## MURRAY *vs.* CLAY.

Where a party covenants to do an act, for which he receives a consideration, and fails to perform the act, the other party may bring covenant for the breach, or assumpsit to reclaim the consideration.

In assumpsit for the consideration, plaintiff must prove the contract under which he paid the money, and the failure, refusal or inability of defendant to perform it on his part.

*Appeal from the Jackson Circuit Court.*

ASSUMPSIT, by Murray against Clay, determined in the Jackson circuit court, November, 1847, before the Hon. W. C. SCOTT, judge.

Plaintiff declared in indebitatus assumpsit, for work and labor, goods, wares and merchandise, money advanced, paid, laid out and expended, and money had and received, &c. &c.

The cause was tried on the general issue, and verdict and judgment for defendant. Pending the trial, plaintiff took a bill of exceptions, in substance as follows:

"On the trial, plaintiff introduced A. H. Graham, as a witness, for the purpose of proving a certain contract (as inducement to plaintiff's cause of action) between defendant and plaintiff, upon which plaintiff had paid defendant $200, and that the consideration for which said money was paid, had wholly failed, (and for which cause plaintiff seeks to recover under the count for money had and received.) And said witness testified that there was an agreement made between plaintiff and defendant, and that they requested him to reduce the same to writing, some time in the month of May, 1847. Whereupon, defendant objected to witness testifying anything about said contract as it was reduced to writing; the court sustained the objection, and plaintiff excepted. Plaintiff then offered to read said written contract to the jury to show an inducement to

the cause of action—to enable him to prove the failure of the consideration for which he paid defendant the said $200, which he sought to recover back—but the defendant objected to the introduction of said written contract, and the court decided that said contract could not be read as evidence to the jury, and that plaintiff could not introduce any other evidence whatever as to said contract, to show that he had paid defendant the said sum of $200 in said contract named, and that the consideration therefor had wholly failed; and plaintiff did not, by reason of such decision, introduce any further or other testimony, and the court directed the jury to find for the defendant, which they did, &c., to all of which plaintiff excepted. The written contract referred to by said witness, and offered in evidence by plaintiff, is in the words and figures following, *to wit*: "Know all men by these presents, I, Mastin Clay, do this day both sell and bargain all my right, title and claim of an occupant claim, that I now live on, to Mr. James Murray for the consideration of two hundred dollars, to be delivered to said Murray on, or by the first day of January next; and said Clay is to prove up the preemption in full without dispute to secure to said Murray all right and title and claim in peace. This made and concluded by me, as hereunto I have set my hand and seal, this the fifth day of May, 1847. MASTIN CLAY, [SEAL.]"
"Attest: A. H. GRAHAM."

The plaintiff appealed, and assigned for errors the points reserved in his bill of exceptions.

BYERS & PATTERSON, for appellant.

FOWLER, contra. Wherever a man may have an action on a sealed instrument, he must resort to it. 2 *Cond. Rep.* 98, *Young vs. Preston.* 1 *Esp. N. P.* 96, 130. 2 *Esp. N. P.* 781. 1 *Saund. Pl. & Ev.* 110. 1 *Maule & Selw. Rep.* 575. *Scack et al. vs. Anthony.* 1 *Chit. Pl.* 94. 2 *M. & Selw. Rep.* 315 *et seq. Moorsom vs. Kymer.*

A plaintiff should not be allowed to go into evidence of any

special agreement on a general count in *indebitatus assumpsit.* 1 *Esp. N. P.* 130. 4 *Ark. Rep.* 579, *Hawk vs. Walworth.* 1 *Saund. Pl. & Ev.* 110.

Where in an action of *indebitatus assumpsit* it appears in evidence, on the trial, that the contract had been reduced to writing under seal, the plaintiff cannot recover; because the proof shows that he misconceived his action, and should have resorted to the higher security. 4 *Ark. Rep.* 579, *Hawk vs. Walworth.* 2 *Cond. Rep.* 98, *Young vs. Preston.* 2 *Esp. N. P.* 781.

The party could only proceed in assumpsit, where the deed is inoperative, or void, which is not the case here. 1 *Saund. on Pl. & Ev.* 110. 1 *Chit. Plead.* 95.

OLDHAM, J. It is a principle well settled that where a party has covenanted to do an act, for which he has received a consideration and fails to perform the act, the other party may either bring covenant for the breach or assumpsit to reclaim the consideration. *Sugden on Vendors, vol.* 1. 368-9. *Vol.* 2, 420 (*Hammond's Ed.*) *Weaver vs. Bentley,* 1 *Caines* 47. It is a common practice for purchasers of real estate, upon the refusal or inability of the vendor to convey, to bring an action of assumpsit for the purchase money, instead of covenant to recover damages for a breach of the contract. The last remedy is in affirmance of the contract; the first is not upon the contract, but in disaffirmance of it.

To entitle the plaintiff to recover in this case in the circuit court, it was necessary for him to prove the contract under which he paid the money, and also the failure, refusal or inability of the defendant to perform it on his part. This the court should have permitted him to do. The court erred in excluding the testimony offered, for which the judgment must be reversed.