C. F. WILHELM JANTZEN, Appellant, v. **JOANNA E. COLEMAN**, Appellee.

ARGUED MAY 4, 1915. DECIDED MAY 10, 1915.

Dossen, C. J., Johnson and Witherspoon, JJ.

1. When the action set forth in the complaint of plaintiff is not suited to the form of action chosen, the action should be dismissed.

2. Where the parties bind themselves under a written contract mutually to do business, the doctrine of principal and agent or factor is established.

3. Where the first count in a complaint in an action of debt is ruled out by the trial court, each subsequent count constitutes a distinct cause and should be **a** sufficient cause of action in itself, to enable the court to take further jurisdiction.

Mr. Justice Witherspoon delivered the opinion of the court:

Debt—Appeal from Judgment. On the sixth day of February A. D. 1913, C. F. W. Jantzen, appellant, plaintiff below, instituted an action of debt against J. E. Coleman, appellee, defendant below, for certain amounts laid in his complaint, which reads as follows:

"C. F. W. Jantzen plaintiff complains that Joanna E. Coleman defendant is justly indebted to him in the sum of five hundred and seventy-nine dollars and ninety-two cents, for sundry matters properly chargeable in account, as will appear by the account herewith filed and that although requested, has neglected to pay said debt. And the said plaintiff further complains that the said defendant is indebted to him in the sum of ninety-three dollars and sixty-one cents, by virtue of the written instrument, a copy of which is herewith filed, as will appear thereby, and although requested has neglected to pay said debt."

The appellee, defendant below, sets up in her answer to plaintiff's complaint, that the debt claimed, grew out of a certain contract made and entered into

between herself and the appellant, plaintiff below, dated May 4, 1911, and that the claim could not be sued for in an action of debt.

The court below, after hearing the law, and examining the evidence offered by both parties, ruled out the first count in appellant, plaintiff's complaint, and submitted the second count to the finding of the petit jury.

The jury returned a verdict finding the plaintiff not entitled to recover, and upon this verdict the court rendered its final judgment as is required by law.

To this judgment and other proceedings the appellant, plaintiff below excepted, and brought the case up to this court of last resort for review. This seems to be a clear and brief account of the positions of the parties as shown by the records before us.

We must express, that the counsellors on both sides have ably represented their positions taken, and that, with due skill and credit.

After a careful examination of the law and evidence in the case, this court says—that the ruling out of the first count in the complaint of appellant, by the court below was in keeping with law, because the written contract put in evidence by the appellee, defendant below, shows to the satisfaction of the court that the action as brought is wrong and illegal for the reason that appellant and appellee were transacting business under a mutual contract, which contract created appellee **a** factor or agent, hence she could not be considered an ordinary debtor; consequently, there is no debt except under the contract, the action brought should have been upon the "contract" for fraud or embezzlement. *(Zeiser v. Montgomery,* I Lib. L. R. 485; Bouv. L. D. under Contracts, Fraud and Embezzlement.)

The lower court after ruling out count first, submitted the second count to the jury, for their finding; in this we are of opinion the court below erred, first because the amount is below the jurisdiction of the court; second because the two causes of action are not suited to the same form of action; the statute reads thus : "if the plaintiff has really several causes of action against the same defendant, suited to the same form of action, he may include them all in one complaint, separating them from each other by the words—`and the

plaintiff further complains that The court should have immediately, after ruling out count first, dismissed the action for the want of jurisdiction.

The judgment of the lower court is therefore affirmed, with costs, and it is hereby ordered.

L. A. Grimes, for appellant.

Arthur Barclay, for appellee.