WILLIAM N. WITHERSPOON, Appellant, *v.* SAMUEL J. GRIGSBY, Appellee.

APPEAL FROM JUDGMENT IN ACTION OF DEBT.

Argued April 18, 19, 1939. Decided May 5, 1939.

Where a contract has been fully performed and executed on the plaintiff's part, an action of debt is the proper form of action to enforce payment due from defendant on the contract.

Plaintiff, now appellant, sued defendant, now appellee, in an action of debt for a sum allegedly due and owing to plaintiff under a contract for the sale of real property. The trial judge held that an action of debt did not lie and that plaintiff should have sued for damages for breach of contract. On appeal to the Supreme Court, *judgment reversed and remanded.*

William N. Witherspoon, assisted by *S. David Coleman* and *Anthony Barclay,* for himself. *C. Abayomi Cassell* and *A. D. Wilson* for appellee.

MR. JUSTICE DOSSEN delivered the opinion of the Court.

According to the records filed here, William N. Witherspoon complained that he and Samuel J. Grigsby, the defendant, had entered into a contract by which the former was to sell unto the latter certain real estate, numbers 395 and 396, situated in Greenville, Sinoe, for a sum of £378:19:2 sterling; that in pursuance of said agreement he, plaintiff, now appellant, signed and sealed a deed as evidence of the sale of said property, his wife also signing away her dower interest therein; that said deed was duly delivered to said defendant, now appellee; that against the sum of $1,824.00 appellee had paid a sum of

five dollars only; and that because of his failure or neglect to pay the balance on the date due appellant sued out this action of debt.

Of the eleven pleas set up in defense to this action, there is only one of them specifically set out and ruled upon in the ruling of the trial judge upon which the plaintiff, now appellant, based his bill of exceptions, which in our opinion, as well as in keeping with the previous opinions of this Court, is worthy of our consideration and that is:

> "That the plaintiff had misconceived his form of action, in this that the action should have been an action for breach of contract and not an action of Debt."

We recognize that, inasmuch as several of the issues raised were mixed questions of law and fact, the trial judge was considerably handicapped in coming to a correct conclusion, having allowed himself to be precluded from taking evidence by disposing of them as pure issues of law. Accordingly, on December 2, 1938, after briefly reviewing the gist of the pleadings, he decided that the action of debt did not lie, but that the suit should have been for damages for breach of contract. To this judgment, exceptions having been duly taken, this appeal has been duly prosecuted to this Court.

The complaint alleges that a contract was made between the appellant and appellee for the latter to purchase two town lots with improvements thereon as aforesaid and that a deed was executed by appellant and his wife and handed to appellee, which was all to be done on the part of appellant to complete his part of the contract. Up to this stage appellee's part of the contract was to pay a sum certain, according to the pleadings, within a given time.

The contract was then executed and not merely executory; and appellee having failed to pay the said sum certain as contracted, an action of debt is the proper form of action to be chosen to enforce payment. Our opinion is upheld by *Cyclopedia of Law and Procedure:*

"It is incontrovertibly settled that *indebitatus assumpsit* will lie to recover the stipulated price due on a special contract which has been fully performed on the plaintiff's part, and it is not necessary in such case to declare on the special contract, although the plaintiff may use the written agreement as evidence of the compensation due; for where there is a special agreement and the plaintiff has performed on his part, the law raises a duty on the part of the defendant to pay the price agreed upon, and the plaintiff may count either on the implied assumpsit or on the express agreement. A new cause of action, upon such performance, arises from this legal duty in like manner as if the act done had been done upon a general request, without an express agreement, and the plaintiff is not bound to declare specially on the agreement. The same is true where the contract has been fully performed in respect to any one distinct subject included in it. The only effect in such a case of proof of an express contract fixing the price is that the stipulated price becomes the *quantum meruit* in the case. It is not a question of variance, but only of the mode of proof of the allegations of the pleading. Where the consideration of a simple contract for the payment of money has been executed it may be declared on in debt or assumpsit, according to the subject-matter. But where the consideration has not been executed, the remedy is by special action on the case." 9 Cyc. of Law & Proc. *Contracts* 685–86 (1903).

Our statutes say:

"Actions are divided into three general classes,—where the injury for which redress is sought is a breach of contract, the action is said to be an action growing out of contract; where it is an injury of any other description, the action is said to grow out of a

wrong. The third class, consists of actions growing out of judgments in former actions.

"Actions growing out of contract, are subdivided into those in which a specific performance of the contract is sought,—and those which are intended to recover damages for the non-performance of the contract.

"There are three actions growing out of contract, in which the specific performance of a contract is sought,—debt,—specific performance of contracts, other than for the payment of money,—and injunction.

"An action of debt is an action to enforce the payment of a sum of money, which the defendant has contracted to pay to the plaintiff." Stat. of Liberia (Old Blue Book) ch. I, §§ 3–6, at 30, 2 Hub. 1524–25.

For the foregoing reasons, we are of the opinion that the judgment should be reversed and the cause remanded to the court below to be tried on the issues of facts, as well as issues of both law and facts raised in the pleadings in this case, with costs of this Court against the appellee; and it is hereby so ordered.

Judgment reversed and remanded.

MR. CHIEF JUSTICE GRIMES, dissenting.

The clock has at last struck the hour when I can with propriety expose and make record of the reasons urged in our private consultations why I am unable to agree with the way in which the conclusions reached by my colleagues in this case have been expressed in the opinion just read.

Anyone who may have carefully followed the reading of said opinion must have imagined a case in which, after appellant had sold appellee a tract of land, the latter had accepted the benefit of the sale and then refused to meet his obligation of paying the balance of the purchase

price agreed upon, while the record before us, when carefully read, presents an entirely different picture to the mind's eye.

According to the pleas in defendant's answer, at the time when the contract of sale was made appellee agreed to purchase from appellant the property, which is the subject of this litigation, upon the assurances more or less expressly given that said appellant was the bona fide owner of the said property and that it was in no way whatever encumbered; but having subsequently discovered that others had a lien thereon and that it would be risky to buy same from plaintiff, now appellant, appellee sent back the deed that had been duly executed and demanded the right to repudiate the contract he had made. See Answer, pleas 1, 7–9; Reply, counts 1–4, 10, 14–17; Rejoinder, pleas 6, 8.

Although his honor the trial judge ruled more specifically upon the second plea in the answer which attacked the correctness of the form of action, yet he briefly reviewed the causes pleaded for the nonpayment of the debt pleaded in the several counts of the pleadings above enumerated, which in his opinion had surrounded the case with intricacies resulting from the complications presented in the said pleadings, and, continuing his premises, said *inter alia:*

> "For the court to maintain that an action of debt would lie in face of the above recited facts culled from the pleadings of both the plaintiff and the defendant would be setting a principle that a party can be forced to purchase and accept that which he does not accept or want, or that which, though he originally agreed or decided to purchase, he for considered good reasons on his part declines subsequently to purchase; a principle obviously immoral, illegal, wrong and inequitable, especially since the party, as in this case, will not have been given either actual or constructive possession of said property."

In my opinion the principal question at issue in this case is not whether defendant, now appellee, should be compelled to pay the debt, but rather whether his attempt to repudiate the contract is justified and whether any effort to hold that he is still bound by the contract of sale, which was admittedly executed and not merely executory, will leave him the unenviable inheritor of a succession of law suits over the premises, culminating in the necessity of his suing appellant for a breach of the covenant contained in the deed "that said appellant was, until the signing and onsealing of the deed, lawfully seized in fee-simple of the premises, and had good right and lawful authority to sell and convey them" to defendant, now appellee. If the latter course is the probable sequel to the sale of the property, then, in my opinion, the trial judge correctly held that "a party cannot be forced and compelled to purchase and accept that which he does not want," although I would have preferred his saying that "a party cannot be forced to purchase and accept that which will lead him into interminable law suits contrary to the covenants of the other contracting party"; and this position of the trial judge, and incidentally of myself, seems to have some support.

Faced by pleas of the unique character above indicated, I am not surprised that the trial judge found himself in such a quandary as to have characterized the issues as full of intricacies and complications. Some judges might have sought a way out by suspending the cause and allowing the parties to test the legality of the offer on the part of defendant, now appellee, to repudiate said contract by, perhaps, an action of specific performance. By recourse to such action cognizable only in a court of equity, a greater opportunity to purge the conscience of the parties in order to ascertain whether or not any fraud or deceit existed that would enable appellee unilaterally to repudiate the contract would be available than in a court of law. But, in the case at bar, the ruling

of the trial judge indicates to me that he was of the opinion that such issue could as well be established in an action for damages for breach of a contract.

At all events one carefully reading the ruling of the trial judge would observe a diligent effort on his part to solve this problem in a correct legal manner.

The circuit judges from whom cases are appealed to this Court for review have a right to expect that upon a judgment remanding a case for trial de novo the opinion filed will be to them an unerring guide for their future conduct of the cause, and the absence of that adequate guidance in the opinion just filed by the majority of my colleagues and the dilemma as to how to proceed in the further direction of the cause are among the reasons why I have not been able to concur with them.