

alone; a difference of relationship, not a change in duty. If the fact of partnership makes a difference in this respect, then neither the appellant, nor the appellant and Sykes as partners, could sue Sykes to return the commission; a result not consonant with the decision in *Beck v. Kantorowicz*, 3 K. & J. 230, nor, as I think, consonant with the ordinary principles governing the relations of partners. . . .

[Reference to *Cassels v. Stewart* (1881), 6 App. Cas. at p. 73, per Lord Selborne; *Kerr on Frauds*, 3rd ed., p. 159.]

I think, having regard to the agreement of the 7th April, 1910, that Sykes may be regarded as a partner, and, as such, the agent of the partnership, either upon the principle suggested in *Kay v. Johnston* (1856), 21 Beav. 536, or in *Reid v. Hollinshed*, 4 B. & C. 867, and *Fereday v. Wightwick*, 1 R. & M. 45.

As pointed out by Middleton, J., in his dissenting judgment, Sykes is a party to this action, and the \$2,000 can be recovered, at all events, as money of the partnership; and, under the facts disclosed in evidence, the appellant would be entitled to it, in view of his having made the payment himself, or it might be applied as to one-half of it upon Sykes's note.

Upon the other question, it is true that, in one aspect, Sykes's interest was to reduce the price, because, as partner, he would benefit to the extent of \$500 for every \$1,000 by which the price was reduced; while as agent he would only lose \$100. And, on this method of calculation, *Buckley, J., in Rowland v. Chapman* (1901), 17 Times L.R. 669, decided that the principal could not complain because he could not establish a conflict of duty. But, speaking for myself, I am not prepared to accept an arithmetical calculation of loss and gain as exhausting the subject.

In the case in hand there are other factors—one of them, that familiarly indicated by the proverb "A bird in the hand is worth two in the bush." To an impecunious man \$2,000 in cash is much more attractive than the saving of many times that amount, when a payment has to be made some months later, and even then probably not by himself. Another is, that in a mining speculation of this character the price is expected to be paid by others to whom the property is to be turned over, and its reduction figures only as a possible increase of future and contingent profits; whereas an immediately available sum of money represents a personal and tangible advantage.

So far as the evidence discloses Sykes's resources, the only