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THE SEDUCTION BILL.

Mr. Charlton's Bill, making seduction a criminal offence, (as well as the Incest Bill,) has been extinguished in the Senate. The Minister of Justice, Sir Alexander Campbell, spoke strongly and decidedly against the measure. In the course of an able argument the Minister referred to communications which he had received "from two of the most eminent judges in "Canada who have written voluntarily, without "my suggestion, against the legislation con-"templated by this Bill." These judicial opinions are important, as it is possible that some ambitious legislator may be anxious to make a fresh attempt at this pernicious and ill-advised species of legislation. One of the learned judges says:—

"I see a bill reported by a select committee, and read a second time, making adultery and seduction criminal offences. I can hardly conceive any more dangerous step that could be taken in the present complicated state of society than to bring such matters within the scope of criminal legislation. It might suit a primitive and simple state of society like that of the old Puritan communities of New England. As an old Judge, alas, of many years' experience in trying civil and criminal cases, I look with undisguised alarm at the probable effects of such legislation on the world as it now is around us; but to my mind the greatest objection to the proposal (as I understand it), it is only a crime for punishment in the man and not in the woman. It is intelligible to declare that such offences are crimes, but it is absurd, to my mind, to declare that the criminality is only with one of the two actors. If it be a sin or a crime, the principals must be equally guilty. It is nonsense to declare that because the consequences—the shame and suffering—fall chiefly on the female the sin or the crime is not equally with her as with him. Such one-sided legislation is an utter confusion of right and wrong, and a burlesque on discriminating justice. I take a strong view, and look upon such one-sided legislation as tampering with immutable principles of right and wrong. Women should be made to understand that they must guard their own honour and chastity. As the law now is, they are too frequently the seducers and tempters, and then obtain, or their parents for them, damages. Give them the additional terrors of a criminal prosecution and the effect on public morals will be indeed edifying."

The other letter was summarized as follows by Sir Alexander Campbell:—

"The other letter which I have points to a very grave danger which men are exposed to in their intercourse with women of this character, although it is not with reference to actions for seduction. The learned judge refers to a case where a young man was charged with rape on a young woman. The evidence of the woman was very clear; she swore to the commission of the offence distinctly. On the part of the defence it was shown that for a month or six weeks after the offence they were in daily intercourse, visiting at each other's houses and dining and taking tea together without objection from the parents on either side. When the young woman found that she was pregnant, she accused the young man of a rape. The judge, on hearing of her conduct during the month after the offence, and that the girl had made no complaint even to her mother, charged very strongly for the defence, and said the jury should acquit the prisoner. To his consternation they found him guilty. In such a glaring case he declined to pronounce sentence, and held the prisoner over for trial at the next assizes, and sent a copy of the evidence to me. He protests against this kind of legislation."

The Minister of Justice also declared that his own experience was not favorable to the bill.

"I find (he said) that the bill which is now proposed is substantially the law in many states of the neighboring union, and in France and Germany. It is not the law in Great Britain or in any colony of the Empire, and I think we are bound to ask ourselves whether the state of morals in those countries, as far as we know, leaves anything to be desired on our part; whether there is any evidence before the community—not before the House—but whether we know as private citizens of any evidence leading us justly and soundly to the conclusion that the state of morals in those communities is higher and better than in ours. For my own part, I

feel bound to answer that question in the negative. I do not pretend to have full information on the point; I do not know that any of us have, or that statistics have been published on the subject, but so far as ordinary reading and the information which one can obtain in the intercourse of life can show, I feel bound to say that there is nothing in the state of morals in those countries for us to envy or which should lead us to the conclusion pointed to in this bill. So far as our knowledge of the subject goes, there is no country, probably, where these offences prevail, where the modesty of women is more justly celebrated than in Ireland, yet there is nothing there but the restraints of religion. Are not these restraints sufficiently strong to induce people to maintain a decent state of morals in this respect; they have been found strong enough in the colonies of the Empire and in Great Britain itself. In the kingdom of England and Scotland, which do not, perhaps, in that respect stand on quite so high a level as Ireland, but still occupy a position leaving nothing to be envied in the States of the Union pointed out, or in Germany or France, neither there nor in the colonies is there any disposition to change the law on this grave subject. That being the case, one is curious to understand, and if possible, to appreciate the motives which have induced people to believe that any good could be done by such a measure as this. The bill itself, I am bound to say, does not seem to be prepared with that thought which should have been given to such a subject. It seems to me (I do not desire to express it in any offensive way) to have been drawn for superficial reasons, and not drawn after that study of the question which is necessary to inspire confidence in a measure, and which would commend it to the Legislature. I have practiced at the bar for some years, and I do not remember a case of seduction which commanded the sympathy which an honest man would naturally feel for a betrayed girl. My experience has been rather the other way—that these are cases of mutual and equal guilt, or cases where strong passion has carried away one or the other, or both of the parties."

SUPREME COURT DECISIONS.

A number of cases from the Montreal District were decided by the Supreme Court on Monday and Tuesday last. In *Harrington & Corse* (5 L. N. 148), the judgment of the majority of the Court of Queen's Bench has been reversed. A very important question was raised in this case as to the position of the particular legatee, when the property left to him is charged with a hypothec. The Supreme Court holds that the particular legatee is entitled to get the property clear, and that the hypothec has to be discharged by the testator's general estate. In *Bain & City of Montreal* (5 L. N. 76), the appeal was dismissed, Justices Henry and Gwynne dissenting. In *Grand Trunk Railway Co. & Wilson* (5 L. N. 88), the appeal was dismissed. In *Hudon Cotton Co. & Canada Shipping Co.*, (5 L. N. 309) the appeal was also dismissed, Justices Fournier and Henry dissenting. Chief Justice Dorion and Mr. Justice Ramsay dissented from the judgment of the Court of Queen's Bench in this case. In *Bank of Toronto & Perkins*, the appeal was dismissed, and in *Giraldi & Banque Jacques Cartier* (5 L. N. 247), the judgment of the Queen's Bench was affirmed without costs, the Supreme Court being equally divided. We presume that in a case of this kind, leave to appeal to the Privy Council would be granted, if it were applied for.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, January 27, 1883.

DORION, C. J., RAMSAY, TESSIER, BABY, JJ.

GRANGE (deft. below), Appellant, and DUNCAN McLENNAN (plff. below), Respondent.

Promise of sale—Condition—Default.

Under the promise of sale set forth below, the respondent, not being put en demeure, did not forfeit his right to obtain a deed of sale by his failure to make the yearly payments agreed upon, or by his failure to ratify.

The appeal was from a judgment of the Superior Court, Montreal, (Papineau, J.), July 8, 1881, maintaining the respondent's action, and condemning the appellant to execute a deed of sale in favor of the respondent, of a certain farm in the parish of St. Télesphore, County of Soulanges.

The appellant, a trader residing at Coteau Landing, on the 7th December, 1874, by a promise of sale, agreed to sell to the respondent the farm in question. The price was $1,200,

of which $500 was acknowledged to have been received in cash at the passing of the agreement, and the balance of $700 was to be paid in seven equal annual instalments. The respondent was then a minor, but he was assisted, for the purposes of the agreement, by his father, who was present, and who promised to procure a ratification of the agreement by his son when he should come of age. It was to enforce this agreement that the action was brought by the son, Duncan McLennan, and the judgment of the Court below sustained the suit.

It was contended by the appellant that Duncan McLennan was not entitled to claim the execution of the agreement, because it contained a clause to this effect: that if McLennan failed or neglected to make the payments as they came due he would forfeit all right to obtain a deed of sale, and he would, moreover, forfeit all monies already paid and which might thereafter be paid (which would then be considered as rent of the farm), and the parties would be considered as lessor and lessee. Here was a specific clause of forfeiture under certain circumstances, viz, the failure of McLennan to meet his payments punctually. The forfeiture had been incurred. McLennan became of age in January, 1875, a month after the passing of the promise of sale; the first instalment became due in December, 1875; but McLennan failed to meet either it or subsequent instalments. Further, it was to be remarked that the respondent did not ratify the promise of sale at the time stipulated, viz., when he came of age, and this failure to ratify, it was contended, was fatal. It was also alleged that the promise of sale was annulled by respondent's father in 1879, and the circumstances showed the father intended to make the contract his own. It was not until 1880, nearly six years after he had come of age, that the respondent served a protest upon the appellant, asking for a deed of sale. Lastly, it had been proved that the respondent had no interest in the suit, having transferred his rights, and he had not taken any part in the initiation of the proceedings.

For the respondent it was urged that he had never been put *en demeure* to fulfil the terms of the agreement. The defendant had stipulated the right to have the bargain rescinded in the event of failure to pay the instalments. The plaintiff was a minor, and until his right had been declared forfeited he was always in time to ratify the promise of sale and ask for a deed. If the balance of price remained for a time unpaid it was through appellant's neglect, as he never demanded it. If it had been asked for it would have been paid, and the amount was tendered in good time. The pretended cancellation by the father was a nullity. As to the interest of the respondent, there was nothing pleaded on this head, and the point did not come up. The judgment of the Court below, it was submitted, should not be disturbed.

DORION, C. J. (dissenting). This action is to compel the appellant to grant to the respondent a deed of sale of a farm situate in the parish of St. Théodore, in compliance with a promise of sale made before Legris, a Notary Public, on the 7th December, 1874.

The appellant pleaded, that the respondent had not fulfilled the conditions of the promise of sale which had thereby become inoperative. The Superior Court has, however, maintained the action and condemned the appellant to give to the respondent a deed of sale in due form, and to deliver over to him the property claimed.

The appeal is from this judgment.

The circumstances which have given rise to the suit are as follows:

By a deed passed before Legris, a Notary Public, on the 7th of December, 1874, the appellant promised to sell the farm in question in this cause, to the respondent, then a minor, but assisted by Roderick McLennan, his father, who promised to have the transaction ratified by his son, when he should have attained the full age of twenty-one years. This promise of sale was made for the sum of $1,200, of which $500 were paid, at the time, and as to the balance of $700, the respondent promised to pay it to the appellant in seven yearly consecutive payments of $100 each, the first of which would fall due on the first day of October, 1875, with interest at the rate of seven per cent. per annum, to reckon from the first day of October, 1874.

The deed contains the following provision, which has given rise to the present litigation:—

"It is especially covenanted and agreed upon between the said parties hereto, that if the said Duncan McLennan makes regularly the said payments of one hundred dollars said currency, when they will fall due respectively, together

with the interest, till the full payment of said sum of seven hundred dollars, then and in that case the said Thomas Grange will be bound, as he doth hereby bind himself to give the said Duncan McLennan a free and clear deed of sale of said farm; but on the contrary, if the said Duncan McLennan fails, neglects or refuses to make the said payments when they come due, then the said Duncan McLennan will forfeit all right he has by these presents, to obtain a deed of sale of said herein mentioned farm, and he will moreover forfeit all moneys already paid and which might hereafter be paid, which said monies will be considered as rent of said farm, and these presents will then be considered as null and void, and the parties hereto will be considered as lessor and lessee."

At the date of this promise of sale, Roderick McLennan was living on the farm with the respondent and other members of his family. The respondent became of age in the month of January, 1875, and continued to live on the farm with his father for about a year after he had become of age. He then left for the United States, where he still resides. He has not come to Lower Canada since he has left except once, on a visit of three or four days in the fall of 1880—(see Roderick McLennan's deposition, appendix to respondent's factum, p. 7).

The respondent never ratified the promise of sale, as he was bound to do, on his coming of age, and neither he, nor his father Roderick McLennan have paid to the appellant any portion of the principal and interest accrued on the balance of $700 due on the price stipulated in the said promise of sale. The appellant has moreover been obliged to pay the municipal and school taxes and the seigniorial charges due on said property.

After waiting for several years without receiving either principal or interest, the appellant sought to get back the possession of his property, and on the 6th day of May, 1879, Roderick McLennan, who was still in possession of it, and who it seems had furnished the $500 which had been paid to the appellant, when the promise of sale was passed, consented to resiliate the same and to give up to the appellant possession of the farm, on condition that he should be allowed to occupy the house till the 1st of November following (1879). A deed was passed to that effect.

Subsequently Roderick McLennan refused to give up the possession of the house, and the appellant obtained a judgment of ouster and finally recovered the possession of the house also.

It was not till the 23rd of October, 1880, after the appellant had been in possession of the farm for nearly eighteen months and of the house for about a year, that a tender was made to him in the name of the respondent, of the sum of $997.31, as the balance in principal and interest of the price stipulated in the promise of sale of the 7th of December, 1874.

This tender was made through a notary and was accompanied by a demand on the appellant to grant to the respondent a deed of sale in the terms of the promise of sale.

The appellant having refused to comply with this request, the respondent has brought this action whereby he renews his tender, and claims that the appellant be ordered to give a regular deed of sale of the property in question, and to deliver him the possession of the same.

Upon the return of the action, the appellant by a dilatory exception demanded security for costs and a power of attorney from the respondent, as residing in the United States. This demand was complied with, and then the appellant filed a plea to the merits setting forth, that the respondent had not ratified the deed of the 7th of December, 1874, on his becoming of age as required by the said deed, and that he had failed to make any of the payments therein mentioned, and that he had thereby forfeited any right to claim a deed of sale; that Roderick McLennan who had promised to have the said promise of sale ratified by the respondent, had by deed of the 6th May, 1879, annulled and cancelled the said deed of sale, and that the appellant had been compelled to pay $39.80 for municipal and school taxes and seigniorial dues accrued on said farm, and also $40 for necessary repairs and $45.70 for legal expenses; and finally that the tender of the respondent was incomplete and insufficient.

To this plea the respondent answered that he was never asked to pay the balance of the price; that the forfeiture could not be claimed until all the instalments had become due, and he had failed to pay them and the interest thereon; that he had always been ready since he had become of age to ratify the promise of sale, but was never asked to do so; that he never autho-

rised the cancellation of the promise of sale by Roderick McLennan, which was obtained by fraud; *that as to the taxes and seigniorial dues, he was never informed that appellant paid the same, and that in any case such taxes and dues should have been paid by Roderick McLennan who was in the occupation of the farm until evicted by the appellant, and who would have paid him;*—that the proceedings in ejectment against Roderick McLennan, could in no way affect him, as he was not a party to the suit and he could not be liable for any costs incurred, and that such proceedings were only part of the same fraudulent design of the appellant to deprive the respondent of the property by indirect and fraudulent means; that when the tender was made to appellant, he fully admitted his obligation to convey the farm to the respondent, and promised to do so, only demanding the reimbursement of certain taxes and dues, which respondent, although not bound to pay, yet offered to do so, in order to remove all difficulties and to leave no pretext to the appellant for withholding the conveyance of the farm.

After the issue had been joined and the parties had proceeded to their *enquête*, the respondent made an additional tender of $31.60 for taxes and seigniorial dues paid by the appellant, and at the same time offered to pay the $40 alleged to have been laid out in repairs if the Court should so award.

Several incidental points have been raised in this case, but the only really important question in issue is as to the effect of the stipulation contained in the promise of sale, that if the respondent failed, neglected or refused to make the several yearly payments of $100 and interest agreed upon, when they became due, he should forfeit his right to obtain a deed of sale, and forfeit the monies he had paid, which should be considered as null and void, and the parties considered as lessors and lessees.

The respondent contends that this promise of sale having been accompanied by tradition and actual possession, was under art. 1478, C. C., equivalent to a sale, which could only be dissolved by a judgment at the instance of the appellant. The appellant, on the other hand, claims that the promise is to be governed by the conditions attached to it, and that the failure of the respondent to ratify the promise of sale when he became of age and to pay the instalments on the balance of the price, as they became due, operated in the terms of the deed as a forfeiture of the rights of the respondent to acquire the property in question.

Art. 1478 C. C. applies to an ordinary and unconditional promise of sale. Here the parties have attached to their transaction a perfectly legitimate condition, the object of which was to enable the appellant to recover back the possession of his property by the simple process as between lessor and lessee, without having recourse to the expensive proceedings of a sheriff's sale, or to that of an action *en résolution de vente* in default of payment of the price of sale. The parties have in effect declared that until the respondent should pay the $700 remaining on the stipulated price of sale, he should be the tenant of the appellant, and the $500 paid should be taken in payment of the rent, and that if the balance of $700 and interest was regularly paid as the several instalments became due, the respondent should then be entitled to claim a deed of sale of the property leased. Art. 1478 C. C. does not apply to such a contract, as it was well decided by the Court of Review in the case of *Noël* v. *Laverdière* and *The British America Land Co.*, opposants, (4 Quebec Law Rep. 247). If we consider the deed of the 7th of December, 1874, not as a lease with a right to the lessee to purchase, but as a promise of sale followed by possession, it cannot be denied that the promise was made subject to the condition on the part of the respondent of paying the balance of the price by instalments, and that default of paying any of the instalments when they should have been made, defeated any right the respondent could otherwise have claimed, and this without the necessity of any demand to annul the deed.

Even before the Code, when all such clauses were considered as comminatory and required a judgment to discharge the promissor, Pothier in his treatise, *de la vente*, No. 480, 4th paragraph, says: "Quoique je n'aie pas obtenu de sen-" tence, s'il s'est passé un tems considérable, il " en peut résulter une présomption que les par-" ties se sont désistées tacitement de cette con-" vention."

Troplong, vente, No. 132, commenting on art. 1589 of the French code, says:

" Puisque la promesse de vente est équiva-" lente à la vente, il faut dire qu'elle est sus-

" ceptible des mêmes conditions suspensives et " résolutoires que la vente. Il est même assez " ordinaire qu'elle soit conditionnelle ;" and at No. 134, the author adds: "si celui à qui la " promesse a été faite ne se présente pas à " l'époque indiquée pour passer contrat, il faut " distinguer s'il y a un terme indiqué ou bien " si la convention ne porte pas de délai."

" Dans le premier cas, la convention est réso- " lue de plein droit et le promettant est dégagé.

" Dans le second cas, il faut suivre la marche " que nous avons tracée au No. 117."

In the present case, the appellant was only bound to sell and to give a contract of sale to the respondent, in case the latter should ratify the promise of sale on his attaining the age of twenty-one years, and pay the balance of the price of sale at the periods fixed by the contract. He has neither ratified the contract, nor paid the instalments on the price as they became due, and therefore, the appellant was *ipso facto* discharged from the obligation to give him a title deed. It is unnecessary to discuss the the pretention of the respondent that his right to obtain a deed of sale could only be forfeited after he had failed to make all the payments mentioned in the promise of sale ; there is no pretext whatsoever to sustain such a pretention ;—The stipulation is plain and applies to the failure to pay any one of the instalments mentioned in the deed.

Laurent, vol. 24, No. 25, speaking of a conditional promise of sale, says :

" La promesse de vente peut-elle être faite " sous condition ? L'affirmative n'est pas dou- " teuse : l'art. 1854 le dit de la vente, et la pro- " messe bilaterale vaut vente. Il faut en dire " autant de la promesse unilatérale, elle forme " aussi un contrat ; donc elle peut être faite " sous condition. On applique, dans ce cas, les " principes qui régissent la condition."

" La promesse de vendre se trouve souvent " ajoutée à un bail comme promesse de vendre " sans que le preneur promette d'acheter ; la " promesse peut aussi être bilatérale, soit pure " et simple, soit sous condition."

" Si la promesse de vente était bilatérale, et " pure et simple, quoiqu'ajournée à la fin du " bail, par exemple, il y aurait vente et trans- " lation de propriété. Partant l'indemnité (due " pour expropriation) appartiendrait à l'ache- " teur. Mais que faut-il décider si la promesse " est conditionnelle ? La vente conditionnelle " ne transfère pas la propriété, tandis que la " vente à terme la transfère. Tout dépendra " donc de l'interprétation du contrat. Est-il " conditionnel, l'indemnité sera due, et l'ache- " teur ne peut la réclamer parce qu'il n'y a " pas encore de vente."

This is a good test, and it cannot be seriously contended that in case ot expropriation, the respondent could have claimed the indemnity if he had not yet paid the price to the appellant.

The error of the Court below is to have considered the deed of the 7th of December 1874 as a real sale subject to a revocatory condition, in case of non payment by the respondent of the purchase money, instead of a mere promise of sale depending on the payment of the price by instalments as a condition precedent or *condition suspensive*, (art. 1079-1081-1082-1087) which, not having been fulfilled within the delay fixed by the parties, annulled *de plano* the promise of the appellant to execute a deed of sale.

The respondent has all along treated the stipulation as a revocatory clause, and the authorities which he cites, are all applicable to the resolution in default of payment of the price of a complete sale, without noticing that here, the sale was only to take place, if the respondent paid the balance of the purchase money within certain specified terms.

The difference is clearly explained by the writers.

Aubry & Rau, vol. 4, § 302, p. 75—sect. B, say : "La condition suspensive venant à dé- " faillir, l'obligation et le droit qui y est corré- " latif, sont *ipso facto*, à considérer comme " n'ayant jamais existé. Ainsi, par exemple, " l'acquéreur qui aurait été mis en possession " de la chose par lui acquise sous condition, " serait obligé de la restituer avec tous ses ac- " cessoires et avec les fruits qu'elle a produits."

Larombière, vol. 2, p. 118, nos. 1, 2 et 3, or art. 1176 & 1177 of the French Code, and p. 120, no. 6.

The respondent has invoked in support of his pretensions, the answer which Gladu, the notary, has inserted in his protest as given by the appellant to the tender made to him on behalf of the respondent : but the appellant having refused to sign the pretended answer, it cannot be invoked against him. The art. 1209 C. C. has an express provision to that effect, and on this point I believe the Court is unanimous. The notary's

declaration cannot give authenticity to such an answer, it is clear that it cannot be proved by witnesses, as the respondent has attempted to do, for such evidence would be a clear violation of art. 1233 of the Civil Code;—even if such evidence was admissible, it is clear from what transpired on the occasion referred to, that no new agreement was entered into between the parties, and neither the tender nor the action are predicated on any such new agreement.

The deed of the 7th December, 1874, merely conveys to the respondent the right to occupy the farm in question, as the tenant of the appellant, coupled with a promise of sale on the part of the appellant, should the respondent pay regularly within the time specified the several instalments of $100 each and interest to complete the stipulated price of $1,200, and the respondent having failed to pay any of the said instalments, his right to claim a deed of sale has lapsed. And in the view I take of this case, it is quite immaterial whether the lease or license of occupation precedes or follows in the deed, the promise of sale. It is said, however, that there could be no lease as there was no rent fixed. This is not correct, for art. 1605 specially provides that persons holding real property by sufferance of the owner, without lease, are held to be lessees, and bound to pay the annual value of the property. This shows that there can be a lease without any agreement as to the amount of the rent, which in such case is to be determined by the annual value of the property leased. It is not necessary to decide here whether the five hundred dollars paid by the respondent are altogether lost to him, or if as is more likely, they are forfeited only to the extent, as it seems to have been intended, of the annual value of the property during the time the appellant was deprived of it; the action not being to recover any portion of these $500, but to recover the property itself.

Even if the condition as to the payment of the price could be considered as a revocatory condition, it could not avail the respondent to compel the appellant to grant him a deed of sale, for according to the authority of Pothier, No. 480, already cited, it was not necessary under the circumstances of the case, that the appellant should have obtained a judgment discharging him of his obligation. This author says, that if a long time has elapsed, a presumption may result that the parties may have tacitly desisted from their stipulation. In the present case, the appellant has been nearly five years without ratifying the promise of sale, as he was bound to do, to avail himself of its conditions; he almost immediately after becoming of age, left the country without any intention to return, and has since resided abroad; he never fulfilled any of his obligations, and has paid none of the six instalments that became due before the institution of the present action, nor any part of the interest accrued thereon: he did not even pay the ordinary municipal and school taxes and the seigniorial dues which were payable on the property. The only party whom he left in possession of the farm, was his father who from all the circumstances, seems to have been the party really interested in this promise of sale, since the $500 paid appears to have been provided for by him, and he is the party who having promised to have the deed ratified by his son, and who was left in possession of the farm, has consented to the resiliation of this promise of sale, and has delivered the property over to the appellant. If there is any case in which a party may be presumed to have desisted from a promise of sale, without requiring an adjudication to that effect from a Court of Justice, it is certainly in a case like this where the party has withdrawn permanently from the jurisdiction of the courts which he now invokes, and by his own conduct, has rendered it almost impossible except at a great sacrifice, to obtain that order of cancellation which he alleges, was necessary to deprive him of his pretended right to claim the property from the appellant, notwithstanding his own laches. If his claim is valid now, why should it not still be valid after twenty-nine years' absence, when the property might have doubled and trebled in value and when the appellant to protect it, would have been compelled to disburse large sums of money, or might have parted with it in good faith? The equitable rule laid down by Pothier, seems to have a special application to the circumstances of the present case.

The respondent may possibly claim that in leaving the country, he has not abandoned the possession of the property, but left it in charge of his father. In that case, the father would have been his constituted agent, and the abandonment which he made to the appellant, would under the

circumstances be considered as an act of good administration and be binding on the respondent.

It is not however on these grounds that I base my dissent from the judgment about to be rendered. It is on the broader ground, that the condition precedent on which the promise of sale was made, was not accomplished by the respondent within the specified delay, and the appellant has thereby been released from the obligation entered into to sell the property to the respondent in case he should fulfil his obligation. I would therefore reverse the judgment of the Court below, and dismiss the action of the respondent.

RAMSAY, J. On the 7th December, 1874, the appellant entered into a deed with respondent, then a minor, but assisted by his father, one Roderick McLennan, by which he promised to sell to the respondent a certain farm for $1,200, on account of which he acknowledged to have received $500, and the balance was to be paid in sums of $100 and interest at seven per cent., the first of these instalments to fall due on the 1st of October, 1875, and the interest to be calculated from the 1st October, 1874.

The presence of the father at the passing of the deed was that he might undertake "to have his said son ratify these presents when he will come to the full age of one and twenty years."

The deed then went on: "It is especially covenanted and agreed, etc." (See clause printed above):

Duncan McLennan came of age in 1875, but never got possession of the farm under the provisions of this deed, but Roderick McLennan did, and remained in possession of the house at all events till June, 1880.

On the 6th May, 1879, the appellant and Roderick McLennan made a deed by which they cancelled the deed of promise of sale, and agreed that the $500 should be for the rent of the premises up to that time. The appellant then brought a suit to evict Roderick.

After the eviction of Roderick McLennan the respondent protested the appellant and demanded a deed for the farm tendering him $997.31 as for the capital of $700 and interest, and offering to supplement the same if need be.

The appellant agreed, it is alleged, to accept this offer if the seigniorial dues and taxes were paid, but without stating the amount. The respondent then wrote to the appellant, desiring to know the amount so due, but the appellant failed to declare the amount, and in effect did not make it known till the 10th March, 1881, at *enquête*.

Duncan McLennan then sued the appellant, repeating his tender, and demanding a deed, and to be put in possession of the farm.

The appellant met this action by five propositions: 1st. The instalments were not paid when due, and therefore the original deed became only a lease. 2nd There was no ratification when the respondent came of age. 3rd. The deed was cancelled according to the terms by Roderick, who as *prête-fort* had a right to cancel. 4th. That respondent has no interest in the farm. And 5th, that the tender was insufficient.

The first and third of these propositions alone appear to me to merit consideration. The ratification of the deed was in the interest of the appellant, and he had a right to require it of respondent so soon as he was of age, but not before. This is all the deed says. The appellant having contracted with Duncan has no right to raise the question of Duncan's interest in the way he has done. He may perhaps have some rights as against Roderick, and through him against respondent; but Roderick was not put *en cause*, and the matter, if any, is not pleaded. If respondent be right as to the first question, the tender appears to me to be sufficient for the reasons given in the judgment of the Court below.

If the third proposition be correct, and be applicable to a case like the present, it will be unnecessary to consider the effect of this curious deed. There can be very little question, I think, that the general principle invoked by the appellant is true. If A warrants (*se porte forte*) that B will do a thing, A binds himself to its performance; and this is equally true whether B at the time be *incapable*, or A acts without authority from B. Nor can it it be doubted, I think, that so long as the *choses sont entières*, A can discharge himself of his obligation by cancelling the deed. When, however, it appears that the *incapable* has paid or done something in execution of the contract I can hardly understand how any act of the warrantor or of the other party can set aside the deed *without reserving his rights*.

Of course, if the protest and answer are proved, it would strengthen respondent's case; for it would be an acquiescence in respondent's pretensions. But, speaking for myself, I do not think the answer is proved. It is not signed, (Art. 1209 C. C.) and I do not think any verbal evidence could be received under our law to establish a title to a property of this value.

Allusion was made to the case of *Munro & Dufresne*. This case is not in point. In *Munro & Dufresne* there was a mere promise of the refusal of certain property up to a certain day, that day having passed the obligation was at an end. I am not aware that an option of that sort, where nothing passed, was held to be of a nature to require a *mise en demeure*. It would be seriously inconvenient if it did.

I am therefore of opinion that there was no cancellation of the deed, and that Duncan McLennan's ratification was *en temps utile*. This seems to me to be the whole question, for the fact of Duncan McLennan being out of the country could not possibly destroy his rights. If he had a right to be put *en demeure*, this must be done, and a deed with an unauthorised person, as Roderick McLennan was, could not affect this right one way or the other. I am to confirm, and this is the opinion of the majority of the Court.

Judgment confirmed.

Doutre & Joseph for the appellant.

Davidson & Cross for the respondent.