ACCEPTED PRACTICE

BY LORRAINE PETZOLD

An important professional negligence decision was upheld by the Supreme Court of Canada recently. It dealt with the practice of a Quebec Notary, who was sued for damages by the vendors of a property. The Notary had advised his clients that the property they had offered to purchase had a defect on title and, as a result, the purchasers refused to close.

The defence in this case argued that the Notary followed the common notarial practice and, in fact, called many witnesses which upheld that the Notary had given advice such as they would have given in a similar instance. A witness who was qualified as an expert on notarial practice, testified that the defendant acted "properly, prudently and in the best possible way in the circumstances".

However, the Trial Judge held that the various witnesses' view of the law was incorrect. The following statement is contained within the decision.

> *"The fact that a professional has followed the practice of his or her peers may be strong evidence of reasonable and diligent conduct, but it is not determinative. If the practice is not in accordance with the general standards of liability, ie. that one must act in a reasonable manner, then the professional who adheres to such a practice can be found liable, depending on the facts of each case."*

How does this affect land surveyors? Too often we hear "this is the practice in this area", "it has always been done that way in this County [Township]", or, "surveying in this area is simply different than surveying in southern Ontario (or northern Ontario)".

The case quite clearly indicates that simply because others follow the same practice, it may not be a good defence at trial. Surveyors, like other professionals, are facing an ever widening circle of liability and responsibility. It is important to note the cases that are settled by the courts to be able to protect one's self in future actions.

Copies of the case referred to above are available from the Association offices.

els

EDITORIAL

20943

Supreme Court of Canada | Cour suprême du Canada

RICHARD DORION

v.

JACQUES ROBERGE
JOHANNE BEAUPRÉ

and

JEAN-PIERRE BOLDUC

CORAM:

The Rt. Hon. Antonio Lamer, P.C.
The Hon. Mme Justice L'Heureux-Dubé
The Hon. Mr. Justice Sopinka
The Hon. Mr. Justice Gonthier
The Hon. Mr. Justice Cory

Appeal heard:
October 4, 1990

Judgment rendered:
February 28, 1991

Reasons for judgment by:

The Hon. Mme Justice L'Heureux-Dubé

Concurred in by:

The Rt. Hon. Antonio Lamer, P.C.
The Hon. Mr. Justice Sopinka
The Hon. Mr. Justice Gonthier
The Hon. Mr. Justice Cory

Counsel at hearing:

For the appellant:
François Aquin
Marie-Claude Provost

For the respondents and
the mis en cause:
Serge Barma

RICHARD DORION

c.

JACQUES ROBERGE
JOHANNE BEAUPRÉ

et

JEAN-PIERRE BOLDUC

CORAM:

Le très honorable Antonio Lamer, c.p.
L'honorable juge L'Heureux-Dubé
L'honorable juge Sopinka
L'honorable juge Gonthier
L'honorable juge Cory

Appel entendu:
le 4 octobre 1990

Jugement rendu:
le 28 février 1991

Motifs de jugement par:

L'honorable juge L'Heureux-Dubé

Souscrivent à l'avis de
l'honorable juge L'Heureux-Dubé:

Le très hon. Antonio Lamer, c.p.
L'honorable juge Sopinka
L'honorable juge Gonthier
L'honorable juge Cory

Avocats à l'audience:

Pour l'appelant:
François Aquin
Marie-Claude Provost

Pour les intimés et
le mis en cause:
Serge Barma

Citation	Référence
C.A. Québec, No. 200-46-000029-883, March 11, 1988 (Jacques J.A.).	C.A. Québec, n° 200-46-000029-883, 11 mars 1988 (j. Jacques).
Sup. Ct. Québec,*Roberge v. Leduc*, No. 200-05-001785-877, February 9, 1988 (Mignault J.).	C.S. Québec, *Roberge c. Bolduc*, n° 200-05-001785-877, 9 février 1988 (j. Mignault).

roberge *v.* bolduc

Richard Dorion *Appellant*

v.

Jacques Roberge and Johanne Beaupré *Respondents*

and

Jean-Pierre Bolduc *Mis en cause*

indexed as: roberge *v.* bolduc

File No.: 20943.

1990: October 4; 1991: February 28.

Present: Lamer C.J. and L'Heureux-Dubé, Sopinka, Gonthier and Cory JJ.

on appeal from the court of appeal for quebec

Appeal -- Jurisdiction of Supreme Court of Canada -- Leave to appeal refused by Court of Appeal -- Whether leave to appeal to Supreme Court of Canada may be granted -- Supreme Court Act, R.S.C., 1985, c. S-26, s. 40(1).

Civil responsibility -- Professional liability -- Notaries -- Title searches -- Res judicata -- Buyers not purchasing property following notary's opinion that defect in title not cured by subsequent judgment -- Notary acting in accordance with general notarial practice -- Whether notary failed to properly assess effect of judgment on vendor's title -- If so, whether error of law constitutes a fault entailing notary's liability -- Civil Code of Lower Canada, art. 1241.

Civil responsibility -- Professional liability -- Distinction between common professional practice and fault.

Judgments and orders -- Res judicata -- Conditions -- Incidence of res judicata in the context of title searches -- Civil Code of Lower Canada, art. 1241.

Evidence -- Expert evidence -- Professional liability -- Role of expert testimony.

Costs -- Costs on solicitor and client basis -- Leave to appeal to Supreme Court of Canada granted on condition that appellant notary assume costs of appeal -- Respondents requesting costs on solicitor and client basis in factum and at hearing -- Decision important to notarial profession only -- Costs awarded on solicitor and client basis -- Supreme Court Act, R.S.C., 1985, c. S-26, s. 47.

In 1987, upon acceptance of their offer to purchase the immoveable property of the mis en cause, the respondents instructed the appellant notary to examine the vendor's title to assure them that he held good and marketable title to the property and, if so, to prepare the deed of sale. In examining the chain of title, the appellant discovered that in 1977 one P.L. had obtained a loan from a Caisse populaire guaranted by a hypothec and by a giving in payment clause. The deed of loan was registered against the property in issue even though P.L. was not the owner, the property being registered at the time in the name of P.L. Inc. Both P.L. and P.L. Inc. later made assignments in bankruptcy and the same trustee was appointed for both bankrupt estates. The trustee registered a notice of the bankruptcy of P.L. against the property but did not register a notice on behalf of P.L. Inc. The Caisse, upon the default of P.L. on his loan and pursuant to the giving in payment clause in the deed of loan, took proceedings against the trustee of the bankrupt estate of P.L. and against P.L. Inc. The proceedings were served on the trustee of the bankrupt estate of P.L., on P.L. personally and on P.L. Inc. As none of the defendants appeared to defend the action, the Caisse obtained a default judgment granting it title to the property. This judgment was duly registered against the property. In 1981, the Caisse sold the property to the wife of the prospective vendor who, in 1984, purchased the property from his wife.

Following the title search, the appellant informed the respondents that, in his opinion, the judgment obtained by the Caisse did not cure the defect in the vendor's title. The hypothec, granted by a person other than the registered owner, was null and void and the judgment could not give more

than the hypothec was worth. The vendor's attorney replied that the judgment registered had perfected the title, and had acquired the authority of *res judicata.* Faced with these opposite views, the respondents consulted a second notary who confirmed the appellant's opinion. The respondents then notified the vendor that, in the circumstances, they would not purchase the property and instructed their attorney to take action against him. The vendor counterclaimed for damage allegedly suffered on account of the respondents' refusal to purchase the property. In answer to the counterclaim, the respondents exercised a recourse in warranty against the appellant on the basis that it was on his advice that they refused to purchase the property.

The Superior Court dismissed the respondents' action and allowed both the vendor's counterclaim and the respondents' recourse in warranty against the appellant. The trial judge held that the judgment in favor of the Caisse had the authority of *res judicata* and conferred good and valid title on the Caisse despite the fact that the hypothec was granted by a person other than the registered owner. The trial judge found that the appellant committed an error of law and that the respondents were not justified in refusing to sign the deed of sale. He concluded that the appellant's error constituted a fault and was the *causa causans* of the damage suffered by the respondents. The Court of Appeal refused to grant leave to appeal from the judgment of the Superior Court. This appeal is to determine whether the appellant erred in law in ignoring the authority of *res judicata* as regards the Caisse's judgment and its effect on the vendor's title; and, if so, whether such an error constitutes a fault entailing appellant's liability. However,

before answering the main issues, this Court must determine if it has jurisdiction to entertain the present appeal.

Held: The appeal should be dismissed.

(1) *Supreme Court's Jurisdiction*

This Court has jurisdiction pursuant to s. 40(1) of the *Supreme Court Act* to review the Court of Appeal's decision not to grant leave to appeal from a judgment at trial. Under s. 40(1), this Court retains the discretionary power to hear an appeal from any final or other judgment of the intermediate appellate courts which raises an issue of public importance. While a certain amount of deference to the undoubted competence of intermediate appellate courts to control their own leave-granting process is called for, it is equally evident that this Court's jurisdiction to exercise its own discretion in intervening in such decisions is not statutorily confined. Moreover, in the present case, leave to appeal was granted from both the Superior Court and the Court of Appeal judgment.

(2) *Res Judicata*

Appellant's contention that the vendor's title could be challenged by an action contesting the validity of the hypothec must be rejected. The judgment granting ownership of the immoveable property to the Caisse acquired the authority of *res judicata* since it met all the conditions set out in art. 1241 *C.C.L.C.* The judgment was rendered by a civil court in Quebec

which had jurisdiction in the matter; the Caisse's action on the giving in payment clause was contentious in nature and the judgment "definitive", even though rendered by default, since the proceedings were served on the parties. Further, there was identity of parties, object and cause. In the context of *res judicata*, juridical identity of the parties is all that is required. The prospective vendor was a successor by particular title to the property and thus a "party" to any judgments rendered in regard thereto. The trustee was a party to the action on the giving in payment clause and represented the creditors of P.L. Inc. When someone is represented by a party to an action, he cannot later challenge the judgment. The object of the judgment obtained by the Caisse was the ownership of the immoveable property, precisely the same object which an attack on the validity of the hypothec would pursue. Finally, the essence of the legal characterization of the facts alleged is identical and relates to the contract of loan. The inexecution of the obligation undertaken in that contract is the "concrete" cause of action.

Even if the creditors of P.L. Inc. were not "represented" by the trustee, they would still be bound by the judgment granting ownership of the property to the Caisse. The chirographic creditors cannot claim more rights than those of their debtor. If that debtor loses some of his patrimony, then these creditors simply have a decreased patrimony to share. They cannot challenge the validity of the judgment unless they prove that such judgment constituted an attempt to defraud the creditors. An oblique action, however, is taken by a creditor, not in a personal capacity, but as a representative of the debtor, and thus would raise the same issues of representation and *res*

judicata. A Paulian action, on the other hand, must allege fraud and is taken in the name of the individual creditor exercising personal rights. Such action, although a possibility even after a judgment in giving in payment, is prescribed after one year of knowledge of the alleged fraud.

The trustee himself could not contest the judgment even if he was not properly served in his capacity as trustee in bankruptcy of P.L. Inc. P.L. Inc. was properly served, given the absence of notice of bankruptcy in the index of immoveables, and the trustee, who failed to register such notice on the debtor's property at the time of the bankruptcy, could not benefit from his own omission. In any event, the trustee had actual knowledge of the proceedings, and if he sought to attack the judgment, he would have had to act within a reasonable time.

As for third parties, if they were aware of the judgment rendered in favour of the Caisse they should have acted with diligence to retract the judgment. Since the judgment was registered against the property years earlier, it would be difficult, if not impossible, for the creditors to claim absence of notice. The time elapsed since the registered judgment obtained by the Caisse would also serve as a bar to third-party opposition. The remote possibility that third parties, unaware of the judgment, could later contest the validity of the hypothec and, as a consequence, the validity of the vendor's title is pure speculation. There is no indication that any other party might have had an interest in the validity of the hypothec and/or the ownership of the property.

The appellant, therefore, made an error of law in ignoring the authority of *res judicata* as regards the judgment obtained by the Caisse and its effect on the vendor's title to the property. The judgment conferred good and valid title on the Caisse, despite the fact that there was a defect in the hypothec, since it was not appealed from and, on the facts of this case, could not have been the object of further proceedings. The appellant failed to distinguish between the hypothec's defect, which existed, and the defect in the title, which did not exist, having been cured by the judgment granting ownership to the Caisse.

(3) *Expert Evidence*

Expert witnesses testified at trial that the appellant's opinion was in conformity with the norms of practice of a prudent and cautious notary in the same circumstances. The expert evidence, although not relevant in the determination of whether the judgment rendered on the giving in payment action had the authority of *res judicata,* was relevant in the assessment of notarial practice and was properly admitted by the trial judge. The trial judge, however, is the final arbiter and is not bound by expert testimony. This is particularly so in matters of professional liability, where an expert's evidence is not binding regarding the precise question of law which the judge is called upon to decide. This is the domain of the judge.

(4) *Professional Liability*

The trial judge was correct in concluding that the appellant's error constituted a fault entailing his liability. The fact that a professional followed the common professional practice at the relevant time is not sufficient to avoid liability. Such practice must be demonstrably reasonable. Accordingly, when a professional adheres to a common professional practice which does not accord with the general standards of liability, i.e. that one must act in a reasonable and diligent manner, he can be found liable, depending on the facts of each case. The common notarial practice followed by the appellant led to the conclusion that there was a defect in the vendor's title and that such defect was not cured by the judgment granting ownership to the Caisse. Given the clear state of the law at the time, the notarial practice as regards title searches cannot be characterized as reasonable and diligent, nor can the casual way in which the issue of *res judicata* was dealt with be condoned. The issue of *res judicata* is not a controversial one in the legal field and its application to this case did not present particular difficulties. The appellant's main contractual obligation toward the respondents was to give a legal opinion as to the vendor's title. This obligation was one of means only but one that he had a duty to fulfill in a prudent and diligent manner. Appellant's error of law was unreasonable and constituted a fault in the circumstances of this case. Further, the necessity to advise clients of the legal consequences of their actions is clearly an aspect of the notarial duty to counsel. Appellant's failure to inform the respondents of the likelihood of legal action by the vendor constituted a breach of his obligations toward the respondents.

The appellant is liable for the damage suffered by the respondents. The appellant's opinion was the direct, immediate, and logical cause of the respondents' decision not to purchase the property. The fact that the respondents sought the opinion of a second notary, which confirmed that of the appellant, did not affect the causal link between the appellant's fault and the damage suffered by the respondents. Had the appellant given proper legal advice, they would never have needed to seek a second opinion. Further, the opinion of the second notary did not constitute a *novus actus interveniens*. The respondents' decision to seek a second opinion was completely dependent upon the appellant's erroneous conclusion that the title was defective.

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Co. v. Foundation Co. of Canada, [1965] S.C.R. 594; *In re Reed: Caisse populaire Desjardins de Côte St-Paul v. Diamond Co.*, [1981] C.S. 944; *Mercure v. A. Marquette & Fils Inc.*, [1977] 1 S.C.R. 547; *Riberdy v. Laroche*, [1986] R.D.J. 510; *Darveau v. Tessier*, [1986] R.J.Q. 2770; *Bédard v. Lavoie*, [1987] R.R.A. 83; *Vail v. MacDonald*, [1976] 2 S.C.R. 825; *Hôtel-Dieu de Québec v. Bois*, [1977] C.A. 563; *Caisse populaire St-Étienne de La Malbaie v. Tremblay*, [1986] R.D.I. 554 (Sup. Ct.), rev'd [1990] R.D.I. 483 (C.A.); *Fournier & Papillon Ltée v. Simard*, [1987] R.R.A. 566; *Villemure v. Hôpital Notre-Dame*, [1973] S.C.R. 716; *G. v. C.*, [1960] Que. Q.B. 161; *Coronation Credit Corp. v. Giasson*, J.E. 79-546 (C.S.), aff'd C.A. Québec, No. 200-09-000363-793, July 7, 1982; *Attorney General of Quebec v. Labrecque*, [1980] 2 S.C.R. 1057; *Janiak v. Ippolito*, [1985] 1 S.C.R. 146; *Lanificio Fratelli Bettazzi S.N.C. v. Tissus Ranchar Inc.*, S.C.C., No. 21373, October 3, 1990; *Sous-ministre du revenu v. Goyer*, *Bulletin of Proceedings of the Supreme Court of Canada*, October 12, 1987, p. 1612; *Attorney General of Quebec v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831; *Palachik v. Kiss*, [1983] 1 S.C.R. 623.

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APPEAL from a refusal of the Quebec Court of Appeal[1] to grant leave to appeal from a judgment of the Superior Court[2]. Appeal dismissed.

François Aquin and *Marie-Claude Provost*, for the appellant.

Serge Barma, pour les intimés et le mis en cause.

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[1]C.A. Québec, No. 200-46-000029-883, March 11, 1988 (Jacques J.A.).

[2]Sup. Ct. Québec, No. 200-05-001785-877, February 9, 1988 (Mignault J.).

Solicitor for the appellant: François Aquin, Montréal.

Solicitors for the respondents and mis en cause: Gingras, Vallerand, Barma, Dawson, Laroche, Québec.

SUPREME COURT OF CANADA

RICHARD DORION

v.

JACQUES ROBERGE
JOHANNE BEAUPRÉ

and

JEAN-PIERRE BOLDUC

CORAM: Chief Justice Lamer and L'Heureux-Dubé, Sopinka, Gonthier and Cory JJ.

L'HEUREUX-DUBÉ J.

The issue in this appeal concerns professional liability, in this instance that of the appellant, a notary practising in Quebec City, as a result of his professional advice to the respondents, the prospective purchasers of an immoveable which was the property of the mis en cause Bolduc.

Facts

On April 7, 1987, the respondents signed an offer to purchase the immoveable property of the mis en cause, Jean-Pierre Bolduc. The property in question is located at 1939, des Épinettes Rouges Street, Lac St-Charles,

being lot 1324-52 in the parish of St-Ambroise de la Jeune Lorette in the district of Quebec. The vendor, here mis en cause, was to provide the respondents with a valid title, free of all charges and encumbrances except for those specifically provided for in the offer. The deed of sale was to be executed before the appellant notary. On April 8, upon written acceptance of their offer, the respondents mandated the appellant notary to prepare the deed of sale. The respondents also obtained approval of a loan for part of the purchase price from the National Bank of Canada. That loan, however, was conditional upon a title search to be undertaken by the appellant notary, in order to ensure that the hypothec to be registered against the property, as a guarantee for the loan, would be [TRANSLATION] "a good and valid first hypothec".

Upon examining the titles, the appellant discovered that, on September 21, 1962, Paul Leclerc had acquired part of unsubdivided lot 1324. That deed was registered against the property on September 26, 1962. On February 14, 1964, the property was sold by Paul Leclerc to Paul Leclerc Inc., by a deed of sale registered on February 28, 1964. In July 1970, pursuant to a subdivision of the property, lot 1324-52, the specific property at issue, was registered in the name of Paul Leclerc Inc. On May 31, 1977, Paul Leclerc personally borrowed $30,000 from the Caisse populaire St-François d'Assise de Québec (the Caisse). This loan was guaranteed by a hypothec and by a giving in payment clause in case of default by the debtor. The deed of loan was registered against the property on June 1, 1977.

On January 22, 1980, both Paul Leclerc and Paul Leclerc Inc. made assignments in bankruptcy. Grégoire Bellavance, C.A., was named trustee of both bankrupt estates. While the trustee registered a notice of the bankruptcy of Paul Leclerc against lot 1324-52 on February 2, 1980, he did not do so on behalf of Paul Leclerc Inc. The Caisse, upon the default of Paul Leclerc on his loan and pursuant to the giving in payment clause in the deed of loan, commenced forfeiture proceedings in Quebec Superior Court on April 29, 1980. Said proceedings were taken both against Grégoire Bellavance in his capacity as trustee of the bankrupt estate of Paul Leclerc and against Paul Leclerc Inc. On May 1, 1980, the proceedings were served on the trustee of the bankrupt estate of Paul Leclerc, and on May 5, 1980 on Paul Leclerc personally at his place of residence as well as on Paul Leclerc Inc. at its business office. The writ was issued against:

> [TRANSLATION] GREGOIRE BELLAVANCE, in his capacity as trustee in the bankruptcy of Paul Leclerc, practising at 425 Charest Boulevard East, Québec, Que. G1K 3H9 -and- PAUL LECLERC INC., domiciled and residing at 25 Place Champéry, Notre-Dame des Laurentides, Que. G0A 2S0/Defendants -and- REGISTRAR OF QUEBEC REGISTRATION DIVISION, Québec Registry Office, 116 St-Pierre, Québec, Que. G1K 4A7.

As none of the defendants appeared to defend the action, the Caisse obtained judgment in its favour by default before the special prothonotary on July 17, 1980, granting it title to the property and ordering Paul Leclerc and Paul Leclerc Inc. to vacate the premises within eight days. The judgment concluded as follows:

> [TRANSLATION] DECLARES the plaintiff [the Caisse] to be

> absolute owner of the immoveable property so described, retroactive to June 1, 1977. . .
>
> DECLARES that neither the defendants nor the mis-en-cause nor any third party has any right in or against this immoveable property . . .
>
> ORDERS the mis-en-cause Registrar to receive and register this judgment to be a good and valid title to the above-described immoveable property in favour of the plaintiff and to strike out any hypothecs, privileges, notices or other charges registered against the above-described immoveable property after the plaintiff's hypothecary deed P-1 of June 1, 1977.

This judgment was duly registered against the property on August 20, 1980. On June 18, 1981, the Caisse sold the property to the wife of the mis en cause and, on February 17, 1984, the mis en cause purchased the property from his wife.

The mis en cause later offered the property for sale and, as earlier stated, the respondents signed an offer to purchase said property on April 7, 1987. In order to obtain their loan from the bank to finance the purchase, the matter was referred to the appellant for a title search. The notary's mandate was threefold: first, to assure the parties that the vendor held proper title to the property; second, to assure the bank that its loan would be guaranteed by [TRANSLATION] "a good and valid first hypothec" on the property; and finally, if all was in order, to prepare the deed of sale.

The notary discovered that, at the time Paul Leclerc borrowed from the Caisse and entered into a contract of loan with a giving in payment clause, he was not the registered owner of the property: Paul Leclerc Inc. was. In addition, the notary realized that, while a notice of

the bankruptcy of Paul Leclerc had been registered by the trustee against the property in question, no notice of the bankruptcy of Paul Leclerc Inc. was registered. However, a 60-day notice, under art. 1040a *C.C.L.C.*, had been given to both Paul Leclerc and Paul Leclerc Inc. by the Caisse before it exercised its rights under the giving in payment clause. The notary gave an opinion to his clients to the effect that the judgment obtained by the Caisse did not go so far as to cure the defect he had detected in the vendor's title to the property. He did so by telephone, on or around April 30, 1987. Pursuant to that advice, the respondents' broker wrote to the mis en cause asking him to correct, if possible, the title defect noted by the appellant. On May 13, 1987, the mise en cause's attorney answered that the judgment registered August 20, 1980 had perfected the title, and had acquired the authority of *res judicata*. The respondents then sought a second opinion and, on May 19, consulted another notary, Me Giroux, who expressed the same concerns as the appellant. In his opinion, the title was vitiated and no bank would grant a loan secured by such title since the hypothec granted by Paul Leclerc to the Caisse was granted by a person who was not the owner of the property at the time.

On May 22, 1987, the appellant notary gave a written opinion to Courtier Royal, the respondents' broker. The letter read as follows:

> [TRANSLATION] Further to your letter of May 21 last, I confirm that I cannot recommend to my clients Mr. Jacques Roberge and Mrs. Johanne Beaupré that they pass title as arranged, since I consider that the titles of Mr. Jean-Pierre Bolduc, the promissor-vendor, are imperfect.
>
> There is a defect in the chain of title relating to the judgment to declare ownership rendered by the Superior Court in favour of

> the Caisse populaire de St-François d'Assise de Québec and registered at Québec as No. 992725. This judgment declared the said Caisse owner under the giving in payment clause included in the hypothecary deed registered at Québec as No. 874806. As the hypothecary deed in question was granted by a person other than the registered owner, this hypothec was null and void and the judgment could not give more than the hypothec was worth.
>
> Finally, I similarly could not recommend that the lender in the matter, namely the National Bank of Canada, or any other lender, make a hypothecary loan, for the reasons stated above.
>
> It would accordingly be advisable for the promissor-vendor to perfect his title as the latter has undertaken to do in the promise of purchase made in this matter, in paragraph "3.1". . . My clients will have to decide what their position will be.
>
> [Emphasis added.]

The next day, the respondents notified the mis en cause that, under the circumstances, they would not purchase the property. They instructed their attorney to take action against the mis en cause. On June 17, the mis en cause was put in default and, on July 6, the respondents instituted proceedings in Provincial Court against the mis en cause claiming damages in the amount of $4,910. On August 17, the mis en cause successfully moved for the case to be evoked to the Superior Court since the title to an immoveable was challenged by the contestation (arts. 32 and 155 *C.C.P.*). In his subsequent defence to the action before the Superior Court, the mis en cause counterclaimed for damages of $15,100, allegedly suffered on account of the respondents' refusal to purchase the property. In answer to the counterclaim, the respondents exercised a recourse in warranty against the appellant on the basis that it was on his advice that they refused to purchase the property.

Judgments

Superior Court (Mignault J.)

The Superior Court dismissed the respondents' action and allowed both the mis en cause's counterclaim and the respondents' recourse in warranty against the appellant.

At trial, both the appellant and notary Giroux testified as to their respective concurring opinions regarding the defect in the title to the property. In addition, Me Yves Demers, a well-known notary in practice for 28 years and a professor at the Faculty of Law, Laval University, was called by the appellant as an expert in the field, a qualification which the trial judge recognized on the issue of notarial practice. Me Demers also agreed that the appellant notary acted in a reasonable and prudent manner in the circumstances of the case. The respondents called no evidence on that particular aspect of the case.

The trial judge rejected the appellant's view on the basis that it disregarded the authority of *res judicata* and held that:

> [TRANSLATION] The effect of the contentious judgment of July 17, 1980 was therefore definitive; it had the authority of *res judicata*, conferring good and valid title on the Caisse populaire St-François d'Assise, despite the fact that the hypothec granted pursuant to the deed of obligation of May 31, 1977 was granted by Paul Leclerc and the owner at that time was Paul Leclerc Inc.

Having found that the mis en cause's title was valid, the trial judge expressed the view that the appellant committed an error of law and that the respondents were not justified in refusing to sign the deed of sale. The trial judge then determined whether the appellant's error of law was the *causa causans* of the damages suffered by the respondents:

> [TRANSLATION] It is true that the decision regarding purchase of the property was exclusively a matter for the plaintiffs [respondents]. In this connection it should be pointed out that the latter, who had no expert knowledge in the area, had no alternative but to follow the recommendation of the notary whose professional services they had retained. As the title of the defendant [mis-en-cause] was for the reasons we gave earlier good and valid, the defendant in warranty [the appellant] was not justified in making the recommendation to them that he did.

Regarding the issue of fault, the trial judge concluded:

> [TRANSLATION] . . . the defendant in warranty concluded that the hypothec granted by Paul Leclerc was null and void, and that accordingly the judgment was as well, since in reality he gave the judgment no more value than the hypothec, which was a mistaken conclusion of law in the circumstances. Mr. Dorion could not be unaware of the provisions of the first paragraph of art. 1241 *C.C.*[*L.C.*]. In performing his duty as legal counsel for the plaintiffs [the respondents], he should have taken his research further and considered whether the judgment of July 17, 1980 had any effect in law, rather than simply concluding that the judgment was vitiated merely by the fact that the hypothec granted by Paul Leclerc to the Caisse populaire was null and void.

He made the following comments as regards common notarial practice:

> [TRANSLATION] . . . we cannot share the opinion of the notary Demers when he says that the notary Dorion "acted properly, prudently and in the best possible way in the circumstances".

Mignault J. thus dismissed the respondents' action, allowed the mis en cause's counterclaim and ordered the respondents to pay the mis en cause $3,500 in damages, the amount agreed upon by the parties, with interest, the additional indemnity provided for in art. 1078.1 *C.C.L.C.* and costs of a fourth class action. The recourse in warranty was allowed with costs and the appellant, defendant in warranty, was ordered to indemnify respondents in the amount of their condemnation in the mis en cause's counterclaim.

Court of Appeal

The appellant sought leave to appeal to the Quebec Court of Appeal. Leave was refused under art. 26(4) *C.C.P.* for the following reason:

> [TRANSLATION] WHEREAS the appellant has not shown that the point at issue was one which should be submitted to the Court of Appeal . . .

Leave to appeal to this Court was granted on February 2, 1989, [1989] 2 S.C.R. viii, on condition that appellant assume the costs of the appeal in any event.

Issues and Arguments

In considering the issue of professional liability, there are several questions which arise in the context of this case. Was the appellant notary in error? If so, did such error constitute a fault engaging his liability? The examination of these questions will entail a discussion of the nature of professional liability, the notion of *res judicata* and its incidence in the context of title searches, the distinction between error and fault, the significance of expert testimony as it relates to legal questions, causation, and finally, the question of costs. On each of these issues the parties submitted arguments.

The appellant maintains that he committed no error of law. In his view, the hypothec was void *ab initio* according to art. 2037 *C.C.L.C.* and the nullity was absolute. Consequently, the hypothecary obligation was null and the judgment on the giving in payment clause did not confer ownership on the Caisse. There was no *res judicata* on the right of ownership of the Caisse since there was neither identity of object nor identity of cause, the judgment not bearing upon the validity of the hypothec. Furthermore, the trustee in bankruptcy of Paul Leclerc Inc. was not called in the proceedings, and thus could later, acting on behalf of the creditors of the bankrupt estate, contest the validity of the Caisse's ownership.

The appellant argues that the judgment of the Superior Court ignores the issue of fault completely. By failing to consider the behaviour of the prudent and reasonable notary in similar circumstances, the trial judge confused the notions of fault and error of law, transforming an

obligation of diligence into an obligation of result. The burden of proof was on the respondents to establish the fault of the appellant, and they brought no evidence to support this claim.

As to the role of expert testimony, while, according to the appellant, the judge must decide questions of law, where professional liability is in issue, experts can assist the court in determining how a reasonable professional would have acted in a given situation. In the appellant's view, the trial judge did not assess the expert evidence regarding "reasonable" notarial practice, but instead rejected it on the ground that he disagreed with the expert's opinion on the question of law. The appellant relies on *Central Trust Co. v. Rafuse* [1986] 2 S.C.R. 147, claiming that expert testimony was considered in the determination of a lawyer's negligence, and thus argues that courts should allow expert testimony in matters of notarial liability.

The respondents, for their part, submit that there was no defect of title. Consequently, the advice of the appellant notary to the contrary was erroneous. They plead in substance the following.

First, the respondents say that the presumption of *res judicata*, as set forth in art. 1241 *C.C.L.C.*, is irrebuttable. Jurisprudence, doctrine, as well as the codal provision itself all recognize the final and definite effect of a judgment rendered in contentious matters by a civil tribunal. The Superior Court's judgment of July 17, 1980, registered against the property in question on August 20, 1980, acquired the authority of *res*

judicata, as the judgment was not appealed. The mis en cause therefore acquired perfect title when he became the owner of the said property.

In the action on the giving in payment clause, the respondents maintain that all the interested parties were called into the proceedings, because the owner of the property, Paul Leclerc Inc., was designated as a party and the action was served on the company. The trustee of both bankrupt estates was served and made a party to the suit, albeit as a trustee to the personal bankruptcy of Paul Leclerc. The conclusions of the Superior Court on the action in giving in payment were, in the respondents' view, clear and unambiguous, declaring the Caisse sole owner of the property and radiating all charges against the immoveable property retroactively to the date of the deed of loan. The failure of the parties to the proceedings to raise the matter of ownership of the property at that time precluded them from subsequently raising the same issue. The judgment is consequently *res judicata* between the parties.

According to the respondents, the appellant's error of law in ignoring the effect of *res judicata* was so fundamental that it constituted a fault. No matter the common notarial practice at the time, the appellant, in the circumstances, did not act as a reasonable and diligent notary. In any event, the evidence of the expert notary, as well as that of notary Giroux, should not have been admitted. Under the guise of discussing common notarial practice, these witnesses' actual purpose was to accredit the legal opinion of the appellant. It is the function of the judge, not experts, to decide questions of law.

The respondents' refusal to pass title and the damages suffered as a result of this refusal were a logical, direct and immediate consequence of the fault of the appellant. Since, in the respondents' opinion, there was no error on the part of the trial judge, the appeal should be dismissed.

Analysis

At the outset, a preliminary question arose as to the jurisdiction of this Court to hear the appeal from both the Superior Court judgment and the Court of Appeal judgment refusing leave to appeal of the lower court decision. The parties urged us to decide the merits of the case, particularly since leave was granted by this Court not only from the Court of Appeal's judgment, but also [TRANSLATION] "if this Court sees fit, from the Superior Court's decision rendered on February 9, 1988".

Any doubt on the issue of jurisdiction is, in my view, resolved by *MacDonald v. City of Montreal*, [1986] 1 S.C.R. 460, where, as here, the Court of Appeal refused to grant leave to appeal. Although dissenting on the constitutional issue involved, Wilson J. spoke on the issue of jurisdiction at p. 508:

> Under s. 41(1) of the *Supreme Court Act* [now s. 40(1)] this Court retains the discretionary power to interfere with any final or other judgment of the intermediate appellate courts which raises an issue of national importance. This discretion is itself broadly phrased so as to include any case with respect to which ". . . the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and

> fact involved in such question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it. . . ." While a certain amount of deference to the undoubted competence of intermediate appellate courts to control their own leave granting process is called for, it is equally evident that this Court's jurisdiction to exercise its own discretion in intervening in such decisions is not statutorily confined.

This being said, before delving into the particular question of whether the appellant notary did err in law, it may be appropriate to situate the debate within the general context in which it arises, i.e. professional liability.

Professional Liability

Professional liability is governed by the principles of ordinary civil liability, i.e. the theory of fault. Mazeaud and Tunc, *Traité théorique et pratique de la responsabilité civile délictuelle et contractuelle* (6th ed. 1965), t. I, at No. 507, p. 574, express this clearly:

> [TRANSLATION] The same rules are always applied by the Court of Cassation in the particular area of *professional fault* . .
>
> This is fault committed by an individual in practising his profession, such as carelessness by a physician or surgeon or negligence by a government officer. [Emphasis in original.]

Similarly, Nadeau and Nadeau, *Traité pratique de la responsabilité civile délictuelle* (1971), at No. 269, p. 279:

> [TRANSLATION] **General principle.** – The study of professional liability falls under ordinary civil liability.

Mayrand, "Permis d'opérer et clause d'exonération" (1953), 31 *Can. Bar Rev.* 150, discusses professional liability in the medical context at p. 154:

> [TRANSLATION] We prefer to say, however, that the theory of fault remains the same in the case of physicians' liability . . .

(Also in the context of medical liability, see Professor Paul-André Crépeau, "La responsabilité civile du médecin" (1977), 8 *R.D.U.S.* 25, at p. 28.)

With particular regard to notarial liability, Me Claude Séguin, "La responsabilité civile du notaire, officier public et conseiller juridique", in Meredith Memorial Lectures 1983-84, *Professional Responsibility in Civil Law and Common Law* (1985), is of the same view, at pp. 227-28.

> [TRANSLATION] Though neither the authors nor the courts agree on the general principles governing civil liability, I think I can say that the notary's civil liability derives from the same basic principles as the liability of any other person: it is either contractual or it is delictual or quasi-delictual.

In *X. v. Mellen*, [1957] Que. Q.B. 389, the leading case on professional liability in civil law, Bissonnette J.A. observes, at p. 413:

> [TRANSLATION] The general rule therefore is that professional fault is fault like any other and is to be determined *in abstracto*.

Lajoie J.A., in *Hôpital général de la région de l'amiante Inc. v. Perron,* [1979] C.A. 567, expresses the same view, at p. 574:

> [TRANSLATION] Since the promulgation of the *Civil Code* the latter has been the legal basis for the liability of the physician or hospital: art. 1053 provides that "Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another" and art. 1065 that "Every obligation renders the debtor liable in damages in case of a breach of it on his part".

(See also the cases referred to by Crépeau, op. cit. at p. 29, note 12.)

A professional will therefore not incur liability unless he or she acts in a manner inconsistent with that of a reasonable professional. Mazeaud and Tunc, op. cit., at No. 705, pp. 812-13, express that view:

> [TRANSLATION] The same reasons of social security that make it necessary to require an individual to devote to the performance of his obligation "all the care of a reasonable person" must make it necessary to require a professional to devote to the performance of his obligation "all the care of a good professional", or more precisely, all the care of a good professional in his specialty. [References omitted.]

Rabut, *De la notion de faute en droit privé* (1949), at No. 89, p. 107, is of the same opinion:

> [TRANSLATION] When the defendant to an action in liability is a professional, therefore, we must look at the conduct of persons in the same profession practising the same specialty . . .

(See also Mayrand, op. cit., at p. 154; Crépeau, op. cit., at p. 29; and Séguin, op. cit., at p. 228.)

Quebec jurisprudence is no less definite on this point. In *Legault v. Thiffault,* C.A. Montréal, No. 09-000-488-472, August 4, 1976 (summarized in [1976] C.A. 729), Lajoie J.A. writes, at p. 8:

> [TRANSLATION] Notaries, who are professionals, have an obligation to give their clients attentive, diligent and competent service, to give them sensible and judicious advice and counsel so far as this can reasonably be expected from a legal practitioner of ordinary competence. If they fail in these duties, they commit a fault making them liable for the damage which is the immediate and direct result thereof.

In the recent case of *Plante v. Lafleur,* [1990] R.R.A. 290, Baudouin J.A. held that a notary was at fault because, at p. 292:

> [TRANSLATION] It seems to me, therefore, that a reasonably prudent and diligent notary in the circumstances of this case would have kept the cheque . . .

The obligation generally undertaken by professionals must be characterized as one of diligence, as the term is discussed by Professor Crépeau, *L'intensité de l'obligation juridique ou des obligations de diligence, de résultat et de garantie* (1989), pp. 7, 11 and 12:

> [TRANSLATION] **Obligation of diligence**
>
> The obligation of diligence is that which requires the person who owes it to demonstrate prudence and skill in arriving at the result desired by the parties. This obligation is equally strong in contractual and in extra-contractual matters.

Obligation of result

> The obligation of result is that in which the person who owes it is required to obtain a specific and given result. The result in this case is not, as in the obligation of diligence, that contemplated or desired, but a promised or imposed result. Here the result is said to be *in obligatione.*

Obligation of warranty

> The obligation of warranty is that in which the person who owes it must certainly produce a specific result, but with the qualification that the person to whom it is owed will be entitled to performance of the obligation whatever happens, even in the event of a fortuitous event occurring. [References omitted.]

There seems to be unanimity, both in jurisprudence and doctrine, on the intensity of professionals' obligations to their clients. Me Patrick Molinari, "La responsabilité civile de l'avocat" (1977), 37 *R. du B.* 275, observes that legal liability is generally based on an obligation of diligence, at p. 282:

> [TRANSLATION] However, is an attorney required to guarantee that what he does will be successful? In no way should an attorney be held to have assumed an obligation of result. For example, he cannot be required to win a trial.

Me Gérald Tremblay, "La responsabilité professionnelle de l'avocat-conseil", in Meredith Memorial Lectures 1983-84, op. cit., at p. 187, puts it this way:

> [TRANSLATION] It is generally agreed that an attorney assumes only obligations of means with respect to his client. [References omitted.]

In the context of medical liability, Vallerand J.A., in *Côté v. Drolet*, [1986] R.L. 236 (C.A.), makes this point succinctly, at p. 247:

> [TRANSLATION] Since I think it is now accepted, so that references need not be given, that a physician has an obligation of means but not of result . . . [Emphasis in original text.]

(See also Crépeau, *La responsabilité civile du médecin et de l'établissement hospitalier* (1956), at p. 212; and Mayrand, op. cit., at p. 156.)

As Me Paul-Yvan Marquis, *La responsabilité civile du notaire officier public* (1977), points out at p. 27, the same standard also applies to notaries:

> [TRANSLATION] We emphasize that absolutely nothing would justify the imposition on a notary, for a breach of this duty [the duty to counsel], of greater liability than that imposed on members of the other professions. If it can be said as an argument in favour of excusing an attorney from liability that he is no more infallible than the judge trying the case, we do not see why this excuse should necessarily not apply to a notary. Otherwise, it is the very nature of the duty that must be changed: the notary's duty will no longer be to counsel but not to err. Such a conclusion is inconceivable. [References omitted.]

Me Marquis adds, at p. 177:

> [TRANSLATION] Obtaining a valid and authentic deed for the client is generally regarded as an obligation of result. [References omitted.]

Me Marquis in a later comment "La nature de la responsabilité civile du notaire, officier public" in *R.D. -- Pratique notariale -- Doctrine-*

- *Document 6* (1983), at No. 268, p. 159, would hold a notary to an obligation of diligence even with regard to the procuration of a valid and authentic act. Other commentators express the view that the intensity of this particular obligation should be one of result (see Mackay, "La garantie apportée par l'intervention du notaire dans les phases préliminaires à la conclusion de la vente", in *Rapports Canadiens Québec*, XIXè Congrès de l'Union internationale du notariat latin (1989), at p. 56; Crépeau, *L'intensité de l'obligation juridique*, op. cit., at note 56-11, pp. 101-2). Nonetheless, the intensity of a notary's obligation to procure an authentic act is not in issue in the present case.

From this brief overview, I conclude that, although there may be cases where the obligation might be one of result, which is not the case here, in principle, notaries in Quebec owe their clients an obligation of diligence: to borrow the words of Lajoie J.A. in *Legault, supra,* they have the obligation to render to their client [TRANSLATION] "attentive, diligent and competent service". That obligation may have its source in art. 1053 *C.C.L.C.* or in contract. Although both liabilities are based on the same criteria of fault, it is interesting to briefly address the matter.

In France, the particular issue is in debate. The situation of notaries in France is best described by Jeanne de Poulpiquet, in *La responsabilité civile et disciplinaire des notaires* (1974), at p. 15:

> [TRANSLATION] In a word, their [notaries'] legal definition is the same now as that contained in the law of 25 Ventôse An XI: notaries are public officers responsible for recording the parties' agreements in legal language, while giving them evidentiary and

> executory effect. The government delegates part of its authority to them for this purpose, and now as in the past they are the "special witnesses" whose task is to guarantee the reliability of legal documents by their official status and their competence. Accordingly, they have privileges and duties beyond those of the ordinary person: they have a monopoly position with regard to the most important documents; a law of April 28, 1816 restored the patrimoniality of their positions and gave them the right to nominate their successors for approval by the Keeper of the Seals. In return for this, however, they are under the direct authority of the Executive: they are appointed by the Minister of Justice and, after this appointment, the chancellery, through its attorneys general, attorneys and deputies, exercises ongoing supervision over them. Their pay is not unlimited but is determined by law. They cannot refuse to act. [Emphasis added.] [References omitted.]

Therefore, even though French notaries may have their own practices and clients, the restrictions imposed by the state have resulted in a great deal of debate as to whether notarial liability is grounded in contract or in delict.

De Poulpiquet criticizes the contractual approach, particularly since the notary in France, as a public official, has no choice but to accept those who seek his or her services. At page 164, she comments:

> [TRANSLATION] It will not suffice that there are two parties present, one providing a service and the other paying for it, to establish an actual contract. It is essential for there to be a meeting of the minds intended to create obligations, and that those obligations should largely result from the individuals' will and intention. [References omitted.]

De Poulpiquet, therefore, opts for delictual liability of notaries while others, such as Decorps, *La responsabilité du notaire en matière d'urbanisme* (thèse 1970), at p. 309, propose a contractual basis of liability:

> [TRANSLATION] The four conditions for validity of a contract required by art. 1108 of the *Civil Code* appear to be met: two parties, the client and his notary, are present. The client is seeking the service provided by the notary and the latter agrees to perform it. The contract is concluded between two legally competent parties and has an object, the preparation of an authentic deed, and a cause, for the client the performance of a given operation and for the notary the collection of fees . . .

In Quebec, unless employed by the government, which may warrant different considerations, notaries, as well as lawyers, are generally engaged in private practice. They are consulted by the public for advice in their particular field of expertise. While a notary may incur delictual liability for a fault generated outside the contractual sphere, the relationship between a notary and his client is generally of a contractual nature.

The obligations that a notary may undertake in a particular case are diverse. As Me Claude Fabien notes, in "Les règles du mandat", *R.D. -- Mandat -- Doctrine -- Document 1* (1986), at No. 48, p. 88:

> [TRANSLATION] The notary performs various functions, including those of public officer, legal counsel and mandatary. Though these may coexist, they should not be confused.

The contract in the present case imposed a specific obligation on the notary, one agreed to by both parties. The obligation is described at p. 1 of the appellant's factum as follows:

> [TRANSLATION] . . . the respondents . . . gave the appellant notary the task of searching the title and preparing the deed of purchase. As the prospective purchasers had obtained a loan from the National Bank of Canada, the notary also had to report on his title search to the lending institution and guarantee the latter "a good and valid first hypothec".

The contractual mandate to search title is one component of a notary's "duty to counsel" his or her clients (Marquis, *La responsabilité du notaire officier public*, op. cit., at p. 60). This duty is well described by Marquis, at p. 32:

> [TRANSLATION] The duty to counsel may be defined as the moral and legal duty imposed on a notary, a public officer, to inform the parties according to their respective needs and the particular circumstances of each case as to the nature and the legal, and sometimes even economic, consequences of their deeds and agreements, as well as the formalities required to ensure that the latter are valid and effective.

(See also Nadeau and Nadeau, op. cit., at No. 287, p. 297.)

The distinction between contractual and delictual liability, which may be of considerable importance in some instances, is of no practical consequence in the present case since both delictual and contractual liability are grounded on the same general principles concerning fault.

It is against these principles governing professional liability that the liability of the appellant notary must be assessed. Given that the appellant had a contractual obligation of diligence toward the respondents, did he fulfill that obligation? Was the notary at fault?

The fault alleged against the appellant notary stems from an error of law which, according to the respondents, the notary made when he gave professional advice to the respondents, particularly in ignoring the authority of *res judicata* as regards the judgment obtained by the Caisse and its effect on the vendor's title to the property in question. It is therefore necessary, as a first step, to determine whether such judgment acquired the authority of *res judicata.*

Res judicata

In order to make this determination, an examination of the nature and conditions of *res judicata* and its application to the facts of the case must be undertaken.

A) *Nature*

Article 1241 *C.C.L.C.* articulates the principle of *res judicata*:

> **1241.** The authority of a final judgment (*res judicata)* is a presumption *juris et de jure*; it applies only to that which has been the object of the judgment, and when the demand is founded on the same cause, is between the same parties acting in the same qualities, and is for the same thing as in the action adjudged upon.

The first Report of the Commissioners for the codification of the laws of Lower Canada relating to civil matters, cites, at p. 131, as the source of art. 1241 *C.C.L.C.*, art. 1351 of the Code Napoléon, which reads:

> [TRANSLATION] 1351. The faith due to *res judicata* only extends to what forms part of the judgment. The thing sued for must be the same; the action must be based on the same cause; the action must be between the same parties and brought by the same parties against the same parties in the same capacity.

Pothier, in *Oeuvres de Pothier* (1980), t. 2, at No. 885, p. 469, explains:

> [TRANSLATION] The *authority of res judicata* means that everything contained in the judgment is presumed to be true and equitable; and as this presumption is *juris et de jure* any evidence to the contrary is excluded. [Emphasis in original.]

(To the same effect, see Aubry and Rau, *Droit civil français* (6th ed. 1958), t. 12, No. 769, p. 319; Laurent, *Principes de droit civil* (5th ed. 1893), t. 20, at No. 1, p. 5.)

The rationale for this irrebuttable legal presumption of validity of judgments is anchored in public social policy to ensure the security and stability of relations in society. The converse would be anarchy, with the possibility of endless trials and contradictory judgments.

Authors, both in France and in Quebec, express this view in more or less the same manner. Planiol and Ripert, in their *Traité pratique de droit civil français* (2nd ed. 1954), t. VII, at No. 1552, p. 1015, observe that:

> [TRANSLATION] In reality this legal presumption amounts to a rule of substance. The judgment once rendered will finally terminate the proceeding if the rights of appeal were exercised in vain or if no use was made of them. It is a social necessity of the first order that legal proceedings should not be started over

> and over again on the same matter. Stability in social relationships requires that decisions of the courts be observed in the same way as legislation.

Me Charles Chauveau, in his doctoral thesis, *De l'autorité de la chose jugée en matière civile* (1903), expands on the purpose of *res judicata*, at No. 1, p. 7:

> [TRANSLATION] Without a clearly defined supreme authority, society quickly degenerates into anarchy. Without the presumption of truth which the law confers on a certain class of judgments, the exercise of judicial authority would become an evil and lead to uncontrollable disorder; the rich would use the courts as instruments of persecution to continue renewing the same attacks on less well-off opponents, and far from being a source of protection and a refuge for the weak, the law would only aggravate their misery.

Nadeau and Ducharme, "La preuve en matières civiles et commerciales", in *Traité de Droit civil du Québec*, t. 9, 1965, hold a similar, albeit less dramatic view, at No. 552, p. 447:

> [TRANSLATION] But the real basis of the authority of *res judicata* lies much less in this legal presumption of truth than in a consideration of social utility. The purpose of the legislature has been to ensure that proceedings being perpetually started over again would not compromise the security and stability of social relationships, especially in view of the unavoidable fact of possible conflicts in judgments rendered in such multiple trials. The public interest requires that something which, to use the classic phrase, has become *res judicata* can no longer be questioned . . .

A necessary consequence of the irrebuttable presumption of the validity of judgments is that the authority of *res judicata* exists even when there is an error in the judgment. The *Code of Civil Procedure* expressly

provides for recourses to correct errors in a judgment (Book III, Remedies Against Judgments), which include appeals and the possibility of retraction of the judgment. If these remedies are not exercised, however, the judgment, by virtue of art. 1241 *C.C.L.C.* and the principles which underlie it, must necessarily have the authority of *res judicata*.

There is unanimity on this issue. Laurent, op. cit., discusses the effect of the principle of *res judicata* as regards judicial error, at No. 1, pp. 5-6:

> [TRANSLATION] A judge may undoubtedly be mistaken in fact or in law; but the parties are not allowed to prove such errors, as the law denies them a court action . . . Why, despite this possibility of error, and even in a case where authentic documents establish that the judge erred, does the law not allow a case that is *res judicata* to be reopened? The legislature has taken the possibility of error into account: to remedy the evil, it has provided two levels of jurisdiction, and an appellate judge may correct the errors which escaped the trial judge. However, when the remedies provided by law have been exhausted there must be an end to the proceedings; if they could still be re-started on the pretext of error, disputes would continue indefinitely and the world would be one huge legal proceeding.

Chauveau, op. cit., adds the following, at No. 36, p. 33:

> [TRANSLATION] What of judgments which are vitiated by intrinsic defects, of law or form, which do not, however, undermine their existence? . . . It is the responsibility of the party concerned to make use of these nullities at the proper time, using one of the remedies provided by law: allowing the matter to be reopened in such circumstances would be to undermine the very foundation of the whole theory on which the presumption of *res judicata* is based.

(See also Planiol and Ripert, op. cit., at No. 1554, p. 1017; Langelier, *Cours de droit civil de la Province de Québec* (1908), at p. 256; Lacoste, *De la chose jugée en matière civile, criminelle, disciplinaire et administrative* (3rd ed. 1914), at No. 128, p. 53; and Nadeau and Ducharme, op. cit., at No. 552, p. 447.)

In order for the principle of *res judicata* to apply, however, the strict conditions set out in art. 1241 *C.C.L.C.* must be met. They are two-fold: conditions pertaining to the judgment itself and conditions pertaining to the action. I shall examine these in turn.

B) *Conditions*

1. Conditions Pertaining to the Judgment

As far as the judgment is concerned, to constitute *res judicata*, it must conform to the following criteria, developed by both doctrine and jurisprudence: the court must have jurisdiction over the matter, the judgment must be definitive, and it must have been rendered in a contentious matter.

(i) *Jurisdiction*

Regarding jurisdiction, Planiol and Ripert, op. cit., at No. 1554, pp. 1017-18, observe that, in France:

> [TRANSLATION] It [*res judicata*] is applied only to judgments... rendered by French courts in civil or criminal matters, or to judgments between opposing parties rendered by foreign courts as soon as they are declared executory by a French court, or to arbitral awards, if according to precedent they have obtained an *exequatur* order. [References omitted.]

Langelier, op. cit., at p. 256, notes that the same rule applies in Quebec:

> [TRANSLATION] What are the judgments that can have the authority of *res judicata*? They are exclusively judgments rendered by the courts of this province: those of foreign courts have no validity here.

According to Nadeau and Ducharme, op. cit., at No. 557, pp. 452-53:

> [TRANSLATION] Judgments that may have the force of *res judicata* must be those of courts of law forming part of our judicial system, whether exercising their jurisdiction at first instance or on appeal, both in the Court of Queen's Bench and in the Supreme Court of Canada. These courts may belong to the various levels of civil jurisdiction. Thus, a judgment rendered by the Magistrate's Court in a case involving damages has the authority of *res judicata* between the parties on the question of liability. [References omitted.]

(See also Professor Jean-Claude Royer, *La preuve civile* (1987), at No. 751, p. 277; and Professor Ducharme, *Précis de la preuve* (3rd ed. 1986), at No. 220, p. 106.)

The case law, as appears from *Tremblay v. D'Amours,* [1972] C.S. 144, is to the same effect. Lesage J., at pp. 144-45, notes:

> [TRANSLATION] Whereas *res judicata* is based on a principle of public order designed to prevent contradictory decisions by the courts on a disputed point between the same parties, and it is in no way significant whether the judgment which has the authority of *res judicata* was rendered by the Provincial Court or by the Superior Court . . .

(See Royer, op. cit., at No. 756, pp. 278-79, for his remarks that, in limited circumstances, art. 180 *C.C.P.* allows the authority of *res judicata* to operate when judgment is rendered "in any other province of Canada".)

Regarding the effect of decisions rendered in criminal matters, Ducharme, op. cit., at No. 221, p. 106, notes:

> [TRANSLATION] It is now well established in law [reference omitted] that judgments rendered by a court having criminal jurisdiction do not have the authority of *res judicata* in civil matters.

To constitute *res judicata*, then, the judgment must have been rendered by a Quebec court of competent civil jurisdiction, as that notion has developed in civil law. The hierarchy of the court which renders the decision is irrelevant.

(ii) *A "definitive" judgment*

The judgment must also be "definitive".

Pothier, op. cit., at No. 850, p. 452, sets forth this requirement:

> [TRANSLATION] For a judgment to have the authority of *res judicata*, and even for it to be known as a judgment, it must be a definitive judgment containing either an order or a dismissal of the action.

The nature of a definitive judgment is also discussed by Mignault, *Le droit civil canadien* (1902), t. 6, at pp. 101-2:

> [TRANSLATION] *Judgments having authority of res judicata.*
>
> (2) Definitive judgments, and by this is not necessarily meant a final judgment, to the exclusion of any interlocutory judgment. Certain interlocutory judgments rule on the rights of the parties and decide the merits beforehand, and it is these very judgments which can be appealed without awaiting the final judgment . . .

Nadeau and Ducharme, op. cit., add, at No. 560, p. 456:

> [TRANSLATION] They [definitive judgments] decide the issue joined, in whole or in part, by ruling in favour of one or other of the parties. [References omitted.]

(See also Ducharme, op. cit., at No. 227, p. 109; Royer, op. cit., at Nos. 770-75, pp. 283-85.)

Even *ex parte* and default judgments can be "definitive", since they arrive at a conclusion and decide the case. Nadeau, in "L'autorité de la chose jugée" (1963), 9 *McGill L.J.* 102 sets out this proposition at p. 107:

> [TRANSLATION] They [definitive judgments] may have been rendered after argument and counter-argument or even by default, provided the opposing party has been served . . .

Royer, op. cit, asserts, at No. 770, p. 284:

> [TRANSLATION] It [a definitive judgment] may also be rendered by default where the party has failed to appear or make submissions, if the defendant has been duly served.

(See also Nadeau and Ducharme, op. cit. at No. 560, pp. 455-56; Chauveau, op. cit., at No. 49, p. 42.)

I would also refer to the decision of the Quebec Court of Appeal in *Markel Insurance Co. of Canada v. Travelers du Canada* [1986] R.D.J. 516. At page 519, the court says:

> [TRANSLATION] Whereas in applying the rules of *res judicata*, even a judgment rendered by default or *ex parte* has the same definitive effect as if it had been rendered following argument and counter-argument;

(See also the cases cited by Royer, op. cit., at pp. 284-85, and his corresponding notes 65-76.)

(iii) *Contentious Matters*

Finally, to acquire the authority of *res judicata*, the judgment must be rendered in a contentious matter.

The notion that the authority of *res judicata* applies only in

contentious matters has been discussed by Aubry and Rau, op. cit., at p. 320, in these terms:

> [TRANSLATION] But only decisions rendered in *contentious matters* have the authority of *res judicata.* [Emphasis in original.]

(See also Plainiol and Ripert, op. cit., at No. 1554, p. 1017.)

Mignault, op. cit., at pp. 101-2 sets out the same requirement in the Quebec context:

> [TRANSLATION] *Judgments which have the authority of res judicata.*
>
> (1) Judgments in contentious matters. This is not the case with judgments in amicable matters, which are deeds rather than judgments. [References omitted.]

Ducharme, op. cit., discusses the term "contentious", at No. 226, p. 109:

> [TRANSLATION] A judgment in a contentious matter is one in which a judge decides a point disputed by two or more opponents.

(See also Nadeau and Ducharme, op. cit., at No. 559, p. 455.)

In summary, then, a definitive judgment rendered by a court of competent jurisdiction in contentious matters will acquire the authority of *res judicata*, provided that the "three identities" set out in art. 1241 *C.C.L.C.* are respected. I will now examine these conditions more fully.

2. Conditions Pertaining to Identity

The question of *res judicata* usually arises in the context of either a defence to another action or a preliminary motion such as *lis pendens*. In the present instance, however, there is only one action and the question to decide is whether the judgment rendered in favour of the Caisse, as regards the immoveable property here in debate, has acquired the authority of *res judicata vis-à-vis* subsequent purchasers of the same property. The principles, however, are the same in all such situations.

The triple identity to which art. 1241 *C.C.L.C.* refers, the identity of parties, object, and cause, has been the subject of much doctrine and jurisprudence, which I will now discuss.

(i) *Identity of Parties*

The text of art. 1241 *C.C.L.C.* is explicit: the presumption of *res judicata* applies only when the demand "is between the same parties acting in the same qualities", upon which Pothier, op. cit., at No. 899, p. 476, elaborates as follows:

> [TRANSLATION] *Res judicata* applies only to the parties in respect of whom the judgment was rendered: it confers no right either on third parties or on foreign third parties.

Nadeau and Ducharme, op. cit., at No. 571, p. 470, extrapolate:

> [TRANSLATION] *Res judicata* is relative and applies only to persons who were parties to the first suit, and so were heard, or had an opportunity of being heard, on the right at issue.
>
> It does not apply to third parties who may exercise the third party opposition to judgment . . . if their interests are affected by the judgment rendered in a case in which neither they nor those representing them were involved. [References omitted.]

Those who are not parties to a judgment are therefore not bound by it. In *Irony v. Rosenberg*, [1974] C.A. 515, the respondent attempted to set aside a judgment on an action in giving in payment, rendered against his debtor, by lodging a third-party opposition. Bernier J.A. analyzes the effect of *res judicata* with regard to third parties, at p. 516:

> [TRANSLATION] The legal position on third party opposition is quite different [from recourses available to the parties in the action on the giving in payment clause]. This remedy is available to third parties against judgments which prejudice their rights. The *res judicata* presumption is not involved since the applicant was neither a party nor represented in the suit; the judgment so obtained cannot be set up against him if it affects his rights, as with regard to him it is *res inter alios acta.*
>
> That is why the third party objector's remedy is not subject to any time limit or formality regarding receipt.

Even though third parties can attack such a judgment, they must however, do this in a direct manner, not through a collateral attack in other proceedings. This is the subject of the recent decision of *Van*

Finance Ltd. v. Sogelong Inc., [1990] R.D.J. 233 (C.A.), where a judgment on an action in giving in payment had granted ownership of an immoveable property to one Sogelong Inc. Although the appellant third party did not oppose the judgment, in a later action against Sogelong Inc. it asked to be declared the owner of that same property. This would indirectly have had the effect of setting aside the judgment rendered on the action in giving in payment. Tyndale J.A. comments, at p. 236:

> Although the judgment of 1 February 1980 may not be, strictly speaking, chose jugée as against Appellant, because it was not a party, it nevertheless represents a total obstacle to Appellant's action as a judgment which retains its full force and effect unless and until set aside; it cannot be successfully attacked collaterally nor deprived of its effect in other proceedings even though its validity be there impugned.
>
> In *Wilson* v. *R.*, (1983) 2 S.C.R. 594, the principle is expressed in these terms:
>
> > "It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally - and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment. . . ."

This is not to say that the parties must be physically identical in both cases. It is the juridical identity of the parties that is required for the presumption of *res judicata* to apply, as Mignault, op. cit., contends, at p. 110:

> [TRANSLATION] And by identity of persons must be understood *legal* identity, not *physical* identity. [Emphasis in original.]

Nadeau and Ducharme, op. cit., at No. 573, p. 472, emphasize this distinction:

> [TRANSLATION] For *res judicata* there must be legal identity of the parties, not mere physical identity. The one may exist without the other. There is legal identity whenever one person represents another or is represented by him. [References omitted.]

(See also Langelier, op. cit., at p. 259; Royer, op. cit., at No. 784, p. 290.)

The same position holds true in jurisprudence. It is perhaps best set out by Bisson J.A. (now Chief Justice) in *Buchanan v. Commission des accidents du travail,* [1981] C.A. 325, at p. 327:

> [TRANSLATION] The capacity spoken of in art. 1241 C.C.[L.C.] is legal capacity, as opposed to physical identity. For example, the same physical person may have acted in his personal capacity in a case and the legal solution to that case will not have the authority of *res judicata* in an identical case in which the person acts in some other legal capacity, for example as a trustee, curator and so on.

Juridical identity can arise by the mechanism of representation. Aubry and Rau, op. cit., discuss this notion at p. 337:

> [TRANSLATION] For the condition of the parties to be legally the same, they must first have personally been involved in the first suit or at least have been represented by those who were involved, and second, they must proceed in the new suit in the same capacity as in the first. [Emphasis added.]

There are several ways in which representation of parties, amounting to juridical identity, may occur. First, it is well recognized that universal successors and successors by general title represent their predecessors. As Nadeau and Ducharme, op. cit., assert, at No. 573, p. 473:

> [TRANSLATION] In general *res judicata* may be invoked by or against any universal successors and successors by general title, heirs, legatees or beneficiaries with respect to judgments rendered in cases in which their principals were involved. [References omitted.]

Second, there is no doubt that a successor by particular title is deemed to represent his or her predecessor, in so far that all judgments rendered against the latter, before the successor obtained title, are opposable to the successor as *res judicata.* This is the position of Chauveau, op. cit., at No. 104, pp. 95-96:

> [TRANSLATION] Successors by particular title, and under this heading we can group legatees, donees or purchasers by onerous title, are not bound to perform all the obligations of their principal. They succeed to the latter's rights over the item bequeathed, given or purchased, but with all the limitations that may be implicit in their principal's ownership and may make it more or less perfect. Judgments rendered before the purchase deed, and recognizing against the principal a right, privilege or servitude benefiting a third party, have the force of *res judicata* in respect of the beneficiary. [Emphasis added.]

Royer, op. cit., comments, at No. 785, p. 290:

> [TRANSLATION] Like contracts, judgments produce effects on heirs and legal representatives. A judgment rendered for or against a principal has the force of *res judicata* with respect to his universal beneficiary or beneficiary by general title. A

> beneficiary by particular title is also bound by a decision made before his right was acquired.

Pothier, op. cit., at No. 902, pp. 476-77, gives the following example:

> [TRANSLATION] . . . when you have given the action to claim a certain inheritance against Pierre, the judgment which dismissed your action against Pierre will give the person who bought that inheritance from Pierre the *res judicata* exception against the action to claim the inheritance, if you renew it against the purchaser, because in this respect he is deemed to be the same party as Pierre, whom he succeeded.

Representation can also arise between debtor and chirographic creditor, as discussed by Nadeau and Ducharme, op. cit., at No. 573, pp. 473-74:

> [TRANSLATION] There is legal identity by representation between:
>
> . . .
>
> a debtor and his chirographic creditors, unless the point at issue is whether the creditor has a privilege which he can exercise against other creditors. [References omitted.]

(See also Chauveau, op. cit., at No. 93, p. 86.) One should note here that such representation does not arise between a debtor and his or her hypothecary creditors. (See Aubry and Rau, op. cit., at pp. 340-41; Chauveau, op. cit., at No. 95, pp. 87-89; and Nadeau and Ducharme, op. cit., at No. 572, p. 475.)

The examples of representation by one party of another are too numerous to list or discuss here. Aubry and Rau, op. cit., at pp. 335-56, review them in detail and even such review is not necessarily exhaustive. Representation may depend on the facts of the particular case and the interests of the parties involved. Suffice it to say that, for the identity of parties insofar as it relates to *res judicata*, juridical identity is all that is required.

(ii) *Identity of Object*

What constitutes identity of object has been discussed both in France and in Quebec. Gérard Cornu and Jean Foyer, in *Procédure civile* (1958), at p. 410, define it as follows:

> [TRANSLATION] An object may therefore be new either because an identical right is claimed over a different thing or because a different right is claimed over the same thing.

Mignault, op. cit., at p. 105, offers the following illustration:

> [TRANSLATION] But what is the object of an action at law? Clearly it is the immediate legal benefit sought in bringing it, namely the right whose implementation is desired. Thus, A claims house C from B. The object of the claim is that A should be declared owner of the house. If this claim is rejected, A can no longer claim house C from B, but this judgment will not prevent him from claiming house D from the defendant. Similarly, A can claim the usufruct of house C from B, despite the dismissal of his action to claim ownership, because the object of the two actions is not the same.

According to Nadeau and Ducharme, op. cit., at No. 577, p. 478:

> [TRANSLATION] The object in an action is the right which the litigant is exercising; it is the immediate legal benefit he seeks to have the court recognize.

(See also Chauveau, op. cit., at No. 135, p. 130; and Royer, op. cit., at No. 794, p. 293.)

To determine, then, what is the "object" of an action, it is necessary to look both at the nature of the right sought and at the remedy or the purpose for which it is sought. This is not to say that there must be an identical remedy sought or object pursued. Mignault, op. cit., explains at p. 105:

> [TRANSLATION] . . . to complete the rule it must be said that it is not necessary for the two actions to seek precisely the same order: there will be *res judicata* once the object of the second action is implicitly included in the object of the first.

Nadeau and Ducharme, op. cit., at No. 577, p. 479, express a similar view:

> [TRANSLATION] It is therefore not necessary for the two actions to seek identical orders: it will suffice if the object of the second action is implicitly included in the object of the first . . . [References omitted.]

(See also Royer, op. cit., at No. 795, pp. 294-95.)

This position also finds support in jurisprudence. The leading case on the identity of object is *Pesant v. Langevin* (1926), 41 Que. K.B. 412, where Rivard J.A. states, at p. 421:

> [TRANSLATION] The object of an action is the benefit to be obtained in bringing it. Material identity, that is identity of the same physical thing, is not necessarily required. This perhaps forces the meaning of "object" somewhat, but an abstract identity of right is taken to be sufficient. "This identity of right exists not only when it is exactly the same right that is claimed over the same thing or over one of its parts, but also when the right which is the subject of the new action or the new exception, though not absolutely identical to that which was the subject of the first judgment, nevertheless forms a necessary part of it, is essentially included in it, as by being a subdivision or a necessary sequel or consequence". In other words, if two objects are so related that the two arguments carried on about them raise the same question regarding performance of the same obligation between the same parties, there is *res judicata.* [References omitted.]

This definition has been adopted in *Buchanan, supra,* at p. 328. (See also Royer, op. cit., at note 122, p. 293.)

A logical extension is that if the second action claims something which is similar or is a necessary consequence of the first action, then there is identity of object. Pothier, op. cit., at No. 892, p. 471, offers the following example:

> [TRANSLATION] . . . if I have succumbed in the action for a principal sum, I should not be entitled to claim interest on that sum, as such interest cannot be owed to me if the principal sum is not owed to me.

In order, therefore, to decide whether there is identity of object, the substance of the claim must be examined, not only its form.

(iii) *Identity of Cause*

Authors have tackled this difficult question in diverse ways and have arrived at a variety of definitions of "cause". This Court, in both in *Air Canada v. McDonnell Douglas Corp.*, [1989] 1 S.C.R. 1554, and *Wabasso Ltd. v. National Drying Machinery Co.*, [1981] 1 S.C.R. 578, analyzed the notion of "cause", albeit in the context of the expression "the whole cause of action", as required by art. 68(2) *C.C.P.*, which does not arise in the present case. Recently, my colleague Gonthier has canvassed the authorities concerning the question of "cause" extensively, in *Rocois Construction v. Québec Ready Mix,* [1990] 2 S.C.R. 440. Although his analysis arises in the context of a motion for *lis pendens*, as he states the requirements are the same in both instances: to conclude that there is either *lis pendens* or *res judicata*, there must be identity of parties, object, and cause.

In *Cargill Grain Co. v. Foundation Co. of Canada,* [1965] S.C.R. 594, Taschereau C.J., speaking for the Court, says, at p. 597:

> The rules that have to be applied in matters of *lis pendens* are the same that are to be applied in *res judicata* and they have to be applied here. These rules rest on the presumption of *res judicata* which is a bar to any further litigation on the same matter. This excludes the possibility of contradictory decisions on the same matter.

As Gonthier J., therefore, affirms in *Rocois, supra,* at p. 448:

> It has long been recognized that the preliminary exception of *lis pendens* is governed by the same principles as those that apply to the exception of *res judicata*: *Cloutier v. Traders Finance Corp.*, [1958] Que Q.B. 274*n*; *Cargill Grain Co., supra.*

In our context, my colleague's analysis of "cause" in *Rocois, supra,* is very pertinent to the present discussion and I propose to refer to it at length. After setting out the different approaches, Gonthier J. proposes the following test, at pp. 454-56:

> The definitions of "cause" proposed by the various authors fall along a spectrum ranging from the raw facts to the potentially applicable abstract rule of law. The phrases "principal . . . fact which is the direct . . . basis" for the right, "legal fact which gave rise to the right claimed", "origin of or principle giving rise to the right claimed" or "legal source of the obligation" are attempts to capture in words the elusive idea of "cause", on the bridge linking the body of facts to the legal rule in legal reasoning.
>
> First, it is clear that a body of facts cannot in itself constitute a cause of action. It is the legal characterization given to it which makes it, in certain cases, a source of obligations. A fact taken by itself apart from any notion of legal obligations has no meaning in itself and cannot be a cause; it only becomes a legal fact when it is characterized in accordance with some rule of law. The same body of facts may well be characterized in a number of ways and give rise to completely separate causes. For example, the same act may be characterized as murder in one case and civil fault in another. In *Essai sur l'autorité de la chose jugée en matière civile* [Paris, Soufflot, 1975], Daniel Tomasin expressed this very clearly. At page 201, he wrote:
>
> > [TRANSLATION] It may be that under one or more provisions certain facts can be characterized differently. If the characterization chosen to attain a result has been rejected in one judgment, can a party then seek to attain the same result in reliance on a different characterization? Judging from article 1351 C.C., the answer must be in the affirmative as there is an absence [of identity] of cause between the two actions.

> As a general rule, the same body of facts can thus give rise to as many causes of action as there are legal characterizations on which a proceeding can be based.
>
> It is equally clear that a rule of law removed from the factual situation cannot be a cause of action in itself. The rule of law gives rise to a cause of action when it is applied to a given factual situation; it is by the intellectual exercise of characterization, of the linking of the fact and the law, that the cause is revealed. It would certainly be an error to view a cause as a rule of law regardless of its application to the facts considered. Accordingly, the existence of two applicable rules of law as the basis of the plaintiff's rights does not lead directly to the conclusion that two causes exist.
>
> Of course, the existence of two rules of law applicable to a factual situation in practice gives rise to a duality of causes in the vast majority of cases, because separate rules generally require different legal characterizations. However, it is not the fact that there are two applicable rules which is conclusive in itself: it is the duality of legal characterizations which may result therefrom. When the essence of the legal characterization of the facts alleged is identical under either rule, it must follow that there is identity of cause. [Emphasis added.]

In my view, this is also the appropriate definition of "cause" for the purpose of determining the existence of *res judicata* in a particular instance.

However, such characterization will depend upon the choice one makes between a more general approach to "cause" and a narrower one, as Professor Henri Motulsky, in "Pour une délimitation plus précise de l'autorité de la chose jugée en matière civile", D. 1968. Chron., p. 1, has outlined, at No. 10, p. 3:

> [TRANSLATION] The practice has been to oppose cause . . . and means . . . but the difficulty is immediately apparent: the distinction can be made in two ways, depending on whether the cause is a *general or abstract concept* or, on the contrary, a

> *special or concrete* concept (we prefer to say *broad* and *narrow* concept). [Emphasis in original.] [References omitted.]

Cornu and Foyer, op. cit., provide examples of such characterization, at p. 410:

> [TRANSLATION] *Concrete or special concept of cause.* — The cause will be: in an action for nullity of a contract, fraud, violence, mistake, or minority and interdiction; in an action for divorce, serious injury, adultery and so on; in an action to establish natural paternity, notorious concubinage, fraudulent seduction, unambiguous admission and so on. Without more detailed discussion of the facts, it is hard to conceive of a more concrete cause.
>
> *Abstract or general concept of cause (clausula generalis).*— In an action for nullity of a contract the cause becomes a defect in consent or incapacity; in an action for divorce, the fact that marital life is intolerable; in an action to establish natural paternity, the natural paternity itself.

They conclude, at p. 411:

> [TRANSLATION] Leaving aside the special features of divorce, the concrete concept seems more rational. In the abstract concept, the cause may be confused with the object . . .

My colleague Gonthier J. in *Rocois, supra,* seems to have adopted the narrower approach to "cause", favoured by Cornu and Foyer, a position I agreed with in *Rocois.*

It is against this theoretical background that the facts in the present case must be evaluated.

C) *Application to the Facts of the Case*

There is no doubt that the judgment of the prothonotary, granting ownership to the Caisse, attained the jurisdictional requirements so that it could be considered as *res judicata*. It was rendered by a civil court, with jurisdiction in Quebec (i.e. the Superior Court). The prothonotary was well within his powers in granting the relief sought. Furthermore, the judgment was "definitive", even though rendered by default, since the proceedings were served on the parties. Moreover, an action on giving in payment is of a "contentious" nature. (See the reasons of O'Connor J. in *Reed (In re): Caisse populaire Desjardins de Côte St-Paul v. Diamond Co.*, [1981] C.S. 944, at p. 948.) The issue of whether there is *res judicata* will therefore ultimately rest on the assessment of whether there is identity of parties, object, and cause.

1. Identity of Parties

It is helpful to recall that the parties to the action on the giving in payment clause taken by the Caisse were all served. These parties were:

> [TRANSLATION] GRÉGOIRE BELLAVANCE, in his capacity as trustee in the bankruptcy of Paul Leclerc -and- Paul Leclerc Inc.

The appellant suggests that, even if the trustee in bankruptcy of Paul Leclerc Inc. was a party to the action, the creditors of the company could later contest the validity of the judgment, claiming that they have distinct juridical personalities from the trustee. There would thus be no

identity of parties. This argument must fail. A trustee in bankruptcy represents the creditors of the bankrupt. This is the very purpose of the *Bankruptcy Act*, which attempts to consolidate, in the hands of the trustee, proceedings as regards a bankrupt's estate. This was made clear by this Court in *Mercure v. A. Marquette & Fils Inc.*, [1977] 1 S.C.R. 547. De Grandpré J., in discussing the role and the powers of the trustee under the *Bankruptcy Act*, spoke for the Court, at p. 553:

> When the trustee is appointed he assumes responsibility in two areas:
>
> (a) he becomes the debtor's representative;
>
> (b) he becomes the representative of all the general creditors to the extent that he can even act on their behalf against the debtor.

It is the concept of representation that is crucial. As noted when discussing the theoretical framework, when someone is represented by a party to an action, he or she cannot later challenge the judgment. If the creditors are dissatisfied with the trustee's conduct, their recourse is generally an action under the *Bankruptcy Act*, rather than a challenge to the judgment, subject to certain exceptions not pertinent to the present discussion.

In this case, however, at the time the action in giving in payment was initiated by the Caisse, no notice was registered against the property in question by the trustee of his nomination as trustee of Paul Leclerc Inc. The appellant notary thus claims that since he could not have known that the trustee was the same for Paul Leclerc and Paul Leclerc

Inc., he had a legitimate concern that the creditors of Paul Leclerc Inc. might challenge the judgment. Even if the creditors were not "represented" by the trustee, however, they would still be bound by the judgment granting ownership of the property to the Caisse. The chirographic creditors cannot claim more rights than those of their debtor. If that debtor loses some of his patrimony (i.e. by the judgment granting ownership of the immoveable property to the Caisse), then these creditors simply have a decreased patrimony to share. They cannot challenge the validity of the judgment unless they prove that such judgment constituted an attempt to defraud the creditors. An oblique action is taken by a creditor, not in a personal capacity, but as a representative of the debtor, and thus faces the same issues of representation and *res judicata* (Royer, op. cit., at No. 787, p. 291). A Paulian action, on the other hand, must allege fraud and is taken in the name of the individual creditor exercising personal rights. Such action, although a possibility even after a judgment in giving in payment, is prescribed after one year of knowledge of the alleged fraud (art. 1040 *C.C.L.C.*).

This is not to say that third parties can never challenge judgments to which they were not parties and which affect their own rights, as was the situation in *Irony, supra.* If these parties were aware of the judgment in question, however, they must act with diligence in retraction of the judgment. Since, in the present case, the judgment was registered against the property years earlier, it would be difficult, if not impossible for the creditors to claim absence of notice. As for the third-party opposition, a case directly on point is *Riberdy v. Laroche,*

[1986] R.D.J. 510 (C.A.), where, as here, a judgment had been rendered by default on an action in giving in payment. A third party later attempted to set aside the judgment, claiming a right of ownership in the property in question. Monet J.A. (Beauregard and Vallerand JJ.A concurring), at pp. 511 and 513, deals with the issue of reasonable diligence:

> [TRANSLATION] This action is based *inter alia* on a hypothec granted by the defendant to the plaintiff on December 28, 1978, as security for an earlier loan, and seeks a declaration of ownership of the immoveable property in question . . . in accordance with application of a giving in payment clause in the event of default by the defendant . . .
>
> . . .
>
> It is well established that it was the appellant and not Hôtel Royal (La Tuque) Ltée which owned this immoveable property at the time that concerns us, and this ownership had been uninterrupted since March 29, 1972 . . .
>
> . . .
>
> There is no question that the appellant's interests are affected by the judgment he is seeking to appeal. Further, it is apparent that the appellant was not a party to the suit and no relief was sought against him.
>
> On the other hand, the decisions of this Court require that a third party opposition be brought with reasonable diligence, taking into account the circumstances and facts in each case.
>
> . . .
>
> The culminating point of the judicial phenomenon is the jurisdictional act which is the outcome of a litigious situation and which makes a state of law official. The social structure itself requires that this decision have a proper finality.
>
> . . .
>
> In the case at bar, the period of approximately one year that elapsed between learning of the judgment and of its effects on the appellant's interests is not reasonable, in light of the circumstances mentioned above. Without necessarily concluding that there was acquiescence, this situation is such that, to use the language of McCarthy J.A. in *Begama Ltd.* [Reid & Ferland,

> C.P.C. p. 497 (1975-C.A.)], the "right to third party opposition is extinguished, expired and late".

Similarly here, the seven years elapsed since the registered judgment obtained by the Caisse would serve as a bar to third-party opposition.

The appellant notary argues further that, since the trustee may not have been properly served in his capacity as trustee in bankruptcy of Paul Leclerc Inc. in the present instance, he, apart from the creditors, might later contest the judgment. Paul Leclerc Inc. however, was properly served, given the absence of notice of bankruptcy in the index of immoveables. The trustee, who failed to register such notice on the debtor's property at the time of the bankruptcy, could not, in my view, benefit from his own omission. Moreover, the trustee was the same person who was acting as trustee in bankruptcy for Paul Leclerc, and he was properly served as such. The trustee, therefore, had actual knowledge of the proceedings, and if he sought to attack the judgment, he would have had to act within a reasonable time. As Monet J.A. writes, in *Darveau v. Tessier,* [1986] R.J.Q. 2770 (C.A.), at p. 2777:

> [TRANSLATION] It is certainly true that a declaratory judgment has the force of *res judicata* only as regards the parties to the case. It is also true that Aldéi Darveau was not impleaded in his capacity as testamentary executor, but in another capacity. <u>However, the knowledge of the existence of a fact, in this case of a judgment, is that of an individual whatever his title or capacity</u>. [Emphasis added.]

There is no dispute that the trustee was, should, or could have been aware of the proceedings and their effect, if any, on the rights of Paul Leclerc Inc. The judgment in execution of the giving in payment clause was rendered in 1980 and registered against the property in the same year, and the bankruptcy of Paul Leclerc Inc. also occurred in 1980, whereas the notary's title search occurred in 1987. Given the well-established jurisprudence, which effectively disposes of such a recourse unless exercised within a reasonable delay, it would have been very unlikely that such action by the trustee in the bankruptcy of Paul Leclerc Inc. could have succeeded.

Finally, the appellant raises the remote possibility that third parties, unaware of the judgment, could later contest the validity of the hypothec and, as a consequence, the validity of the vendor's title. I find this argument somewhat perplexing. There is no indication that any other party could have had an interest in the validity of the hypothec and/or the ownership of the property. The hypothec was granted by Paul Leclerc to the Caisse, even though the land was owned by Paul Leclerc Inc. These are the only parties who could claim a property interest in the immoveable. Any other potential interest is not only pure speculation but is also not grounded on the facts. I would therefore conclude that the judgment in favour of the Caisse has, in such circumstances, acquired the authority of *res judicata* against the creditors of Paul Leclerc Inc., its trustee in bankruptcy, and any third party.

With respect to the prospective vendor, since he is a successor by particular title to the property, he is thus a "party" to any judgments rendered in regard to the said property. There is thus an identity of parties between the vendor and the Caisse concerning ownership of the property.

2. Identity of Object

Upon its debtor's default, the Caisse was seeking, in the proceedings pursuant to the giving in payment clause, to be declared the sole owner of the immoveable property in question. This is apparent from the remedy sought in its action:

. . .

> [TRANSLATION] DECLARE the plaintiff to be absolute owner of the immoveable property so described . . .
>
> DECLARE that neither the defendants nor the mis-en-cause nor any third party has any right in or against this immoveable property or any right to compensation, maintenance, improvements, additions or any other cause;
>
> . . .
>
> ORDER the mis-en-cause Registrar to receive and register the judgment to be rendered, to be a good and valid title to the above-described immoveable property in favour of the plaintiff, and to strike out any hypothecs, privileges, notices or other charges registered against the above-described immoveable property after the plaintiff's hypothecary deed P-1 of June 1, 1977;

The judgment granted this relief. While, as the appellant suggests, the sole issue in that case related to the default of the debtor and the application of the giving in payment clause in the deed of loan,

nevertheless, the juridical benefit sought was the ownership of the property.

Could then the validity of the securities granted by the debtor to the Caisse still be contested? Appellant claims that one of those securities at least, the hypothec, is nul *ab initio* and can always be contested, relying, in this connection, on art. 2037 *C.C.L.C.*:

> 2037. Conventional hypothec can only be granted by those who are capable of alienating the immoveables which they subject to it; saving the provisions of special enactments concerning *Fabriques.*

In other words, besides the hurdles previously discussed — identity of parties and delay — which such a plaintiff would have to face, would the object of such proceedings be the same as that of the action taken by the Caisse? The appellant suggests that it would not. In his view, the sole object of the giving in payment proceedings was to give effect to a specific security provided for in the deed of loan in case of default and not to question the validity of the securities, in particular the hypothec, which was never in issue then. That being so, the appellant maintains that a separate action could lie in order to decide such issue. This, in my opinion, overlooks the fact that the object of the judgment obtained by the Caisse years before was the ownership of the immoveable property, precisely the same object which an attack on the validity of the hypothec would pursue.

In fact, the judgment obtained by the Caisse radiated, retroactively to the date of the deed of loan, all charges on the immoveable, including the securities, hypothec and giving in payment, held by the Caisse, despite the fact that such securities may have originally been invalid. Moreover, with particular regard to the hypothec, it was originally open to the Caisse to exercise a hypothecary recourse, but, having succeeded on the giving in payment action and become the owner of the property, the Caisse's hypothecary recourse was no longer available. Even though a hypothecary action and an action in giving in payment may give rise to different conclusions, on the facts of this case, this could not have been relevant to the appellant notary's determination of the validity of the vendor's title. Both were securities given on an immoveable property which did not belong to the debtor and could not be pursued concurrently. The judgment in favour of the Caisse had to presume that these securities were validly given. As discussed earlier, even if this was in error, such error does not prevent the judgment from acquiring the authority of *res judicata* on the facts of this case, given the object of the proceedings, i.e. the ownership of the immoveable property, and the effect of such judgment on charges against the immoveable property, provided, of course, that all other conditions of art. 1241 *C.C.L.C.* are respected. This brings us to the last condition, identity of cause.

3. Identity of Cause

The test for identity of cause, as discussed previously, is set out by Gonthier J. in *Rocois, supra*, at p. 456, in the following terms:

> When the essence of the legal characterization of the facts alleged is identical under either rule, it must follow that there is identity of cause.

Both parties propose that the contract of loan is the "cause" of the action taken by the Caisse. If this is so, the "cause" is not the debt between Paul Leclerc and the Caisse, nor the securities listed in the loan agreement. These are simply "a body of facts", to use the words of Gonthier J. in *Rocois, supra,* at p. 456. It is the legal characterization of these facts that is crucial, and these facts are only relevant in the legal context of a contract of loan, secured by both a hypothec and a giving in payment clause. The inexecution of the obligation undertaken in the contract of loan will be the "concrete" cause of action.

The issue of ownership of the immoveable property was expressly raised by the Caisse in its action in execution of the giving in payment clause, at par. 6 of its declaration:

> [TRANSLATION] The defendant still holds the said immoveable property as owner. [Emphasis added.]

The question of ownership was therefore addressed in both the pleadings and judgment granting the Caisse's action on the giving in payment clause. Subsequent proceedings to challenge ownership would, in my view, also be based on the ownership of the immoveable property.

On the other hand, a hypothecary action is based on one form of security, the hypothec, while an action on a giving in payment clause is based on a different security. Since these two actions give rise to different conclusions and remedies, in principle, one could perhaps pretend that they constitute two different causes of action. While in my view, the "cause", on the facts of this case, would relate to the contract of loan, in any event, the securities provided for in the deed of loan could not be pursued together, since the judgment allowing the giving in payment action precluded proceedings on the hypothec. The legal characterization of the facts alleged thus remains a contract of loan. The inexecution of the obligations undertaken in that contract is the "cause" and would constitute but one cause of action. Given that characterization, the inevitable result is that the requirement of identity of cause is satisfied.

D) *Conclusion*

In summary then, since all of the conditions set out in art. 1241 *C.C.L.C.* as to jurisdiction and identity of parties, object, and cause, are met here, the judgment obtained by the Caisse acquired the authority of *res judicata*. This judgment granted good and valid title to the Caisse since it was not appealed from and, on the facts of this case, could not have been the object of further proceedings.

The appellant notary assumed that, because of the defect in the granting of the hypothec, the vendor's title could be challenged. In my view, the appellant failed to distinguish between the hypothec's defect,

which existed, and the defect in the title, which did not exist, having been cured by the judgment granting ownership to the Caisse.

In my view, the trial judge was correct when he concluded:

> [TRANSLATION] The effect of the contentious judgment of July 17, 1980 was therefore definitive; it had the authority of *res judicata*, conferring good and valid title on the Caisse populaire St-François d'Assise, despite the fact that the hypothec granted pursuant to the deed of obligation of May 31, 1977 was granted by Paul Leclerc and the owner at that time was Paul Leclerc Inc. [Emphasis added.]

This, however, does not end the matter. The following question must be answered: did the error of law of the notary constitute a fault entailing his liability?

Error and Fault

The distinction between error and fault was perhaps best made by Vallerand J.A. in *Côté v. Drolet, supra*, at p. 247:

> [TRANSLATION]. . . error . . . is not a source of fault by itself.
>
> . . .
>
> The plaintiff has the burden of establishing fault. That is a commonplace. Error is certainly a starting-point, but as I noted, it will not suffice.

(See also *Bédard v. Lavoie,* [1987] R.R.A. 83 (C.A.), at p. 84, and *Vail v.*

MacDonald, [1976] 2 S.C.R. 825, at p. 832, for cases involving professional medical liability.)

In a remark which applies as well to notaries, Molinari, op. cit., observes, at p. 289:

> [TRANSLATION] An attorney does not assume an obligation not to make mistakes. That would be an absurd situation.

Similarly, Marquis, *La responsabilité civile du notaire officier public,* op. cit., at p. 35, after analyzing notarial liability for errors of law, pursues, in note 145:

> [TRANSLATION] However, ignorance and an error in judgment should not be confused. We feel it is proper to apply to the notary *mutatis mutandis* what Rand J. of the Supreme Court said of the surgeon in *Dame Wilson v. Swanson*, [1956] S.C.R. 804, at p. 812: "An error in judgment has long been distinguished from an act of unskilfulness or carelessness or due to lack of knowledge..."

Although an error may amount to fault, it is not necessarily so. On the facts of this case, did the error of the appellant notary constitute a fault?

Fault

A) *Expert Evidence*

In order to disclaim liability, the appellant notary introduced in evidence the testimony of notary Giroux, a colleague who was consulted by

the respondents, and the testimony of an expert, notary Yves Demers. Both testified that the appellant notary's opinion was in conformity with the norms of practice of a prudent and cautious notary in the same circumstances.

The respondents objected to their testimony since, as they state in their factum at pp. 25-26:

> [TRANSLATION] To the extent that this testimony related to the correctness of the appellant's opinion, it was useless and inadmissible.

According to the respondents, it is for the judge to decide questions of law, not for witnesses, whether or not they are experts in the field.

The trial judge admitted the testimony of the expert witness but only as regards notarial practice. With respect to any conclusions the expert may have given on the validity of title, the trial judge said:

> [TRANSLATION] . . . he [the expert] may have an opinion in the circumstances, but that does not mean that that must be the judgment of this Court.

In my view, the trial judge was right. Expert evidence is admissible provided that the expert is qualified and his or her testimony is necessary or useful to assist the court in the determination of technical or

scientific matters. Professor Ducharme, *L'administration de la preuve* (1986), comments, at No. 317, p. 109:

> [TRANSLATION] Expert testimony is admissible in matters which require information in the fields of sciences and the arts.

(See also *Hôtel-Dieu de Québec v. Bois*, [1977] C.A. 563.)

As regards legal professional liability, the admissibility of expert testimony has always been accepted. Tremblay, op. cit., at p. 204, makes the following distinction:

> [TRANSLATION] We cannot reject the presence of expert witnesses out of hand when the fault with which the defendant lawyer is charged results from a mistaken interpretation of the law. In such a case, though the applicable legislation and authorities available at the time the interpretation was given should enable the trial judge to determine the state of the law at that time, they would not enable him to determine whether the lawyer demonstrated reasonable competence in preparing his opinion. [Emphasis added.]

In *Caisse populaire St-Étienne de La Malbaie v. Tremblay*, [1986] R.D.I. 554 (C.S.), the trial judge held that a notary was not liable on the facts of the case since the law was not settled at the time. He noted, at p. 555:

> [TRANSLATION] No expert witness was called to suggest that the notary acted improperly at the time or that he should have proceeded otherwise.

Although the decision was reversed on appeal, [1990] R.D.I. 483, the Court of Appeal did not question the admissibility of the expert testimony, mentioning only that expertise is not always necessary in cases of professional liability.

In another decision, *Fournier & Papillon Ltée v. Simard,* [1987] R.R.A. 566, the Court of Appeal, while holding the notary at fault, did not question the admissibility of an expert notary's evidence. LeBel J.A. assessed the expert evidence at p. 569:

> [TRANSLATION] Supported by the testimony of an expert witness, the notary André Cossette, former president of the Chambre des notaires and a practitioner of long standing, the respondent [the notary] maintained that this way of doing things was in accordance with general practice and considered prudent. [Emphasis added.]

The same holds true at common law, as evidenced by the judgment of this Court in *Central Trust, supra,* where Le Dain J. broached the issue at pp. 210-11:

> Two solicitors [. . .] gave evidence as to their practice and that of other solicitors in real estate transactions involving corporations.
>
> . . .
>
> The Appeal Division held that the trial judge erred in disregarding the evidence of Mr. Fordham [one of the two lawyers]. . ..
>
> . . .
>
> With respect, I am in agreement with the conclusion of the Appeal Division on the issue of negligence.

The judge, however, is the final arbiter and is not bound by expert testimony. As Jean-Paul Landry, "De la preuve par expert: la jurisprudence" (1980), 40 *R. du B.* 652, writes, at p. 656:

> [TRANSLATION] While the expert acting as a witness will clarify matters for the jury or the court, *his testimony is not binding on them.* The courts have repeatedly emphasized this. [Emphasis in original.] [References omitted.]

It is particularly so as regards professional liability, where an expert's evidence is not binding on the precise question of law which the judge is called upon to decide. This is the domain of the judge.

Professors Bernardot and Kouri, *La responsabilité civile médicale* (1980), at No. 27, p. 17, stress this point:

> [TRANSLATION] We said earlier that the expert was a specialist and the judge a layman. This is true in the medical field. It is no longer true in the legal field. What is the function of an expert? It is to inform the judge about the facts, to tell him exactly what "is known by science" in a particular case. At this level the judge cannot disregard the information given. It is imposed on him, in the sense that he cannot ignore it. However, when the expert's task is over, that of the judge begins. He must transpose the facts into law, and here it is usual for the judge to enjoy complete freedom. [Emphasis added.]

Here, before affixing liability, the trial judge had to decide whether the judgment rendered on the giving in payment action had the authority of *res judicata.* Expert evidence was neither necessary nor relevant to such determination. It was only at the second step that such

evidence became relevant, i.e. in the assessment of notarial practice, and it is that course which the judge rightly followed, in my opinion.

Having said that, was the judge also right in concluding that the error of law committed by the appellant notary constituted a fault entailing liability?

B) *Liability*

Liability must be assessed bearing in mind the principles governing professional liability discussed earlier. Whether liability is grounded on contract or on delict (in this case, the contract), the obligation is one of means, not of result, and a simple error of law will not necessarily entail liability. Given that the appellant notary made an error of law when advising the respondents, it is now necessary to examine the common notarial practice in Quebec at the time, as disclosed by uncontradicted evidence, and to determine whether this practice shields the appellant notary from liability.

There appears to be little doubt that common notarial practice, at the time that the appellant advised the respondents, would have led to the conclusion that there was a defect in the vendor's title and that such defect was not cured by the judgment granting ownership to the Caisse. Notary Giroux, who was later consulted by the respondents, described in his testimony how he arrived at the same conclusion as the appellant:

[TRANSLATION] A. Which I did. So I went, I checked the index of immoveables, I consulted the deeds, I consulted the books of reference, the cadastral plans and I found that in fact the title - personally - that I would not have given perfect title to it, if you like, simply as a matter of current practice; to tell him, to shield him from all professional liability, I made these reservations in my title report. And then he [the respondent] asked me what the consequence was, and I told him: "You will never get a loan on it".

. . .

. . . the reservations were that it was Paul Leclerc who had granted a hypothec, though the title belonged to Paul Leclerc Inc.; that the lot had been registered in the name of Paul Leclerc Inc. and the hypothec was granted to Paul Leclerc, and the chain of title started at that point. Then as a consequence of that hypothec, in my opinion, the hypothec was not granted by the owner of the thing.

Q. So, in your view, that vitiated the title?

A. That's right.

The opinion of the expert, notary Demers, is to the same effect. In his written report submitted at trial, the pertinent passages read:

[TRANSLATION] After examining the title to this immoveable property since the deed registered as No. 515,049 (sale by John E. Morrow to Paul Leclerc), we also conclude that the Caisse Populaire de Saint-François d'Assise de Québec did not have a good and valid hypothec on the immoveable property from the deed of obligation registered as No. 874,806, since that hypothec had not been granted to it by a person who could alienate the hypothecated immoveable.

Article 2037 of the *Civil Code* provides that:

Conventional hypothec can only be granted by those who are capable of alienating the immoveables which are subject to it; saving the provisions of special enactments concerning Fabriques.

It is the owner who is "capable of alienating".

In our view, a creditor's right to give sixty days' notice on the basis of an invalid deed of hypothec is open to question; even more questionable is his right to obtain judgment declaring

> him owner under the exercise of the giving in payment clause contained in the invalid deed of obligation respecting this immoveable.
>
> We do not feel that the judgment on giving in payment could have conveyed good title to the Caisse Populaire Saint-François d'Assise de Québec and the mere fact that there was no appeal from this judgment cannot ameliorate it.
>
> In carrying out his instructions, the notary Dorion was required to inform the parties of any defects he might find in the title and to be sure himself that the title was valid before concluding the deed. We feel that the notary Dorion acted properly, prudently and in the best possible way in the circumstances. The defect of title he found justified him in giving the advice he gave in his letter of May 22, 1987. We consider that the defect in title was sufficient to justify his actions. In the same circumstances, we would have given the same opinions. [Emphasis in original.]

It is clear from the above that neither the appellant nor witnesses Giroux and Demers gave serious thought to the effect of *res judicata*. None of them analyzed that issue in depth, but rather appear to have casually dismissed it. One can only speculate as to the reasons for this disregard of a well-known and well-established legal principle.

That the appellant notary acted in accordance with the then general notarial practice does not seem to be contested. Neither the trial judge nor the respondents suggest otherwise. It is not sufficient, however, in my view, that the common professional practice be followed in order to avoid liability. That practice has to be demonstrably reasonable.

Professors Bernardot and Kouri, op. cit., while discussing professional medical liability, provide an extensive analysis of the role of

common professional practice in the determination of fault. At No. 27, pp. 16-17, they assert:

> [TRANSLATION] *Judge's discretionary power in determining custom.* - It should not be thought that all professional practice or usage has exonerating effect. The mere fact of observing such practice will not with certainty preclude an adverse civil judgment.
>
> . . .
>
> The courts can always refuse to submit to a custom if, for example, it is likely to infringe elementary rules of caution . . . Moreover, while it is true that a practitioner must comply with "what is known by science", we must admit that up to now we have been incomplete. The case law has not limited the physician's obligation to this point, it has always argued that he must:
>
> > . . . give *conscientious and attentive care* and, apart from exceptional cases, care which is consistent with what is known by science [Cass. Civ., May 20, 1936, D. 1936.1.88].
>
> It is true that the care given may be consistent with common professional practice; but we must not in any way doubt that it is conscientious and attentive. The conjunction "and" is not alternative but cumulative. In other words, even if a doctor practises his profession in accordance with common professional practice, he will be liable to an action for damages if that practice proves to be defective and constitutes negligence. [Emphasis in original.]

Professor Crépeau, "La responsabilité médicale et hospitalière dans la jurisprudence québecoise récente" (1960), 20 *R. du B.* 433, also in the context of professional medical liability, comments on the distinction between common professional practice and fault, at pp. 480-81:

> [TRANSLATION] It seems to us that, like the French courts and the courts of the common law countries, the Quebec courts, especially in an area where human life is at risk, must reserve the right, without making themselves arbiters of medical theory, to decide on the value of common practice, and they definitely

> cannot tolerate a practice which, though accepted in certain places, nonetheless constitutes professional negligence. [References omitted.]

(See also Professor Crépeau, *La responsabilité civile du médecin et de l'établissement hospitalier,* op. cit., at pp. 217-18.)

Similarly, Professor Gérard Mémeteau, *La responsabilité civile médicale en droit comparé français et québecois* (1990), states, at No. 90, p. 57:

> [TRANSLATION] The technical information is complemented by the rules of caution and common sense. The difficulty then arises from the fact that reasonable practice may in itself be dangerous, which is an inherent contradiction.

The principle that usual professional practice may not necessarily be prudent and diligent has also been accepted by the courts.

In *Villemure v. Hôpital Notre-Dame,* [1973] S.C.R. 716, as Pigeon J., dissenting, but not on this issue, notes at p. 718, the expert testimony was unanimous:

> [T]he three psychiatric experts who testified in this case stated that if they had had the patient under their care, they would have "done exactly the same thing as Dr. Turcot did". No evidence was adduced to contradict this testimony . . . .

The majority of this Court, nonetheless, held the doctor at fault. For the reasons of Choquette J.A., in the Court of Appeal, the Court

restored the judgment of Chief Justice Challies at first instance, adopting that part of his reasons quoted by Choquette J.A., [1970] C.A. 538, at p. 539:

> The Court is unable to accept the opinion of Doctors Fortin and Saucier. It may be that they would have done exactly what Dr. Turcot did. Had they done so, in the opinion of the Court they would have been wrong and negligent. It is no answer to say it is impossible absolutely to prevent a person from committing suicide unless he is placed in a straight jacket. This of course is obvious. But it is surely possible to prevent him from committing suicide for 30 hours and until a sufficient investigation has been made into his condition to be able more accurately to diagnose his true situation. . . . The facts as proven of what happened prior to the entry into the hospital, coupled with the incidents in the hospital, indicate to the Court rather a situation which should have made both Dr. Turcot and the nurses take particular care of the deceased. [Emphasis added.]

In the case of *G. v. C.*, [1960] Que. Q.B. 161, where forceps or clamps were left by the doctor in the abdominal cavity of a patient during an operation, Taschereau J.A., while considering common medical practice at the time, found that it nevertheless did not excuse the doctor's fault, at p. 167:

> [TRANSLATION] The defendant [doctor] rightly said that it was not the practice in Québec hospitals in 1950 to count hemostatic forceps. However, that could not excuse the defendant for failing to take a precaution dictated by the most elementary prudence. [Emphasis added.]

This brief overview of both doctrine and jurisprudence indicates that courts have discretion to assess liability despite uncontradicted evidence of common professional practice at the relevant time. The

standard, in regard to the particular facts of each case, must still be that of a reasonable professional in such circumstances.

It may very well be that the professional practice reflects prudent and diligent conduct. One would hope that if a certain practice has developed amongst professionals in regard to a particular professional act, such practice is in accordance with a prudent course of action. The fact that a professional has followed the practice of his or her peers may be strong evidence of reasonable and diligent conduct, but it is not determinative. If the practice is not in accordance with the general standards of liability, i.e. that one must act in a reasonable manner, then the professional who adheres to such a practice can be found liable, depending on the facts of each case.

It may happen that the question of law facing the notary is a controversial one. In such case, the notary cannot be faulted for choosing one method or theory over another, so long as the choice is reasonable. In *Coronation Credit Corp. v. Giasson*, Sup. Ct. Hauterive, No. 05-000-050-75, May 3, 1979 (summarized in J.E. 79-546), confirmed on appeal, C.A. Québec, No. 200-09-000363-793, July 12, 1982, Philippon J. held, at p. 12, that the notary was not at fault, although the notary opted for a theory which was later rejected:

> [TRANSLATION] It thus follows that two arguments could be opposed, the first that waiver of the hypothecary priority necessarily implies waiver of everything which could interfere with the exercise of that priority; the second, which is now accepted, is that a right cannot be waived vaguely or by

> implication, and when doing so the person must have the right being waived clearly in mind.

(See also Marquis, *La responsabilité civile du notaire officier public*, op. cit., at p. 36; Tremblay, op. cit., at pp. 193-94; and Marquis, "Appréciations judiciaires de la conduite professionnelle de notaires" (1987), 89 *R. du N.* 597, at p. 620.)

The issue of *res judicata*, which is at the heart of this case, while fraught with difficulties, is not a controversial issue in the legal field. The law is well settled. While its application to the facts of each case may require a thorough analysis, this is what is expected of a legal practitioner, whether a lawyer or a notary. In the case at bar, the facts did not present particular difficulties in assessing the principle of *res judicata*. The notarial practice as regards title searches, as established at trial, cannot be characterized as reasonable and diligent, given the clear state of the law then, nor can the casual way in which the issue of *res judicata* was dealt with be condoned.

The appellant notary was consulted by the respondents primarily for a legal opinion as to the vendor's title, an essential condition of the granting of their loan by the bank. This was the notary's main contractual obligation towards the respondents, one of means only but one that he had the duty to fulfill in a prudent and diligent manner. It was not sufficient for the appellant notary, after consulting the index of immoveables, cadastral plans, and the books of reference, to simply conclude as regards the judgment obtained by the Caisse:

> [TRANSLATION] As the hypothecary deed in question was granted by a person other than the registered owner, the hypothec was null and void and the judgment could not give more than the hypothec was worth.

The notary, obliged to provide a legal opinion as to title, was thus expected to verify and understand the effects of judgments on title. The judgment obtained by the Caisse had to be reviewed by the notary in order to assess its impact on the vendor's title to the immoveable property in question. The appellant notary's opinion about the effect of the judgment obtained by the Caisse was based on an unreasonable interpretation of the applicable law, whatever may have been the notarial practice at the time in Quebec. Further, that practice was not in accordance with a reasonable and diligent course of conduct. This is the conclusion reached by the trial judge:

> [TRANSLATION] Where the notary Demers errs, with the greatest respect, is when he says that in his opinion the giving in payment judgment could not have conveyed a valid title to the Caisse populaire St-François d'Assise de Québec. It is apparent that Mr. Demers . . . regards the judgment as having no effect: this becomes even clearer when he says that "the mere fact that there was no appeal from this judgment cannot ameliorate it". What we have said about Mr. Dorion's opinion applies equally to Mr. Demers's opinion. The same is true of the conclusion we have reached that the judgment of July 17, 1980 gave the caisse populaire good and valid title.
>
> Additionally, we cannot share the opinion of the notary Demers when he says that the notary Dorion acted "properly, prudently and in the best possible way in the circumstances" and that "the defect in title he found justified his giving the advice he gave in his letter of May 22, 1987". The defect referred to here was not a defect.

Later, the trial judge adds:

> [TRANSLATION] In the course of his search the defendant in warranty [the appellant] concluded that the hypothec granted by Paul Leclerc was null and void, and that accordingly the judgment was as well, since in reality he gave the judgment no more value than the hypothec, which was a mistaken conclusion of law in the circumstances. Mr. Dorion could not be unaware of the provisions of the first paragraph of art. 1241 *C.C.[L.C.]*. In performing his duty as legal counsel for the plaintiffs [the respondents], he should have taken his research further and considered whether the judgment of July 17, 1980 had any effect in law, rather than simply concluding that the judgment was vitiated merely by the fact that the hypothec granted by Paul Leclerc to the Caisse populaire was null and void. [Emphasis added.]

I agree. The failure to consider the authority of *res judicata* in such matters is unreasonable, whether or not it is common notarial practice. While the appellant was right in pointing out the defect in the deed of loan, he was wrong in not properly assessing the effect of the judgment obtained by the Caisse on the vendor's title. That error of law was unreasonable and constitutes a fault on the facts of this case.

Further, in the present case, a promise of sale had already been signed when the respondents consulted the appellant notary. It appears from the evidence that the respondents were not advised of the possible legal repercussions pursuant to a decision not to proceed with the sale; in particular, they were not advised of the likelihood of legal action by the vendor. The necessity to advise clients of the juridical consequences of their actions is clearly an aspect of the notarial duty to counsel (see Marquis, *La responsabilité civile du notaire officier public*, op. cit., at p.

32), and the failure to give such advice constitutes a breach of the appellant's obligations towards the respondents.

Notwithstanding the above conclusion, I wish to touch on another point raised by the appellant. He submits that, in the present case, his duty was two-fold. First, he had to complete a title search and advise the prospective purchasers. Second, if the appellant concluded that the title was valid, he would then have to pass the act for the financial institution which would be lending money on the security of a hypothec on the property. This is done according to the following certificate, cited by Jean Gagnon, *L'examen des titres immobiliers* (1987), at p. 5:

> [TRANSLATION] SEARCHER'S CERTIFICATE
>
> I the undersigned, a practising notary, declare on my oath of office that I have prepared this report on the borrower's title from the declarations, title deeds and other documents provided by the borrower together with any necessary research at the registry office. I have carefully examined these title deeds and have familiarized myself with the hypothecary situation and the borrower's ownership right, and I consider that once the loan contract has been registered, ABC Inc. will have a good and valid first hypothec on the property described in title I, which the borrower owns by good and valid title which in our opinion is absolute.

The appellant thus claims that, in case of doubt as to the validity of title, it would be reasonable to express caution to the prospective purchasers, since a reasonable notary would not be able, in good faith, to endorse such a stringent declaration to the financial institution.

In situations where doubt regarding validity of title is justified, this argument may have some merit. What may be a small hesitation with regard to prospective purchasers may be a barrier to the notary, who must assert under oath that the title is good and valid and that the financial institution possesses a good and valid hypothec of first rank. The difference between the two obligations, may, in some cases, require additional caution in a notary's advice to his or her clients. This case, however, does not fall into this category. There was no doubt as to the validity of title, given the authority of *res judicata*. A reasonable interpretation of the law and review of the presumption of *res judicata* would have resulted in no hesitation towards either the respondents or the financial institution as to the validity of the vendor's title. In any event, the appellant notary did not even express a doubt when he categorically asserted that the vendor's title was vitiated and advised his clients not to purchase the property.

I would therefore conclude that, even if the appellant notary acted in accordance with common notarial practice at the time, his failure to consider the effect of *res judicata* constituted a fault, *i.e.* a course of action which a reasonable, diligent, and prudent notary would not have taken. That fault will, however, entail liability only if damage and causation can be proven. Since damages are admitted, there remains the issue of causation.

C) *Causation*

In most contractual relationships, the issue of causation rarely surfaces. If it can be demonstrated that one of the parties failed to perform a contractual obligation, and that damage was suffered, it is usually evident that it was the contracting party who "caused" the damage. In this case, however, some question was raised, in oral argument, since the legal opinion given by notary Giroux, the notary subsequently sought by the respondents, confirmed that of the appellant. As the respondent Roberge said in his testimony:

> [TRANSLATION] We on our part asked the notary Giroux - we wanted to have a second specialist in the matter, to give his verdict on . . . to study the title and give us his assessment. His assessment was exactly the same as that of the notary Dorion, namely that it was better to withdraw from the matter as the record was imperfect and it would be impossible to take possession of the property within a reasonable time.

At issue then, is whether the decision of the appellant notary is causally linked to the respondents' decision not to purchase the property.

Professor Jean-Louis Baudouin (now of the Quebec Court of Appeal) assesses the general position in Quebec concerning causation in *La responsabilité civile délictuelle* (3rd ed. 1990), at No. 353, pp. 192-93:

> [TRANSLATION] The only real constant in all the decisions is the rule that the damage must have been the *logical, direct* and *immediate* consequence of the fault. This rule, stated many times by the courts, indicates a desire to limit the scope of causation and accept as causal only the event or events having a close logical and intellectual connection with the damage complained of by the victim. [Emphasis in original.] [References omitted.]

In my view, despite the consultation and opinion of notary Giroux, the appellant's fault is still causally linked to the damage suffered by the respondents.

There is no doubt that it was the appellant's negative opinion as to title that triggered the respondents' decision to seek a second opinion, but only after the receipt of a letter from the vendor's attorney, affirming the vendor's valid title and implying the possibility of legal action. This is made clear by the testimony of respondent Roberge:

> [TRANSLATION] It was a little later - it was . . . it was on May 19 that I called the notary Giroux. You have to understand that in the meantime we had received a letter also from Mr. Barma [the vendor's lawyer] which suggested that there could be - in any case, that's how I interpreted it - which indicated that there could be legal action against us if we did not purchase.
>
> . . .
>
> At that time, as we were also stuck vis-à-vis the National Bank, we were between a rock and a hard place, that is, on the one hand we could not purchase and on the other, at the same time, we felt compelled to purchase. The result was that we then asked a second specialist if he would kindly examine the title and give us his assessment.

In the circumstances as revealed by the evidence, one must necessarily conclude that the appellant notary's opinion was the direct, immediate, and logical cause of the respondents' decision not to purchase the property. Had the appellant given proper legal advice, as the respondents testified, they would never have needed to seek a second opinion. The fact that the second legal opinion was also erroneous in law could only have been, on the facts of this case, a ground for legal

proceedings against that notary, provided causation could have been established. It cannot affect the causal link between the appellant's fault and the damage suffered by the respondents. The very fact that the appellant alone was sued, and not the second notary, demonstrates that in the respondents' estimation, it was the appellant's opinion that motivated their refusal to purchase the property.

Nor can the opinion of notary Giroux constitute a *novus actus interveniens*. This notion is defined by Baudouin, op. cit., at No. 361, p. 198, as:

> [TRANSLATION] . . . the new event, beyond the control of the perpetrator of the fault and breaking the direct connection between the fault and the damage, even if under the system of adequate causation the wrongful act could in itself objectively give rise to the damage and the agent could foresee the consequences thereof. [References omitted.]

The decision to seek the second notary's opinion was in no way independent of the appellant notary's conclusion. In fact, it was completely dependent upon it. The second opinion only confirmed what the appellant had stated, and the only reason that opinion was sought was due to the appellant's fault in concluding that the title was defective.

It is ironic that the respondents are, in a sense, being reproached for taking an appropriate, cautious, course of conduct. Faced with a situation where the opinion of their notary conflicted with that of the vendor, what other choice did they have but to seek a second opinion? The fact that the second notary reached the same conclusion as the

appellant does not, in the circumstances of this case, detract from the direct, logical, and immediate effect that the appellant's fault had on the damage suffered by the respondents. The fault, if any, of the second notary is not in question here. What is not in doubt is that the respondents relied on the appellant notary's conclusion, and it was that fault which was the *causa causans* in the sequence of events which led to the damage suffered by the respondents.

I would thus conclude that the trial judge correctly found the appellant liable for the damage suffered by the respondents. Accordingly, I would dismiss the appeal with costs throughout.

On the issue of costs, the respondents asked that costs in this court be awarded on a solicitor and client basis, a request left to the discretion of this Court. I will now discuss this issue.

Costs

Upon granting leave (Revised order granting leave to appeal, August 10, 1989), this Court confirmed the undertaking by the appellant to assume the costs of the appeal:

> . . . the application for leave to appeal is granted, and the applicant will assume the costs of the appeal in any event.

The order did not, however, provide for solicitor and client costs in favour of the respondents should the appeal be dismissed. These were

requested, nonetheless, by counsel for the respondents, both in his factum and in oral argument.

Counsel for the respondents submitted that his clients were not financially able to support the costs of an appeal to this Court. In fact, for this reason, counsel had asked, in a motion filed before this Court on July 11, 1989, for permission to cease representing the respondents. In support of the motion, the respondents filed the following letter:

> [TRANSLATION] We wish to inform the Court that our financial resources do not allow us to assume the cost of our defence in the Supreme Court of Canada, and we are not eligible for legal aid or likely to obtain leave to defend *in forma pauperis* pursuant to Rule 47(4) . . . We certainly could not imagine that we would be taken up to the highest court in the country in a proceeding of this type.

Upon the dismissal of the motion by this Court, counsel for the respondents did represent them at the hearing despite the fact that he was aware that his clients would not be able to pay his costs, as he made clear in oral argument:

> [TRANSLATION] They [the respondents] have already paid the plaintiff's and the mis-en-cause's costs in the main action. They have already paid fees to their first counsel in the Superior Court and the Court of Appeal. They have already paid $350 for me to represent them in the Court of Appeal on the application for leave to appeal. I could not ask it of them: first, I was obliged to argue the case, and second, my sense of justice told me that it was not fair for these people not to be represented and have an opportunity to present their arguments.

Besides, it should be noted that the respondents were successful at trial and the Court of Appeal refused even to hear the case. While this decision may be important to the notarial profession, it was of no such importance to the respondents given, in particular, the amount involved.

The powers of this Court with regard to the award of costs in this Court are to be found in the *Supreme Court Act*, R.S.C., 1985, c. S-26. Section 47 of the Act states:

> 47. The Court may, in its discretion, order the payment of the costs of the court appealed from, of the court of original jurisdiction, and of the appeal, or any part thereof, whether the judgment is affirmed, or is varied or reversed. [Emphasis added.]

This broad power does not appear to prohibit the granting of costs on a solicitor and client basis, and in fact, this Court has done so on several occasions, with or without the parties' consent.

Given the parties' consent, in *Attorney General of Quebec v. Labrecque,* [1980] 2 S.C.R. 1057, Beetz J. concluded, at p. 1086:

> In accordance with the conditions which the Attorney General agreed to when leave to appeal was granted to him, he will pay the costs of respondent Labrecque in this Court on a solicitor-client basis.

Solicitor and client costs were also awarded in *Janiak v. Ippolito,* [1985] 1 S.C.R. 146, where again, leave to appeal had been granted on the

condition that appellant pay the costs on a solicitor-client basis (see p. 173).

However, even without the parties' consent, in *Lanificio Fratelli Bettazzi S.N.C. v. Tissus Ranchar Inc.*, S.C.C. No. 21373. on respondent's motion to adjourn, heard October 3, 1990, this Court ordered that:

> [T]he costs and disbursements of this attendance on the appeal are to be paid by the Respondent to the Appellant on a solicitor and his own client basis.

Similarly, in *Sous-ministre du revenu v. Goyer, Bulletin of Proceedings of the Supreme Court of Canada*, October 22, 1987, p. 1612, this Court denied leave to appeal with costs against the applicant on a solicitor and client basis.

In *Attorney General of Quebec v. Carrières Ste-Thérèse Ltée* [1985] 1 S.C.R. 831, this Court dismissed the appeal, and held, at p. 839, that:

> Respondents shall be entitled to costs in this Court on a solicitor and client basis, both on the application for leave to appeal and on the appeals.

In *Palachik v. Kiss*, [1983] 1 S.C.R. 623, Wilson J. states, at p. 639:

> For the reasons given, I would dismiss the appeal and award the respondent solicitor and client costs out of the estate. The

> trial judge expressed the view that this case should never have come to trial and I agree with him. [Emphasis added.]

Mark Orkin, in *The Law of Costs* (2nd ed. 1987), at No. 219, pp. 2-61 and 2-62, sounds a note of caution, albeit one which does not arise in the present case:

> An award of costs on the solicitor and client scale, it has been said, is ordered only in rare and exceptional cases to mark the court's disapproval of the conduct of a party in the litigation. The exercise of discretion must be based on relevant factors, for example the conduct of the litigation, and not on otherwise unrelated conduct.

In addition to the factors set out by counsel for the respondents, another consideration stems from the affidavits filed on behalf of the appellant, in support of his leave application, by some prominent notaries in Quebec. Notary Roger Comtois asserts in his affidavit:

> [TRANSLATION] I consider that Migneault [*sic*] J.'s judgment deprives of all authority the opinion that a notary and legal counsel may give on the title to an immoveable property and that this judgment would require the parties, before concluding a deed where the title is in doubt, to obtain a judgment from the court on the validity of title to an immoveable property, which would seriously paralyze all real estate operations and transactions and cause serious hardship to the owners of immoveable property.

Notary Yvan Desjardins declares:

> [TRANSLATION] Mignault J.'s decision is of fundamental importance for the entire legal profession in Canada, and in particular for notaries in Quebec, in that it makes a legal practitioner responsible for advice given to his client in complete

> good faith and without negligence on his part, advice which he in fact has a duty to give in the course of his profession.

Notary Jean Lambert's affidavit reads:

> [TRANSLATION] It is essential for notarial practice in Quebec that the trial decision be revised by the Court of Appeal or by this Honourable Court, if it sees fit, since the decision affects the understanding of the notary's duty to give advice and his obligation, when he has a reasonable doubt as to the validity of a title, to tell his clients of it;
>
> Additionally, the trial decision raises a question as to the extent of the obligation contained in the notary's duty to advise and imposes on him an obligation of result contrary to what has so far been established by the law, the authors and the courts.

It is apparent from the above affidavits that this case was considered to be of great importance to notaries in Quebec. This was a relevant consideration in the decision to grant leave to appeal, particularly since the damages involved in the case were minimal and the respondents showed no interest in pursuing the case before this Court, even if leave to appeal were granted. Given our discretion in this matter, I am of the view that this is a case where it should be exercised in favour of the respondents. I would accordingly grant the respondents' request and award costs, in this Court, on a solicitor and client basis both on the application for leave to appeal and on the appeal.

Conclusion

On the whole, having concluded that the appellant notary committed an error of law which constituted a fault in the circumstances of

this case, I would affirm the judgment of Mignault J. at trial, dismiss the appeal with costs throughout, and award the respondents their costs in this Court on a solicitor and client basis, both on the application for leave to appeal and on the appeal.