

MATTHEW PERKINS, *adm'r.* vs. SHEPHERD BUMFORD.

In an action upon a promissory note which has been made in consideration of a deed of the promisser, conveying to the maker all the promisser's right in a tract of land, it is no defence, that the promisser had no interest in the land, unless some fraud is made to appear.

ASSUMPSIT upon a promissory note, dated April 9, 1819, for \$50, made by the defendant, and payable to *D. Smith*, or bearer, on demand.

The cause was tried here, upon the general issue, at November term, 1825, when it was admitted, that the defendant made the note; and it appeared, that on the day of its date, *D. Smith*, the promisee, by deed, released to the defendant, all his right in certain lands, and that the description in the deed, of the subject matter of the conveyance was in the following words, "all the right, title, claim, and demand, that I have on a certain tract of land lying and being in Sanbornton, aforesaid, which land was taxed to said *Bumford* for the direct tax, levied and assessed for the year 1815, was sold by *W. B. Kelly*, deputy collector for the sixth collection district, in May, 1816, and bid off by me, the said *Smith*, at his sale; meaning to convey all the right or title I have, by virtue of said sale." It also appeared, that the note was given in consideration of the said release.

The defendant offered to prove, that the note still remained the property of said *Smith*, and that previous to the sale of said land, as aforesaid, by the collector, the said tax had been paid by the defendant. But the court rejected the evidence; and a verdict was taken for the plaintiff, subject to the opinion of the court upon the relevancy of said testimony, thus rejected.

Woodbury, for the plaintiff.

Bell, for the defendant.

RICHARDSON, C. J. The consideration of the note, in this case, was a deed, which passed whatever the grantor had contracted to sell. This is not the case of a man, who has paid money in consideration of a contract, void for want of power in the other party to contract. *Shearer vs. Fowler*, (7 *Mass. Rep.* 31,) nor of a man, who has given a promissory note in such a case. 7 *Mass. Rep.* 14, *Fowler vs. Shearer*.

This is not the case of a man, who affirming, that he has a right, sells it, when he is aware, that he has no right, and so is guilty of a fraud. 3 D. & E. 438, *Hayne vs. Mallby*.—8 *Mass. Rep.* 46, *Bliss vs. Negus*.—1 *N. H. Rep.* 174, *Reed vs. Prentiss*.

Perkins
vs.
Bunford.

Here the defendant bought the right of *Smith*, whatever it might be; and *Smith*, by deed, conveyed whatever right he might have had. There was no fraud. The defendant has all that he purchased. The case of *Bree vs. Holbeck*, (*Douglas* 654.) is strongly in point; and we think, the evidence of payment of the tax was properly rejected, as wholly irrelevant, and that there must be

Judgment on the verdict.



S. A. PEARSON vs. THOMAS EAMES.

In assumpsit the defendant pleaded, in the first place, the general issue, and then the statute of limitations, but without alleging it to be done by leave of the court. The plaintiff demurred to the second plea, and assigned for cause, that it was not pleaded with leave of the court—but the plea was adjudged good.

ASSUMPSIT. The declaration contained three counts. The defendant, in the first place, pleaded the general issue to the whole declaration. He then pleaded in bar of the first count, but without alleging that he did it by leave of the court, that he never promised within six years.

The plaintiff joined in the general issue, and demurred to the plea in bar of the first count, and assigned for cause, that the said plea was pleaded without leave of the court.

Pearson, pro se.

Stuart and Sheafe, for the defendant.

By the court.—If the plaintiff in this case had treated all the pleadings, on the part of the defendant, as one plea, and had demurred to it, assigning duplicity as a cause of demurrer, it might have deserved consideration, whether the pleas, in their present shape, could have been supported. But it is very clear, that on this demurrer the second plea is in form sufficient. The case of *Ryley vs. Parkhurst et al.* (1 *Wils.* 219,) is directly in point.

Judgment for the defendant.