Judgment at the same time affirmed in another cause (not argued) of the same nature, relating to the same subject, and between the same parties, with 140*l.* costs.

March 7, 1817.

ERROR.—DEBT.—FOREIGN JUDGMENT.—WRIT OF INQUIRY.—COSTS.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

BAYNE—*Appellant.*
FERGUSON and KYD—*Respondents.*

B., F., and K. become copartners in a joint adventure in land. A third person (Lord L.), for whom K. is factor, is anxious to purchase a part of the copartnership land called Hilton, at 19,441*l.*, and applies to certain monied relations to furnish him with the means of effecting the purchase. B. is aware of the anxiety of Lord L. to purchase Hilton, but K. does not communicate to B. the steps taken by Lord L. with that view. F. (K. concurring) persuades B. to agree to offer the lot to Lord L. at 19,000*l.*, in order to bring him to a decision; and B. and F. offer it at that price to K., who accepts it for himself without any objection made by his co-partners, B. however, understanding the offer and acceptance to be for Lord L. Lord L. does not accept the offer at that time, and K. sells the lot at 19,000*l.* to F. without any communication with B.—F. sells pieces of the lot to M. and Lord L., without any interference by B., and then sells the remainder to Lord L. at a price which makes up for the whole lot the sum of 22,311*l.*, instead of 19,000*l.* B. brings his action for a share of the increased profits, alleging that his consent to offer the lot at 19,000*l.* was obtained by fraud and concealment, on the part of his co-partners, for the purpose of excluding him from his share of these profits. F. examined on oath, states that he did not consider himself legally bound to allow K. to participate in the profits, but that he had a feeling of honour on the subject, K. having promised, in case F. should be obliged to sell the lot at a loss, to bear a part of that loss. Judgment below for the Defenders, affirmed above, but without costs.

March 24, 26; June 23, 1817.

CO-PARTNERS.—CONCEALMENT.—FRAUD.

March 24, 26; June 23, 1817.

CO-PARTNERS.—CONCEALMENT.—FRAUD.

The Lord Chancellor and Lord Redesdale being of opinion that, although the circumstances might raise a suspicion of unfair dealing, B. by his own conduct in not interfering at all with the sales by F. of pieces of the lot to M. and Lord L. taken in connexion with his conduct at the time of the offer to and acceptance by K., was precluded from the relief which he prayed.

THE Appellant had brought this action against the Respondents to recover a share of certain profits made upon a joint adventure in land, from which his co-partners had, unjustly as he alleged, attempted to exclude him.

August, 1808. Estate purchased by Respondents.

In the beginning of August 1808, the Respondents, Messrs. Kyd and Ferguson, purchased the estate of Carselogie, in Fife, from Sir John Hope's trustees at the price of 44,000*l.*, payable by instalments, 10,000*l.* at Candlemas, 1809; 10,000*l.* at Martinmas, 1809, and the remaining 24,000*l.* at Martinmas, 1811. Before this purchase took place, Lord Leven, to whose property a lot of the estate called Hilton lay contiguous, was very anxious to purchase that lot separately, and directed Kyd, who was his factor, to consider the value of Hilton, and state his opinion upon it. Kyd, in a letter to his Lordship, dated the 14th July, 1808, stated that he thought Hilton worth 19,332, but that they asked 19,850, and that it was not worth while to break off for 500*l.* on such a purchase. This projected separate purchase, however, did not take place; and then Kyd and Ferguson resolved to purchase the whole estate as a speculation, Lord Leven agreeing to take Hilton off their hands. It was expected that the whole might be purchased for

43,000*l.*, in which case Lord Leven was to take Hilton at 19,000*l.* The price of the whole being 44,000*l.*; the proportion for Hilton was raised to 19,441*l.*, and then Lord Leven, who, without objecting to the account of the price, became apprehensive that he could not provide the money to pay it, expressed to Kyd his desire to be relieved from his engagement. Messrs. Kyd and Ferguson consented; and notice being given that Hilton was to be sold, the Appellant, Bayne, came forward and offered 18,500*l.* for it. The Respondents would not accept that sum, but offered it at 19,000*l.*, which Bayne refused to give. Then it was proposed to Bayne, or by him (for it was stated one way in the one case, and the other way in the other), that he should become a partner in the adventure, and on the 6th or 8th of August, 1808, he was admitted a partner accordingly.

March 23, 26; June 23, 1817.

CO-PARTNERS. —CONCEALMENT.— FRAUD.—

It appeared by a letter from Lord Leven to Kyd, dated 4th August, 1808, that his Lordship had not then abandoned all thoughts of purchasing Hilton, though he had been desirous of being released from the obligation; and on the 11th August, 1808, his Lordship wrote to Kyd, that in the belief that he might still have the refusal of Hilton, he had written to Messrs Thorntons (bankers, London, relatives of his Lordship) to assertain whether they would assist him with the two first instalments, if not the whole sum, to enable him to make a purchase every way desirable for him; and, on the 13th August, his Lordship wrote to Kyd that the plan and valuation (made by Kyd as above, 14th July, 1808) were before the Thorntons; and that if they listened to the proposal, it would be cruel to be disappointed.

August 6, or 8, 1808. Appellant admitted as a partner.

March 24, 26; June 23, 1817.

CO-PARTNERTS —CONCEALMENT.—FRAUD.

On the 15th August, 1809, about a week after the Appellant had become a partner, he was, in the course of a conversation with the Respondent, Ferguson, informed, in general terms, of Lord Leven's anxiety to purchase Hilton, but was not then informed that the plan and old valuation had been laid before the Thorntons. In the course of that conversation it was agreed between Bayne and Ferguson, that Hilton should be offered to Lord Leven at 19,000*l.*, Bayne being informed by Ferguson that Kyd was of the same opinion; and the following memorandum or missive was written out by Ferguson, and signed by him and Bayne, and addressed by Ferguson to Kyd.

Missive or offer, August 15, 1808.

"It is our opinion, that Hilton should be sold, "with its proportion of freehold effeiring to the rent, "for 19,000*l.*; the price to be payable as follows, "viz. 3000*l.* at March 1809, and the balance at "the time of the last payment to Sir John Hope; "reserving our right to straight marches, on receiving land for land, quantity and quality considered. "This *offer* to be binding for a week from this date, "Cupar, 15th August, 1808. (Signed) JOHN "FERGUSON, WILL. BAYNE. *Cupar, 15th August,* "1808."

On the day following, Mr. Kyd returned an acceptance in these terms: "*Cupar, 16th August,* "1808. Messrs Bayne and Ferguson,—Your offer "of Hilton of yesterday I accept, and am, Gentlemen, your most obedient servant. (Signed) "JAMES KYD."

It was admitted, on all hands, that this offer was made with a view to a sale of the property to Lord Leven, though Kyd accepted it as if made to himself. Bayne did not at that time object to this ac-

ceptance, conceiving, as he afterwards alleged, that Kyd was acting in the affair merely as the agent of Lord Leven. His Lordship did not take advantage of that offer; and, on the 19th or 20th August, 1808, Kyd applied to Ferguson to purchase the lot at 19,000*l.*, which Ferguson agreed to do. No intimation of that transaction was given at the time to Bayne. On the 22d of August, Ferguson sold a small portion of Hilton to one Martin; but the minute of sale was subscribed by Kyd instead of Ferguson, which was accounted for by the circumstance that at that period the whole estate was vested in Kyd, to whom alone the conveyance had been made. About ten acres of Carselogie, not included in Hilton, were at the same time sold to Martin, and about that part of the transaction Bayne was consulted. On the 24th August, 1808, Ferguson sold thirty acres of Hilton to Lord Leven. These sales of Hilton were publicly known; but Bayne did not at all interfere in them, nor was he consulted respecting them.

March 24, 26; June 23, 1817.

CO-PARTNERS. —CONCEALMENT.—FRAUD.

Sales of Hilton by F. in which B. does not interfere.

In October, 1808, Lord Leven again intimated to Kyd his anxiety to purchase the remainder of Hilton; and, on the 11th Nov. 1808, he did actually purchase it, at a price which made up, for the whole of Hilton, the sum of 22,311*l.*, instead of 19,000*l.* at which it had been offered in the missive to Kyd.

Bayne insisted that he was entitled to a share of the profits, derived from this increased price, and on the 3d May, 1809, brought an action against Ferguson and Kyd to compel them to pay him that share, contending that it was evident, from the circumstances, that the missive of the 15th August,

Action.

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1808, had been obtained from him by fraud and collusion between Kyd and Ferguson; particularly by the concealment of Lord Leven's application to the Thorntons. Ferguson and Kyd rested their defence on the missive. The defenders being examined upon oath in the course of the proceedings, in consequence of a reference for that purpose, they stated that there was no agreement nor understanding between them, at the time the missive was given, that they were to participate in the profits of the purchase; and Kyd deponed that he had no expectation at the time of his examination of sharing in the profits; and Ferguson deponed that he did not consider himself legally bound to allow Kyd a share of the profits, but that he had a feeling of honour on the subject, Kyd having promised, in case he (Ferguson) lost by his purchase of Hilton, to bear a share of the loss.

Judgment below.

The Court of Session decided in favour of the defenders, adhering to the interlocutor of the Lord Ordinary (Newton), May 14, 1811, in which it was found that, if Bayne understood the offer of the 15th August, 1808, to be merely an authority to Kyd to dispose of the lands to a third person, he ought to have declared so when he received the acceptance, which showed that Kyd understood it in a different sense. From that judgment Bayne appealed.

Sir S. Romilly and *Mr. Abercromby* for the Appellant; *Mr. Leach* and *Mr. Stephen* for the Respondents.

Judgment. June 23,

Lord Eldon C. The question here is, whether

the Court of Session was right in determining that Bayne was not entitled to a share of certain profits obtained on a joint adventure in land, in which he was concerned with Kyd and Ferguson. It will be in your Lordships' recollection that the Appellant, and the Respondents Kyd and Ferguson, were partners in the purchase of a certain estate, including a property called Hilton. This property had, it appears, been offered to Bayne by the other partners at 19,000*l.*, and had been refused by him at that price, and it was therefore thrown into the mass of the partnership property. It will be in the recollection of some of your Lordships also, that by a missive, signed by Bayne and Ferguson, the Hilton property was offered—I say, *offered*, as that appeared from the terms of the missive and acceptance to be considered as the nature of the transaction—to Kyd for 19,000*l.*; and it was a question, whether the offer was made to Kyd merely as factor for Lord Leven, on his Lordship's account, or for his own benefit if he chose so to accept it at that price.

June 23, 1817.

CO-PARTNERS.—CONCEALMENT.—FRAUD.

Missive, Aug. 15, 1808.

It will be recollected, that Kyd was factor to Lord Leven, and that a correspondence had been carried on between them relative to the purchase of Hilton by his Lordship. Lord Leven, though anxious to have the property, had not found the means to provide the purchase money; and when the missives passed, it remained in a sort of suspense whether he would purchase or not. I observe, it is contended, and I believe rightly contended, that, according to the law of Scotland, if a person standing in such a situation as Kyd's, accepted the offer and gave such a missive, though he accepted it on behalf of ano-

Factor or agent purchasing in his own name for his principal.

June 23, 1817.

CO-PARTNERS. —CONCEALMENT.— FRAUD.

ther person, whether that other person completed his contract or not, he would be bound to take it, if the other partners chose that he should be so bound.

Lord L. did not take advantage of the offer, and then Kyd sold the property to Ferguson for 19,000*l.*, and Ferguson says, that he was a *bonâ fide* purchaser at that price. But by sale of a small part of the property to one Martin, and another small part, and afterwards the residue, to Lord Leven, it turned out that a profit of between 3000*l.* and 4000*l.* was made of it beyond the sum of 19,000*l.*; and then Bayne insisted, that the transaction of the missives was affected by concealment and management on the part of the Respondents in such a manner that it could not, consistently with the law of partnership, exclude him from his share of the profit made by the sale of this property which formed, if I may so call it, a part of the partnership stock. I cannot disguise from your Lordships that when the cause was heard, whether the circumstances would authorize a judicial opinion to that effect or not, I could not avoid entertaining a good deal of suspicion that all was not so fair as it should be on the part of the Respondents. Such having been the impression on my mind, it became my duty carefully to consider whether that impression was well founded. I have carefully and repeatedly considered this case, and, upon the whole, I am of opinion that, connecting the missive and acceptance with the conduct of Bayne after Ferguson was acknowledged as the owner, this is a case in which the Appellant, whatever may be the real character of the proceedings of the Respondents, is precluded by his own acts from

having the relief which he now claims on the ground of fraud and concealment. But, on the other hand, it is impossible for me to dismiss certain reflections from my mind, so as to leave me at liberty to advise your Lordships to give costs.

June 23, 1817.

CO-PARTNERS.—CONCEALMENT.—FRAUD.

Lord Redesdale. I entirely concur in what the noble Lord has said. A., B., and C. unite as partners in an adventure. A. and B. make an offer to C. as attorney for a stranger, D.; and C., without informing his partners whether he had made the offer to D., chooses to take it as an offer to himself. A. concurs in that, but B. does not. If the case stood there, the decision would clearly be wrong. I have scarcely a doubt that the transaction was fraudulent on the part of the Respondents; but Bayne has, by his own conduct, precluded the relief which he claims. I have thought it right to say this much, because with reference to the general principle the Judgment below would be wrong.

Judgment *affirmed*, without costs.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

GEDDES—*Appellant.*
PENNINGTON—*Respondent.*

June 9, 16, 1817.

G. purchases from P., a horse-dealer, a horse warranted "a thorough broke horse for a gig," P. representing at the time that the horse had been sent to him to be sold,