success, but by the conjoint effect of that and of his own previous sale. If he had not sold the 80 shares, there would have been 80 to answer MacEwan's claim and 80 to divide. Perhaps the position of the parties is kept more precisely in view by dropping the convenient designation of shares and taking up the more abstract and more accurate terms in which they speak of their interests. There were then no separate shares in existence capable of being specifically transferred; the interests in existence were subject to be bought and sold, but were only claims to aliquot parts of an undivided whole. Thus the defendant assigns to the plaintiff all his interest in the undivided one-tenth interest in all the property taken from the Montreal Mining Company, "my interest at present "remaining in the said property being an "undivided one-twentieth interest therein." And the plaintiff agrees that his interest just acquired by the defendant's assignment, "to "the extent of fortieth of the whole interest "originally held by you," shall be liable in that proportion to MacEwan's claim. It is not said how the defendant's interest was reduced from a tenth to a twentieth, but it cannot be doubted that the parties were referring to the defendant's sale of the other twentieth; and when the whole interest of the partnership was shown by MacEwan's suit to be only a twentieth instead of a tenth, and so the plaintiff's intended portion was reduced from a fortieth to an eightieth, he became entitled, under the agreement, to have that eightieth made good to him in specie so far as the partnership assets sufficed for it.

This view of the contract tends to support Chief Justice Dorion's opinion as to the eight shares. He says,—"In the view that we take "of this case, that the transfer of the 3rd "March 1871 constituted a division of com-"mon property, these eight shares should be "returned to the respondent (*i. e.*, the plain-"tiff), and thereby reduce his claim for in-"demnity to 12 shares instead of 20." Then he goes on to mention reasons which make him think it more equitable to make the decree in the form in which it stands. The reasons point to a desire to alleviate the plaintiff's loss.

Now before pursuing this question further, or deciding the precise mode of apportioning what remains of the shares, their Lordships ask what practical difference will be made by giving the plaintiff more shares than he takes under the decree. That depends upon the value at which the shares are assessed for compensation to him. His original agreed quantity is 40; of these 18 go to make good MacEwan's claim, and he is not to be compensated for them. The agreed quantity is thus reduced to 22, and the plaintiff is entitled to compensation for so many of them as he does not get *in specie*. Then the question is, on what basis of value?

Their Lordships cannot accept the view of the Superior Court, that the date of the action is the proper time for ascertaining the value; a view which, if tenable, would give to the plaintiff the power of taking property of a highly speculative and fluctuating character at flood tide, and there fixing the value as the thing he had been deprived of. Nor can they agree with the argument at the bar, that on the 3rd March 1871 the defendant sold 40 shares with warranty of title to the plaintiff, that MacEwan's suit was an eviction of the plaintiff from that property, and that its value must be ascertained either at the commencement of that suit or at the date of the decree in it. It is difficult to say that the transaction was a sale, or that the form of sale with warranty was anything more than a form adopted not to express the exact transaction between the partners but with some other view, or that there was eviction from a property which never was or could be possessed by the assignee. No doubt MacEwan's suit intercepted the claim of the plaintiff to have shares from the Company; but as between the plaintiff and defendant that suit is the very thing which is contemplated by their agreement, and is the subject of special stipulation which does not contain any provision for indemnity to the plaintiff if thereby he failed to get the 40 shares designed for him.

The fact is that the agreement never took effect at all so as to vest in the plaintiff any right to a share in the property, or any possession of such a share. Half the defendant's nominal interest of one tenth really belonged to MacEwan, though that result was not then ascertained. The other half had disappeared