

leaving a balance due by the appellant to respondent of \$63,811.49, to which he is condemned unless he gives the respondent forty shares within fifteen days.

It is manifest that whatever view may be taken of this case the judgment is exaggerated. If appellant is *garant* of respondent for the forty shares transferred to him by Prentice, the least we can say is that Macdougall is *garant* in the measure of his interest of the other forty shares sold by Prentice to Macdougall for the account of Miss Auldjo. But in truth the deed of the 3rd March is not a warranty deed in the sense of the respondent's pretention, or a deed of sale. It is an assignment of all Prentice's rights in the forty shares, and it is made with special reference to McEwan's claim for which Macdougall undertakes to guarantee Prentice proportionally. This will appear by a letter of guarantee from Macdougall to Prentice, of the same date, which is in these words:—

"63 Wall Street, New York, 3rd March, 1871, Edward A. Prentice, Esquire.

"DEAR SIR,—In consideration of your assignment to me this day of your remaining interest in the property formerly belonging to the Montreal Mining Co., and now held by Alex. H. Sibley and other trustees, I hereby agree that any interest therein to the extent of one-half of that conveyed by the said assignment, or one-fortieth of the whole interest originally held by you, shall be liable in said proportion for any damages which may result to you by reason of any suit which Mr. Alex. McEwan, of London, England, may institute against you for failure to secure *his interest*, or any expenses which have been already incurred in the negotiation of the sale of the property by you.

"Yours truly,

"(Signed,) H. T. MACDOUGALL."

It is strange, after reciting this letter textually, to find respondent saying in his factum, "This letter was given without consideration, at a time when plaintiff knew nothing whatever of McEwan's claim." Mr. Macdougall may not have known the full extent of the firm's liability to McEwan, but it is evident by this very letter that he knew there was something, and it is difficult

to believe from his correspondence with Prentice in 1870 that he did not know from the beginning that Prentice was getting financial assistance in the matter, which had to be paid somehow. Again, if taken with the articles of partnership it would seem, that the assignment was simply a mode of giving Macdougall his proportion of the 160 shares. As the learned counsel for the respondent has pointedly referred to Art. 1507, I shall endeavour to put the argument technically. *Partage* is not *vente*. It is determinative of the right of property and not translatif. "Pareillement, lorsque plusieurs personnes ont été conjointement légataires d'un héritage, ou lorsqu'elles l'ont acheté en commun, et que par la suite elles le partagent, chacun est censé avoir été seul légataire ou seul acheteur de ce qui est tombé dans son lot, et n'avoir été légataire ni acheteur de rien de ce qui est tombé dans les autres lots." "Cela a lieu quoique le partage ait été fait avec retour en deniers ou en rente. * * * "Il est évident, suivant ces principes que le partage est un acte qui n'a aucun rapport avec le contrat d'échange, et encore moins avec le contrat de vente, soit qu'il soit fait sans retour, soit avec retour en deniers; car, suivant ces principes, le partage n'est point un titre d'acquisition; je n'acquies proprement rien par le partage que je fais avec mes cohéritiers ou autres copropriétaires; et tout l'effet du partage se réduit à rendre déterminé à de certaines choses le droit que j'avais, qui était auparavant indéterminé." Pothier, *vente*, No. 630. Laurent tries to show that this opinion of Pothier is erroneous, and that it is not in accordance with Roman law. He has for him the great name of Dumoulin, but I think he is unsuccessful. He goes back to the feudal law and contends that it was declared by the lawyers, who were hostile to mutation fines, that *partage* was not *équipollent à vente*, in order to avoid the payment of fines. (X. No. 396.) This is not a very satisfactory mode of reasoning, and he admits the C. N. has adopted Pothier's view (Art. 833), but he says that by the use of the word "*censé*" the article indicates a fiction. So it does, but the fiction is not that *partage* is not *sale*. Evidently it cannot be confounded with either.