to ask him whether the plaintiff paid the bill for the repairs.

Arts. 418, 532 C.C.P.: Judgments by Default and *ex parte*

Arts. 418 and 532 C.P. must be read together, as both deal with cases where the defendant fails to appear or to plead (the latter cases being known as "ex-parte" cases). The procedure of making affidavits in the name of the stenographer in the employ of the plaintiff's attorney should be resorted to only if it is to her personal knowledge that the defendant owes the amount claimed. It is not sufficient to describe the deponent as the agent of the plaintiff, unless as a result of the agency he knows the truth of the allegations contained in the plaintiff's declaration. It must be pointed out here that a lease is not considered a writing on which judgment can be rendered by the prothonotary on seeing the document. Proof has to be made to the effect that the defendant is or has been occupying the premises, and that he has not paid the rent. Furthermore, where damages are asked for future loss of rent, they have to be proved by the plaintiff or anyone else who can attest to the fact that, after the ejectment of the tenant, it will be difficult to lease the premises to another, or to lease them at the same price.

PART IV

Art. 518 C.C.P.: Amendments

Arts. 518 C.P. *et seq.* deals with amendments. When the defendant in his plea raises an issue such as failure to protest a note, it is best to make a motion to amend the declaration to allege a waiver of protest and not include the

waiver in the answer to plea. The plaintiff is condemned to pay the costs incurred by his amendment (which costs, however, do not have to be paid before the amendment is made).

Amendments can be made not only to pleadings but also to fiats, writs, preliminary exceptions, motions, petitions, etc. If, therefore, a motion or petition is presented and the opposite party points out that it is lacking an essential allegation, the amendment, if it needs no affidavit, can be made in open court. If an affidavit is necessary, a postponement can be asked for, and, before the next hearing, the amended motion or petition can be presented after it is served on the opposite party. If an action is erroneously taken as summary and an exception to the form is made before the error is noticed, it is better to make a motion to amend immediately, as the judge cannot, strictly speaking, order the striking out of the words "summary procedure".

Arts. 527 C.C.P. *et seq.*: Confessions of Judgment

Arts. 527 C.P. *et seq.* deal with confessions of judgment. What is the difference between a confession and a tender and what are the advantages and disadvantages of each? Where the defendant admits part of the plaintiff's claim but is unable to pay the amount he thus admits to be owing, he should produce a confession of judgment; in this way he will be able to contest the plaintiff's demand for the balance, if the plaintiff should notify the defendant that he persists in claiming the full amount. If, however, the defendant is capable of paying the amount he admits owing, it is not advisable to confess judgment, as judgments are published in commercial credit papers; in this case it is better to tender the amount owing.

If no legal demand for payment was made on the defendant before the action was instituted, the plaintiff's attorney should be tendered the amount the defendant owes, without costs. If the attorney is willing to accept it as full payment, then the matter is closed. If not, he can give a receipt to the effect that he is taking the money without prejudice to the plaintiff's claim for the balance. The defendant, in the latter case, should file an appearance and, if the plaintiff returns his writ and thus persists with his action, a plea can be produced which will allege the tender, produce the receipt and ask for the maintenance of the tender and for the dismissal of the action. If the writ is not returned, the defendant can file his copy of the writ and then, within three days, ask that it be declared discharged with costs.

If the plaintiff had made a demand for payment prior to the issue of the writ and the defendant had offered what he admitted to be owing but the plaintiff refused to accept same, the defendant can make his tender with the plea — that is, he can file the money in court and ask for the dismissal of the action for the balance, with costs of such action against the plaintiff.

If the defendant had made no offer, although payment was duly demanded of him, he should, on receiving a writ of summons, offer, besides the amount

he admits owing, the costs incurred. While a tender before the action has to be made in money, an accepted cheque — and even a cheque that is not accepted — can be offered, if it can be proved later that the cheque was refused only because its amount was not considered sufficient. If the defendant then makes a proper tender on receiving the action, he would not be responsible for the costs should the court find that the offer first made was sufficient.

Where a defendant contends that he owes less than the amount claimed by the action, he should make a tender of the sum he is prepared to offer, not with his plea but before the return of the writ into Court; in his plea he should be in a position to renew the tender already made. Where the tender is made before plea, the costs to be tendered are those of an uncontested action, but where the tender is made with the plea, the costs must be those of a contested action. If the costs of an uncontested action only are tendered with the plea, but the plaintiff in the answer to plea joins issue on the sufficiency of the tender only as regards the amount of the debt, he is then deemed to have waived his right to object to the sufficiency of the tender insofar as the costs are concerned and the plaintiff's action will stand or fall depending on whether he succeeds in his contention that he is entitled to the full amount of the debt claimed (or at least more than the defendant admits).

Care should be taken, in the event that the judge grants more than is tendered, that the judgment clearly and exactly states what the defendant is condemned to pay. If the defendant tenders $100.00 and the judge finds that he owes the plaintiff $150.00, the judgment should permit plaintiff to withdraw the $100.00 tendered and condemn the defendant to pay $50.00 and the costs of an action of $150.00.

Can the plaintiff settle with the defendant before judgment and relieve the latter from payment of the costs, in whole or in part? The answer is that the plaintiff is master of his case, not only insofar as the debt is concerned but also as regards the costs, since the attorney is not a party to the proceedings. If the latter were so considered, he could be condemned to pay the costs of the defendant, jointly and severally with the plaintiff, if the latter's action were dismissed.

Art. 541 C.C.P.: Contents of Judgments

It is always advisable to read judgments as soon as they are signed, or, if possible, (*e.g.* in the case of judgments by default or *ex parte*) as soon as they are drawn up, in order to ascertain that the *dispositif* contains no mathematical errors.

Art. 549 C.C.P.: Costs

Art. 549 C.P. deals with the question of costs. In the Practice Division, when judgment is given on an incidental petition or motion, the losing party is condemned to pay the costs. For special reasons, the judgment may order that

the costs be reserved, *i.e.* that the trial judge, in giving judgment on the merits of the case, decide who has to pay the costs on the incidental proceeding; the judge can also order that the costs follow suit, *i.e.* that whoever loses in the end will have to pay the costs. If costs are granted they are by law the property of the attorney, and thus, even if the plaintiff's action should be dismissed, if his attorney has been granted costs on incidental proceedings, he can collect them from the defendant and the latter cannot compensate them with the costs granted by the final judgment against the plaintiff.

As regards the fees due to the attorneys for the plaintiff or the defendant, they are governed by a tariff which is part of the law. This tariff only applies with respect to what the plaintiff can charge the defendant if the action is maintained, or what the defendant can charge the plaintiff, if the latter's action is dismissed. The fees that a lawyer can charge his own client are not governed by the tariff, but when the proceedings are not out of the ordinary, the tariff serves as a guiding rule. If proceedings are out of the ordinary, the importance of the matter, the amount of work done and study required and general usage re payment for services of a similar nature are essential elements to consider.

In the District of Montreal the lawyers generally do not draw up their own bill of costs. They allow the deputy Prothonotaries of the Superior Court and the deputy Clerks of the Magistrate's Court to draw up their bills. In *ex-parte* matters and in contested cases, notice has to be given to the attorney for the opposite side, who can appear at the time fixed for the taxation and object to any items that he finds have been illegally put on the bill. If the taxing officer finds that the objections are justified, he strikes off the items to which such objections have been made.

While the deputies' calculations are generally correct, it is advisable to check over the items with the record and the tariff, because the bill is legally deemed to be drawn up by the attorney for the party presenting it for taxation and, if it contains items which should not have been included, the adverse party can make a request for the revision of the bill (even if he did not show up to object to it at the taxation) and thus obtain costs against the other side. When the opposite party does not show up the Deputy Prothonotary marks the bill of costs accordingly; if he does show up, his appearance is noted.

Art. 651 C.C.P.: Oppositions to Seizure

Art. 651 C.P. permits the judge, upon motion, to dismiss an opposition to seizure if it appears on the face of it to have been made with the intent of unjustly retarding the sale. This motion can therefore be presented during July and August, as it is also the judge and not only the court that has jurisdiction, (15 C.P., *supra*). The article also permits the seizing creditor to examine the opposant and have the opposition dismissed after examination, provided that there are good reasons for the examination.

After the examination of the opposant has taken place, the seizing party may be satisfied that the proof *undoubtedly* shows that the opposition is not well-founded; in such a case, he may give notice to the opposant that he will re-present his motion for adjudication of that part of its conclusions which asked for the dismissal of the opposition — on which judgment was reserved. If the seizing party does not re-present this motion, the opposant can do so and ask that the motion be dismissed with costs, but, of course, he runs the risk of the judge dismissing the opposition.

Many opposants do not take any further proceedings after the opposition is served, if the seizing party does nothing himself. An opposant to a seizure, however, has to proceed in order to obtain a judgment releasing the seizure, as the opposition can be perempted after two years, with costs, and the seizing party can then proceed to sell the assets seized.

Most printed forms for oppositions contain a clause to the effect that the opposant opposes the seizure, publication, sale and adjudication; but there is nothing in the Code of Civil Procedure to the effect that an opposition has the effect of stopping the advertising of the sale. If the opposition is frivolous on the face of it and is served some time before the date of the sale, the seizing party can make a motion to dismiss the opposition; if he is successful, the sale can then proceed on the date advertised.

If the attorney for the seizing party receives sufficient proof from a third party that some or all of the movables seized belong to the said third party, it is better to give a release; otherwise, if the opposant is forced to make an opposition, he can ask for costs against the seizing party. (This is an exception to the rule embodied in art. 652 C.P., *viz.* that the costs go against the defendant).

In oppositions to seizures, it is important to value the objects detailed in the opposition, so that the class of the opposition be fixed as regards the stamps and the costs.

If the debtor, on receiving a *saisie-gagerie*, desires to withdraw some or all of the articles seized on the ground that said objects are unseizable, it is not sufficient to make an opposition to seizure after judgment; instead, the debtor, on receiving the writ, should confess judgment for the amount claimed and consent to the seizure being maintained for the effects that are seizable (if there are any). If his confession is refused, he can plead the confession and ask that the seizure of the unseizable effects be quashed with costs.

In the event of a third party being entitled to annul the seizure of a movable object which has been seized for rent and which belongs to him, it is necessary to intervene before judgment; if it is too late to intervene, a third party opposition to judgment has to be filed rather than an opposition to the seizure.

The most frequent opposition is that of a wife, separate as to property from her husband (the debtor), claiming ownership of the furniture seized at the

common domicile. There is no difficulty if the furniture was actually purchased by the wife with her own monies or if it is a gift given to her by a relative, other than the husband. Where, however, the wife claims ownership as a result of a clause in the marriage contract wherein her husband gave her the furniture as a gift, the jurisprudence is conflicting as to how the clause in question must be worded in order to enable the wife to claim the ownership of the furniture during the lifetime of her husband. In any event, an opposition can only be made if the marriage contract has been registered and if the debt was incurred subsequent to the registration. The wife can make an opposition to the seizure of furniture given to her by her husband even if the judgment on which the seizure was issued was rendered against her personally, if the donation was subject to a condition that the furniture would be exempt from seizure.

In virtue of art. 664 C.P. a judgment debtor has a right to determine the order in which the things are put up for sale. When the plaintiff finds that the sale will bring in better results if it is made *en bloc*, he has to make a motion and serve it on the defendant, which motion can be granted if the defendant does not object to the articles seized not being sold one by one.

Art. 682 C.C.P.: Declaration of Garnishee

Art. 682 C.P. speaks of the garnishee's declaration. It is to be pointed out that the garnishee has a right to make his own declaration and that his attorney can help him to draw it up. It is therefore improper for the seizing creditor to insist on making up the declaration for the garnishee, unless, of course, the latter allows him to do so. The seizing creditor's only right is to cross-examine the garnishee.

In making a seizure of the wages of a judgment debtor, it is essential to mention in the seizure that the latter is in the employ of the *tiers-saisi*; the seizure must also mention where the debtor is working and what his occupation is, especially when the garnishee is a large corporation.

Many garnishees, on receiving a seizure, neglect to go to court to declare; yet if the seizure was served personally or at the domicile of the garnishee, the garnishee may be condemned to pay the full amount owing by the judgment debtor. The law does not provide that this judgment has to be served on the garnishee, as would be the case if the garnishee made a positive declaration and was ordered to pay the amount owing to the seizing creditor or deposit it in court.

Art. 694 C.C.P.: Several Seizures by Garnishment

Art. 694 C.P. shows the distinction between a seizure of an ordinary debt and a seizure for wages. In the first case, should the garnishee be indebted to the debtor in a sum of $1,000.00 and should several seizures be served, the first seizure is paid in full, debt and costs, and the next seizing creditor takes

what is left; in the latter case, however, the first seizing creditor gets his costs only and, as regards the debt, he is paid proportionally with the other creditors, who may file claims into the record of what is due to them by the debtor.

Art. 955 C.C.P.: Conservatory Attachment

Art. 955 C.P. (paragraph 1) is not frequently heard of, although it could be taken advantage of in every case where a debtor has purchased goods which are still in his possession and which have not been paid for. This paragraph, combined with art. 1543 C.C., allows every vendor of movables, when the buyer does not pay the price, to take an action to cancel the sale and get back his merchandise, which action can be accompanied by an immediate seizure. The plaintiff can ask in his conclusions (as in an action accompanied by a *saisie-revendication*) that, if any of the effects cannot be found, judgment be rendered against the defendant for the value of such effects.