The decision of the Supreme Court of New York is cited, because it illustrates in a striking manner how an application of the rule that statutes in derogation of the common law are to be construed strictly, may override positive mandates of the Legislature and destroy a highly remedial measure, the intent and general object of which were as clear as could be made by appropriate language. In view of the foregoing, we are of the opinion that the judgment of the court below should be affirmed; and it is so ordered.

Arthur Barclay, for appellant.

Abayomi Karnga, for appellee.

C. VAN HEUSDEN, Head Agent of the Oost Afrikaansche Compagnie in Liberia, Appellant, *v.* WALTER F. WALKER, Appellee.

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

1. Counsel for appellant, defendant in the court below, having in his brief admitted that the law points he raised in the case were voluntarily waived at the trial, neither in this court nor in the court below was it within the power of the court to consider them.
2. It is not error in the judge of a trial court to refuse to instruct the jury upon a point of law withdrawn from the consideration of the court by a waiver of the pleadings.
3. For A to make an agreement with B, and then make difficulties and put obstacles in the way of his carrying out those stipulations he had undertaken to perform, is an injury for which an action of damages will lie, especially when A makes it possible for C to reap the advantages which but for his actions B would have secured.
4. When A shall have put obstacles in the way of B's performing his part of a contract and given C the opportunity of so doing he accepting whatever benefit accrued therefrom, he is estopped from attributing blame to B.
5. The taking of depositions is in derogation of the common law, and hence the statute must be strictly followed.
6. Should the necessity therefor arise application should be made to the judge of the court in which they are intended to be used, and a commission to take the depositions obtained without which they are inadmissible.

Mr. Chief Justice Dossen delivered the opinion of the court:

Action of Damages for Violation of Contract. This case is be-

fore us upon an appeal by appellant, defendant below, from the judgment of the Circuit Court of the first judicial circuit, Montserrado County, at its May term, A. D. 1921, for the alleged violation of a commercial agreement entered into between the parties for the sale and purchase of six hundred (600) tons palm kernels from appellant's company by appellee at the rate of fifteen pounds (£15.0.0) per ton.

The contract is in the nature of an offer by appellee to purchase from appellant on certain terms, the said quantity of palm kernels at the price above mentioned, and the acceptance by appellant of the offer upon conditions stipulated and as are embodied and contained in a series of communications as hereinafter set forth in this decision.

The case came on for trial at the February term of said Circuit Court, A. D. 1921, when a verdict was rendered in favor of the appellee for six hundred pounds (£600.0.0) sterling. To this verdict both appellee and appellant excepted, and prayed a new trial. The prayer for a new trial was allowed, and the cause came on for hearing at the ensuing May term of said court. At this second trial, a verdict was awarded appellee for three thousand pounds (£3000.0.0) sterling and costs; and judgment was subsequently entered thereupon. To this verdict and final judgment appellant excepted and has brought the cause up before this judicature upon a bill of exceptions for review.

We purpose to consider the exceptions so far as they are germane to our decision, and are properly within our purview and embrace. But before proceeding to consider said exceptions we deem it proper to set forth the letters constituting the contract, and the alleged violation thereof together with the incident. The first of said communications is an offer from Walker, appellee, to purchase from appellant's company six hundred (600) tons palm kernels, upon conditions herein mentioned, and embodied in the following language:

"Monrovia, Liberia,
May 5th, 1919.

The Oost Afrikaansche Compagnie,
Monrovia.
Dear Mr. Reilingh:

In reference to our conversation of a few days ago, concerning the palm kernels which your firm is offering for sale

at the ports of Sinoe and River Cess, I am now able to state that I will purchase 600 tons of these kernels in good clean condition in bulk at £15. fifteen pounds sterling per ton cash against documents delivery of such kernels to be made not later than the first week of June. I have arranged for a motor schooner of sufficient cargo capacity to carry 600 tons, and I expect that delivery of kernels be made free on board vessel.

Shipment to begin immediately after arrival of vessel at the rate of 40-50 tons per working day of twelve hours. I will be only obliged to take over kernels from boats to vessel and to furnish sufficient hands to dispatch your boats in the quickest possible time. Should your boats be willing to work day and night, I will of course do the same with pleasure.

For every ton of palm kernels not delivered you are to guarantee to refund to me the amount of freight charged per ton of the charter of the vessel.

In the event this should happen the original of the charter will be handed you in order that you may satisfy yourself as to what this charge may be.

I would be pleased to have a confirmation of this offer at the earliest date.

Respectfully yours,
(Sgd.) Walter F. Walker."

To this offer appellants' agent at Monrovia made the following conditional acceptance:

"Oost Afrikaansche Compagnie,
Head Office Rotterdam.
Liberia Branch, Monrovia, Grand Bassa,
River Cess and Sinoe.
Cable address: Jupiter.
Monrovia, Liberia,
May 5th, 1919.

Walter F. Walker, Esq.,
Monrovia.
Dear Mr. Walker:

I beg to acknowledge the receipt of yours of even date offering to purchase from us 600 tons of bulk kernels at River Cess and Sinoe, delivery free alongside sailor not later than the first week in June, 1919; £15. sterling per ton payment against documents in Liberia, and you have arranged for a motor schooner of sufficient carrying capacity, shipment to begin immediately after the arrival of the vessel at the rate of about 40-50 tons per working day of twelve hours. In reply I beg to say that I have wired your offer to our Rotterdam head office, and on receipt of their reply will immediately inform you if accepted or not. In the meantime I shall be glad to know to whom the kernels are going to be consigned and who shall be responsible that your part of the bargain shall be

carried out to the letter namely: principally delivery not later than the first week in June, 1919, and the payment. As it is evident that you hold us responsible for the amount of kernels to be delivered we must have your guaranty that the ship shall be here at the time stipulated, that the ship will be able to take 600 tons in bulk, and before we start shipment the credit in your name for the amount eventually involved must be established in the Bank of British West Africa, Limited. We will in case of a sale do all we can to ship 40-50 tons per day, but cannot give any guaranty, as allowance must be made for sea and weather conditions.

Yours truly,
per Oost Afrikaansche Compagnie,
(Signed) W. Reilingh."

To the above queries appellee made the following answer:

"Monrovia, Liberia,
May 6th, 1919.

The Oost Afrikaansche Compagnie,
Monrovia.

Dear Mr. Reilingh:

In reference to the queries raised in your letter of yesterday's date in respect of the purchase of the 600 tons of palm kernels, I beg to say that I am acting for and on behalf of Leopold del Castillo of Las Palmas, Grand Canary Island. This gentleman or a representative of his with full power of attorney, and accredited to the Bank of British West Africa, will come to Liberia on board the vessel which is to take over the kernels for shipment. This vessel will first stop at Monrovia where arrangements will be first made for payment at the bank in cash to the satisfaction of your firm. When I shall have your reply that your firm accepts my offer, I shall immediately cable for the vessel to proceed to Monrovia. I will receive a reply stating the date of the departure of the vessel from Las Palmas and the probable date of its arrival here. Every effort will be put forth to reach here at the earliest time, and it is expected that the vessel will take approximately fourteen days to arrive. Considering the fact that there may be some delays in cable transmission, the exact time of the arrival of the vessel will depend in a great measure upon the receipt of the reply from your firm, and weather conditions at the time of the sailing of the vessel. Every possible effort will be exerted to take the kernels the first part of June, and I wish only to be assured that the kernels will be ready for delivery when the vessel arrives, so as to prevent claims for demurrage should it arrive before they are ready for shipment; and to establish a working basis for loading. The vessel will be able to take 600 tons of kernels in bulk without doubt. In this transaction no liability ought to be at-

tached to either side in the event of circumstances over which neither has control.

Respectfully yours,
(Signed) Walter F. Walker."

It will be noted that in this explanatory letter of the offer of appellee in which time was eliminated as the essence of the contract, and made subordinate to certain contingencies such as delays in cable transmission; the reply of appellant's firm accepting the offer; weather conditions; the change of the time for taking the delivery of the kernels from the first week in June as first proposed to the first part of June; and the broad condition that neither party should be held liable for circumstances over which neither party had control, these contingencies greatly modified and qualified the offer of appellee to which appellant at the time raised no objection and by his silence it is proper to presume that he assented to them.

Ten days later, that is to say on the fifteenth day of May appellant's agent at Monrovia sent the following letter containing a cable from the directors of appellant's company at Rotterdam confirming the acceptance of appellee's offer for the purchase in the following words:

"Oost Afrikaansche Compagnie, Head Office: Rotterdam.
Liberian Branches: Monrovia,
Grand Bassa, River Cess, Sinoe.
Monrovia, May 15th, 1919.

The Honorable Walter F. Walker,
Monrovia.

Dear Sir:

In reply to my cable of the fifth of May informing the Oost Afrikaansche Compagnie, Rotterdam, that you were in a position to offer for 600 tons of palm kernels, £15. per ton in bulk to be delivered free alongside a sailor which will call for the produce in the beginning of the month of June, 1919, I received the following cable:

'Accept only River Cess, Sinoe, provided Bank of British West Africa guarantees absolutely without reserve, all payments before shipment.'

We shall be glad to hear from you that the credit in the bank has been effected in which case on confirmation by the manager we shall be glad to supply the kernels as specified by the directors. Hoping to hear from you in short.

Yours truly,
per Oost Afrikaansche Compagnie,
(Signed) W. Reilingh."

In this cable from the directors at Rotterdam finally accepting the offer of appellee, the question of time is totally eliminated, the only condition being that the bank absolutely guarantee payment before shipment.

Thus an agreement had been reached between the parties; appellee engaging to purchase and appellant's company promising to sell 600 tons of palm kernels at £15. per ton; said agreement being subject to the terms and conditions stipulated in the offer and acceptance. But notwithstanding an agreement had been reached between the parties as set forth above, on the 19th day of May, four days after said contract had been completed, appellant through the agent at Monrovia gave the following notice to appellee attempting to cancel the agreement and rescind the sale, to wit:

"Oost Afrikaansche Compagnie, Head Office: Rotterdam.
Liberian Branches: Monrovia,
Grand Bassa, River Cess, Sinoe.
Monrovia, Liberia, 19th May, 1919.

Honorable W. F. Walker,
Monrovia.

Sir:

I beg to inform you that I received yesterday a cable from our directors, Rotterdam, instructing me to inform you that the option you had on their River Cess and Sinoe kernels has expired, and to cancel all arrangements made in connection with said kernels and to revoke all letters and communications. Regretting that your principals at Las Palmas did not see their way clear to establish the bank credit in time.

I remain, yours truly,
per Oost Afrikaansche Compagnie,
(Signed) W. Reilingh."

We are of the opinion that this notice was unwarranted, and evidently did much to upset the plan of the appellee in arranging for the compliance with the conditions set forth in the contract, namely, with respect to the dispatch of the schooner and the establishment of the credit at the Bank of British West Africa within the specific time. Consequently appellee could not be prejudiced or made to suffer any injury growing out of the wrong conduct of appellant, in thus attempting to cancel the contract. The motive which inspired this action on the part of appellant, can only be understood when viewed in the light of what subsequently transpired, that is to say, appellant's demand for a share in the profit of the transaction. And his ultimate bargain with the principal

of appellee for the direct sale of 600 tons of palm kernels at a profit to appellant's company over and above what appellee had engaged to pay. The evidence of witness Feighery shows that about this time palm kernels had risen in the foreign markets to about forty-five pounds sterling per ton. It was obviously with a view to participate in this great rise in price of the commodity appellant's company summarily broke the contract and rescinded the sale.

Courts of justice will view with positive disfavor, and will frown upon, all actions on the part of parties to an agreement to fraudulently violate same. And whenever any such agreement is brought within their grasp will give to it such interpretation and effect as will best secure the rights of the innocent party. To the foregoing notice cancelling the agreement and rescinding the sale, appellee immediately protested in the following language:

"Monrovia, May 19, 1919.

Messrs. The Oost Afrikaansche Compagnie,
Monrovia.

Dear Mr. Reilingh:

I am in receipt of your letter of this date, stating that you had received instructions from your directors at Rotterdam to the effect that my option on the River Cess and Sinoe palm kernels has expired, and all arrangements made in connection therewith are cancelled, and regretting that the necessary bank credit had not been established. In reply I beg to refer you to my letter of the 6th instant in which I stated when and in what manner such bank credit would be established.

The dispatch of the schooner to Monrovia with a representative accredited to the Bank of British West Africa to take delivery of the kernels, could not be made until your firm had accepted my offer to buy the kernels in question. I was informed by you on the 15th instant that my offer had been accepted, provided all payments were made at the bank before shipment. As my principal was preparing to pay cash against documents as stated I immediately cabled them to dispatch schooner at once.

In these circumstances and as the acceptance of your firm carried the only condition that payment before shipment be made in full, I cannot see that the arrangement for the purchase of the 600 tons of palm kernels can be arbitrarily cancelled as mentioned in your letter of today.

I am therefore compelled to regard my option as still being valid.

My principal may have already acted upon my cable and dispatched the vessel intended to load the kernels and in

these times when cables to and from all points are being unusually delayed, I must be given reasonable time to have this confirmed.

Respectfully yours,
(Signed) Walter F. Walker."

Here we have the uneqivocal confirmation of appellee's letter to appellant's company on the 6th of May in reply to appellant's queries with respect to the guaranty at the bank for the payment of the 600 tons of palm kernels, and which proposal appellant by his silence tacitly accepted as a satisfactory guaranty for the payment of the 600 tons of kernels.

And in further pursuance of appellee's intention to perform his part of the contract, he on the 15th day of May the date of the final acceptance of his offer dispatched the following cable to his principal at Las Palmas, Leopold del Castillo, Las Palmas:

"If bank credit arranged according to my first cable dispatch schooner urgent, May 15th, 1919. Walker."

It should be noted that this cable was sent at least three weeks before the time first proposed by appellee to take delivery of the said 600 tons of palm kernels which was ample time for the said schooner to have arrived at Monrovia, as the evidence shows, had not appellant upset the whole arrangement by his notice cancelling the agreement and rescinding the sale. And as a further evidence of appellee's intention to perform his part of the contract, the bank notice to him that the nine thousand pounds sterling had been arranged in his favor for the payment of the 600 tons of palm kernels, established this fact conclusively. We give below the text of said notice as follows:

"Bank of British West Africa, Limited,
Incorporated in England.
Monrovia, 13th June, 1919.

Walter F. Walker, Esq.,
Monrovia.

Dear Sir:

We beg to advise that we have today received cable from Las Palmas instructing us to open a documentary credit in your favor on account of Castillo for 600 tons of palm kernels, £15. per ton, payment will be made against documents in complete set of bills of lading consigned to the order of the bank together with signed invoices for the kernels shipped. The port of destination is unknown at the present, but will be advised later also the insurance will be effected at Las Palmas.

Yours faithfully,
(Signed) J. R. Bingham, Manager."

Appellant's company was duly informed both by appellee and the manager of the bank at Monrovia of the foregoing fact, which in our opinion was a valid guaranty for the payment of the 600 tons of kernels as had been proposed by appellee, and in principal and effect accepted by the appellant's company in Rotterdam.

It should here again be noted that this occurred at least three weeks within contract time.

In answer to appellee's protest to the cancellation of the contract, the head agent of appellant's company at Monrovia after consultation with his lawyer, on the 21st of May sent the following reply:

"Oost Afrikaansche Compagnie, Head Office: Rotterdam.
Liberian Branches: Monrovia, Grand Bassa, River Cess and Sinoe.
Monrovia, Liberia, 21st, May, 1919.

The Honorable Walter F. Walker,
Monrovia.

Dear Sir:

Replying to your letter of yesterday's date, I beg to say that since you insist upon the delivery by the Oost Afrikaansche Compagnie of the kernels of River Cess and Sinoe, I am wiring today to my directors as follows:

'Impossible to cancel sale of kernels River Cess and Sinoe, payment before shipment delivery beginning first week in June, 1919, and therefore sale still stands.'

Yours faithfully,
per Oost Afrikaansche Compagnie,
(Signed) W. Reilingh."

This we hold was valid notice to the appellee of the revocation of the notice of cancellation, and it appears from the records that the negotiations went on. But notwithstanding the fact, on the 21st of June appellant's agent at Monrovia repeated his notice of cancellation in the following words:

"Oost Afrikaansche Compagnie, Head Office: Rotterdam.
Liberian Branches: Monrovia, Grand Bassa, River Cess and Sinoe.
Monrovia, Liberia, 21st, June, 1919.

The Honorable Walter F. Walker,
Monrovia.

Dear Sir:

We beg to acknowledge receipt of your letter dated 18th June; notwithstanding said letter, we have to inform you again, that that our principals at Rotterdam have cabled us to the effect that the agreement between you and us for the

sale of 600 tons of palm kernels delivery at River Cess and Sinoe is now cancelled.

Yours faithfully,
per Oost Afrikaansche Compagnie,
(Signed) C. Van Heusden."

Having thus *in extenso* set forth the communications constituting the contract between the parties, and the alleged violation thereof, by appellant's company together with the attendant incidents, we come now to consider the bill of exceptions addressed to our consideration by appellant's counsel, and in which it is prayed that the verdict and judgment of the court below should be reversed.

At the November term of this court, 1922, the arguments *pro et con* upon the contested points in said bill of exceptions were heard by the court, at which time judgment was entered affirming without reserve the judgment of the trial court, and reserving its opinion until such time as it might see fit to hand down the same.

This action of the court has been made the subject of much adverse comment, and indeed a basis for diplomatic protest. This court resents with indignation the implication and assertion that in reserving its opinion in the premises it committed a breach of duty or was chargeable with dereliction thereof. It must be remembered that the opinion of an appellate jurisdiction in no sense is a part of its judgment, and does not settle the controversy between litigants.

It is the court's exposition and constructions of the law involved. It is a considered view of the court upon some statute or other parts of the law which may have arisen for interpretation. Unless where it is mandatory either by constitutional provision, or statutory enactment, such courts are not bound to hand down opinions in all cases adjudicated by them. The Constitution and the statutes of Liberia NOWHERE IMPOSE THE DUTY UPON THE SUPREME COURT TO RENDER OPINIONS IN CASES ADJUDICATED BY IT.

It is the judgment which settles the controversy between litigants and which this court is commanded to render in causes tried before it without unnecessary delay.

It follows therefore that the contention that the court should have simultaneously with the rendition of its judgment at the last November term handed down its opinion in the premises is unsound and without legal merit. Moreover as we shall see later

there were no points of law before the court for its interpretation and opinion.

Scrutinizing the exceptions as laid in the bill of exceptions before us, and submitted in the brief of counsel for appellant, we have discovered that they relate in part to the issues of law in the case.

Let us here observe that neither before the trial court, nor at this bar, were the questions of law originally raised in the pleadings properly before us. In the fifth point of the brief submitted by the counsel for appellant it is admitted that the law points in the case were voluntarily waived, and were not properly before the court below at the trial. By this act appellant withdrew from the purview and embrace of said court the issues of law originally raised. It is a maxim of law, consonant with reason, that a party may waive any right established for his benefit. (See Bouv. L. D., Maxims; Id., vol. 2, Waiver.)

When therefore by this act of appellant all law points in his defense were waived, the trial court lost all jurisdiction over them and no attempt on the part of either side to re-import into the case any part of the legal controversies raised in the pleadings by appellant was permissible. This is an elementary principle of law which has been uniformly upheld by this court.

Disregarding therefore the exceptions founded upon the pleadings, so far as they relate to the questions of law, we shall confine ourselves to that part of the bill of exceptions which is properly within our purview, embracing the contract and the alleged violation thereof; the evidence, trial and damages awarded.

We shall first consider the exceptions taken to the refusal of the court below to instruct the jury that the contract before the court was an executory contract, which exception was taken as follows:

> "And also because on the said 18th day of May defendant asked Your Honor to charge the jury that the contract was an executory contract of which request Your Honor took no notice whatever, to which action defendant excepts."

Having carefully inspected the records we have failed to find that this instruction was asked of the trial judge, but supposing it was, it was improperly asked. We have already observed that appellant upon his own initiative withdrew from the purview of the court all questions of law raised in the pleadings. The request therefore alleged to have been made to the trial judge to instruct

the jury upon the nature and character of the contract was a question of law which the trial judge, in our opinion, did not err in refusing to take cognizance of.

Attaching to the appellee's communication of the 5th of May its legal significance, we hold it to be an offer to purchase from appellant's company 600 tons of palm kernels at £15, per ton, under conditions therein embodied. This offer was finally accepted on the 15th day of May, 1919, by the directors of appellant's company at Rotterdam, on the only condition that the Bank of British West Africa will absolutely guarantee payment before delivery of produce. There can be no reasonable doubt therefore as to the parties having come to an agreement to buy and sell 600 tons of palm kernels.

It was a commercial agreement commonly made by offer and acceptance. (See Bouv. L. D. under the head of Offer and Acceptance.) This contract appellant sought to cancel four days after it had been entered into, and although upon the protest of appellee against said cancellation, and his promise to give W. Reilingh, appellant's chief agent at Monrovia 50% of the profit to be derived from the transaction, whereupon he, Reilingh, the said agent notified appellee that he had cabled to his directors in Rotterdam that the contract could not be cancelled, thereby implying that it would remain in force; and his assuring appellee that his principals would conform to any advice given by him, thereby making appel lee believe that the contract would be left in vogue by his principals, under which impression appellee continued his agreement for the dispatch of the schooner, and for the guaranty at the bank for the payment of the said 600 tons of kernels. Yet in further violation of the said agreement, appellant's company through the agent at Monrovia repeated to appellee the notice of the cancellation of the sale, and treated the transaction as a nullity. This action on its part taken together with the action of W. Reilingh the company's head agent at Las Palmas, where, as the records show, he stopped the dispatch of the schooner intended to load the kernels; refused the offer of appellee's principal to save the situation by paying cash for the 600 tons of kernels on condition that keys for the warehouse containing the kernels be deposited with the bank at Monrovia; and further informing appellee's principal that the contract with Walker, appellee, had been cancelled; and

proceeded to sell to appellee's principals on behalf of appellant's company the said 600 tons of kernels at a profit to said company and a bonus of one thousand pounds to himself, was a direct violation of the agreement, and an injury to appellee for which damages will attach. (See Lib. Stat., ch. on Injuries, secs. 1 and 2; see also Bouv. L. D., vol. 1, Damages; 1 Taylor on Evidence, sec. 602; 2 Taylor on Evidence, sec. 1108.)

It was argued at this bar with great stress by appellant's counsel that in these transactions at Las Palmas by Reilingh, head agent of said company, he acted on behalf of Walker, the appellee, and a letter written by him to Reilingh before his departure from Monrovia for Las Palmas is cited in proof of this assertion. We have failed to find wherein the action of Reilingh at Las Palmas can be construed into an agency for Walker. Did not the sale of the kernels in question by Reilingh to appellee's principals deprive him of the profit of three thousand pounds sterling, which he would have made out of the transaction? Did not this profit by the fraudulent act of Reilingh, appellant's agent, go to the benefit of appellant's company? Did not Reilingh himself derive from his said fraudulent acts, a bonus of one thousand pounds? Was not all this prejudicial to the interest of Walker the appellee?

If he was acting as agent for appellee as is contended, wherein did his acts benefit the appellee? Did the profit he made on the sale accrue to Walker or to appellant's company? There can be no doubt that no matter what instructions appellee may have given Reilingh he acted in these matters as the agent of appellant's company to whom, as the records show, all the benefits which resulted therefrom went, and which they, having accepted, are now estopped from denying the responsibility and absolving themselves from the fraudulent act of Reilingh their agent in this respect.

The next exception which we deem important to notice in our consideration of the case is the exception taken to the admission of the deposition of W. Reilingh a witness for defendant below, which is taken as follows:

> "And also because when on the said 18th day of May defendant asked that the deposition of W. Reilingh a witness for defendant taken before a justice of the peace filed in court be read as evidence for defendant, said deposition was objected to by plaintiff on the ground that no commission was issued from said court to take said deposition. That the deposition was

taken by a justice of the peace unauthorized by the Circuit Court judge, Your Honor after argument, sustained the objection and ruled out said deposition to which defendant excepts."

We hold that taking of depositions is a practice in derogation of the common law, and hence the statute should be strictly followed. (See Bouv. L. D., Depositions; Foster's First Book of Practice, pp. 407 and 410; see also Ency. of Pleading and Practice, p. 487; Id. p. 489 c., 492 d.)

The principle of law laid down on this point in the above citations has been uniformly upheld by this court. In the case *McCarthy v. Weeks* (Lib. Ann. Series, No. 2, p. 12) this court held that the taking of depositions is regulated by statute and the statute must be strictly followed in any proceedings had thereunder. "If there were any legal reason for taking of deposition in this case," said the court, "application should have been made to the judge of the Court of Quarter Sessions of Montserrado County," now the Circuit Court. This principle was upheld in the case *Page v. Jackson* (Lib. Ann. Series, No. 3, p. 20). From a careful inspection of the records, we find that this practice was not followed.

The justice of the peace before whom the deposition was taken was not commissioned to do so by the court before which the case was pending, and in which the said deposition was intended to be used. He was therefore without legal authority to act in the premises, his acts being devoid of the necessary element to impart to them legal efficacy it was in effect a nullity. The trial court therefore rightly ruled out the said deposition.

The next exception which we regard as material and germane to our conclusion of the case is that taken to the verdict and final judgment of the court below. Summing up the evidence for the appellee, plaintiff below, we are of the opinion that the verdict was supported by the unimpeached evidence adduced by the plaintiff in his favor. Having in the foregoing observations endeavored to show that the records disclose the existence of a contract, and the violation thereof by appellant's company in manner as has already been set forth, we proceed to consider whether the measure of damages assessed by the jury was justified by the evidence. The evidence shows that appellant's company agreed to sell six hundred tons of palm kernels at fifteen pounds per ton that appellee had engaged to re-sell these to one Leopold del Castillo of Las Palmas

at £20 per ton, that the difference between the purchase price from appellant's company and the selling price to the said Leopold del Castillo was five pounds per ton which aggregated three thousand pounds on the whole transaction.

That this amount appellee would have received as a clear profit to himself had appellant's company kept and performed its part of the contract. That appellant's company's failure so to do entailed upon appellee the loss of this entire profit without justifiable reason; that the motive underlying the action of appellant's agent, was to secure to his principal at Rotterdam the whole of this profit plus a bonus to himself of one thousand pounds, and that by this fraudulent manipulation in the premises he actually realized this objective to the injury and loss of appellee.

To these facts which were substantially proved at the trial appellant offered no rebutting evidence which in our opinion was sufficiently cogent to overturn the case thus made out for appellee. Nor did he effectively traverse the facts proved. In these circumstances the jury was bound to find for the appellee. And the measure of damages to be awarded by them was by the simplest arithmetical computation the difference between the price at which he had engaged to buy from appellant's company and to sell the same to Leopold del Castillo of Las Palmas, namely three thousand pounds as compensation for the loss he had sustained growing out of the said wrongful and fraudulent acts of appellant's agent, the benefits of which, having been accepted by appellant's company, it cannot now absolve itself from responsibility. (See Bouv. L. D., vol. 1, Principal and Agent; Story on Contracts, Principal and Agent; Evans Principal and Agent, under the heading of Responsibility of Principal for the Acts of Agents; 1 Pollock on Contracts.)

The trial judge acted therefore in conformity with the evidence at the trial when he refused the motion for new trial and entered judgment upon the verdict found.

The judgment of the court below should therefore be affirmed, and it is hereby so ordered.

Mr. Justice Johnson read and filed the following dissenting opinion: I dissent from the judgment in this case, because I

cannot concur in the opinion of the court on which said judgment is based. The facts in the case are substantially as follows: On the 5th day of May, A. D. 1919, the appellee wrote to W. Reilingh, agent for appellant, offering to purchase six hundred (600) tons of kernels at River Cess and Sinoe, delivery free alongside sailor, not later than the first week in June, for fifteen pounds (£15.) sterling per ton; he further stated in said letter that he had arranged for a motor schooner of sufficient capacity, shipment to begin immediately after the arrival of the vessel, at the rate of about forty (40) to fifty (50) tons per working day of twelve hours.

On the same day Reilingh acknowledged the receipt of said letter and promised to wire the offer to their Rotterdam Head Office, and on receipt of their reply to immediately inform Walker, if they accepted his offer or not. In his said letter he wrote as follows:

> "In the meantime I shall be glad to know to whom the kernels are going to be consigned, and who shall be responsible that your part of the bargain shall be carried out to the letter, viz: principally, delivery not later than the first week in June, 1919, and the payment. As it is evident that you hold us responsible for the amount of kernels to be delivered, we must have your guaranty *that the ship shall be here at the time stipulated,* that the ship will be able to take 600 tons in bulk, and before we start shipment, the credit in your name for the amount eventually involved, must be established in the Bank of British West Africa, Limited.
>
> "We will, in case of a sale do all we can to ship 40-50 tons per day, but cannot give any guaranty as allowance must be made for sea and weather conditions."

On the 15th day of May, Reilingh informed Walker that he had received the following cable from the Oost Afrikaansche Compagnie at Rotterdam:

> "Accept only River Cess, Sinoe, provided Bank of British West Africa guarantees absolutely without reserve, all payments before shipment."

Reilingh further wrote:

> "We shall be glad to hear from you that the credit in the bank has been effected in which case on confirmation by the manager, we shall be glad to supply the kernels as specified by the directors."

On the 19th of May, Reilingh wrote Walker as follows:

> "I beg to inform you that I received yesterday a cable from our directors, Rotterdam, instructing me to inform you that the option you had on their River Cess and Sinoe kernels has ex-

pired, and to cancel all arrangements made in connection with said kernels and revoke all letters and communications. Regretting that your principals at Las Palmas did not see their way clear to establish the Bank credit in time." * * * *

On the same day Walker acknowledged the receipt of Reilingh's letter of the 19th instant, saying *inter alia*:

"The dispatch of the schooner to Monrovia with a representative accredited to the Bank of British West Africa to take delivery of the kernels could not be made until your firm had accepted my offer to buy the kernels in question.

"I was informed by you on the 15th instant that my offer had been accepted, provided all payments were made at the bank, before shipment. As my principals were prepared to pay cash against documents, as stated, I immediately cabled them to dispatch schooner at once.

"In these circumstances and as the acceptance of your firm carried the only condition that payment before shipment be made in full, I cannot see that the arrangement for the purchase of the 600 tons of palm kernels, can be arbitrarily cancelled as mentioned in your letter of today."

On the 21st of May Reilingh wrote to Mr. Walker as follows:

"Replying to your letter of yesterday's date, I beg to say that since you insist upon delivery by the Oost Afrikaansche Compagnie at River Cess and Sinoe, I am wiring today to my directors as follows: 'Impossible to cancel kernels River Cess and Sinoe, payment before shipment beginning first week in June, 1919, and therefore sale still stands'."

In consequence of the delay thus caused Walker asked for an extension of the time, to two weeks longer for the arrival of the vessel, to which Reilingh assented.

Before advising his directors that agreement could not be cancelled, Reilingh required that Walker should agree to give him, Reilingh, 50% of any profit he made on the kernels. To this Walker assented. Subsequently a credit was established at the said bank in favor of Walker, and the agent of the Oost Afrikaansche Compagnie at Monrovia received from the manager of said bank the following letter:

"We are in receipt of your favor of yesterday's date, and have to inform you that we have received instructions from Las Palmas to discount Mr. Walker's bills against complete set of bills of lading, made out in the name of the bank, accompanied by signed invoices for six hundred (600) tons of palm kernels. When the shipment has been made Mr. Walker states that he shall receive instructions to pay to your goodselves, the amount of nine thousands pounds sterling."

A similar letter was sent to Mr. Walker.

Mr. Reilingh left Liberia on May 30th for Rotterdam, via Las Palmas. At the time of leaving Walker gave Reilingh power to deal with his principal, del Castillo, in reference to the kernels, and wrote his said principal, that he, Walker, would confirm whatever Reilingh did,—see letters 4 and 5. On the 19th of July, Reilingh sent the following letter to Walker, from Las Palmas:

> "Dear Mr. Walker,
>
> "As you will have heard from Mr. Krans, the deal is off; directly on arrival here, I tried to find Leopold del Castillo, and at last succeeded, he is a little fruit merchant of practically no means but has several persons with capital interested in the game."

See letter marked "N."

About this time Walker received the following from Las Palmas:

> "Reilingh stopped vessel saying your contract ceased 17th, explain urgently, Tulome."

On the 19th July the agent of the Oost Afrikaansche Compagnie (Reilingh's successor in the agency) wrote Walker informing him that the agreement was cancelled.

These are substantially all of the facts essential to a complete understanding of the case. At first glance, it might seem that appellee has a strong case, but on a thorough investigation of the facts, and the laws governing contracts, shipping, and bills of lading, it will be readily seen that he hasn't a leg to stand on; in short that he hasn't a shadow of recourse against appellant in this action. The main question presented for our consideration, relates to the nature of the contract; counsel for appellant claiming that it is an executory contract, while on the other hand counsel for appellee contends that it is an executed contract. We will therefore inquire into the character of the contract in the case at bar; and first we will premise an executed contract is one in which nothing remains to be done by either party, and where the transaction has been completed or was completed at the time the contract or agreement was made. While an executory contract is one in which some act remains to be done. Now let us see if, in the contract now under consideration, any act remains to be done. Reduced to its simplest terms, it was an agreement under which Walker contracted to purchase from the Oost Afrikaansche Compagnie, six hundred (600)

tons of palm kernels, payment to be made before shipment. It was also agreed that the vessel on which the kernels should be shipped, should arrive before the first week in June. Now it is obvious that before Walker could require appellant to perform the one part of the contract, he himself must make payment or have payment guaranteed by the Bank of British West Africa, Limited; but nowhere in the records does this appear to have been done. On the contrary the manager of the bank writes:

> "Walker states, when shipment has been made, he shall receive instructions to pay your goodselves the amount of nine thousand pounds sterling."

Again, I regard time as of the essence of the contract; and that the parties so regard it is evident from the fact, that owing to the delay occasioned by the first attempt to cancel the agreement, Walker asked for an extension of time for two weeks, which was granted by Reilingh. It is a well settled rule of law that if a party by his contract charges himself with an obligation that is possible to be performed, he must make it good unless its performance is rendered impossible by the act of God, the law, or the other party. The law requires parties to do what they have agreed to. If unexpected impediments lie in the way, and a loss must ensue, it leaves a loss where the contract places it. If the parties have no provision for a dispensation, the rule of law gives none. It does not allow a contract fairly made to be annulled, and does not permit it to be interpolated; but exacts a performance of what the parties themselves may have stipulated.

In the case *Lowber v. Bangs* (2 Wall. 728, 17 L. Ed. 768) a vessel while on a voyage to Melbourne, was chartered at Boston for a voyage from Calcutta to a port in the United States. The charter party contained a clause that the vessel was to proceed from Melbourne to Calcutta with all possible despatch. Before the master was advised of this engagement, the vessel had sailed from Melbourne to Manila, which is not on the direct course between Melbourne and Calcutta and did not arrive at Calcutta directly or as soon as the parties had contemplated. The defendants requested to load. Freights, it may be added, had largely fallen between the date when the charter party was made and that of the vessel's arrival at Calcutta; and also that after the arrival of the Mary Bangs,

and after she had been made ready and had offered to take the cargo, the charterers engaged another vessel of about the same tonnage to take her place, and loaded her with a cargo purchased after the arrival of the Mary Bangs with the funds provided to purchase a cargo for her. Upon suit to recover damages for a breach of charter party the court below held, that the clause to proceed with all possible despatch, was not, under the circumstances, a condition precedent, but an independent stipulation which gave the charterers a claim for damages, on failure of performance by the owners, but did not give them the right to avoid the contract, the object of the voyage not having been wholly frustrated.

This judgment, the Supreme Court, in the face of an able argument to the contrary, reversed. "Promptitude in the fulfilment of engagements," declared the court, "is the life of commercial success." * * * * "We lay out of view the state of things at Calcutta when the vessel arrived there. To allow that to control our conclusion would be to make the construction of the contract depend not upon the intention of the parties when it was entered into, but upon the accidents of the future."

In Parsons on Contracts, the following observation is made: "In the contract of merchants, time is of the essence, and any statement descriptive of the subject matter or any material matter such as the time or place of shipment, is ordinarily a warranty amounting to a condition precedent performance of which is essential to convey. If there be a condition not subordinate to any other condition of the contract, then since they have seen fit to give it this prominent place, and controlling influence in the contract, courts must hold it to be of the essence of the contract." (See Parsons on Contracts, p. 505.)

In quite a number of cases the principle has been settled by the American Courts, that in the sale of a cargo to be shipped by a specified time and place and there is an implied condition that the ship shall be at the place at the time stipulated, the vendor or vendee can not excuse himself by showing that he was prevented from completing his bargain by the blockade of the port or any other inevitable accident. (See *Allison v. Pitchie;* see Parsons on Contracts, pp. 565-566.)

Reverting to the credit established by Walker's principals in the

Bank of British West Africa, no doubt one of the reasons why appellant inserted the clause in the agreement that payment must be made before shipment was because the vessel in which it was proposed to make shipment was not a common carrier, but was under the contract of Walker's principals.

Let us suppose that the vessel after taking the cargo on board had sailed without making payment, what remedy had the Oost Afrikaansche Compagnie? Could they call upon the bank to pay? Decidedly not, for the bank had given them no guaranty. Walker himself could not avail himself of the credit established until he had received instructions from del Castillo, whom Reilingh describes as "a little fruit merchant of practically no means." Much stress was laid upon the action of Reilingh by counsel for appellee, who held that in his letter of the 15th May (marked "C") he Reilingh informed appellee that "on confirmation by the manager that the credit in the bank had been effected, we shall be glad to supply the kernels as specified by directors," said counsel contending that by such clause in said letter, the agreement had been so modified that the mere establishing of the credit was sufficient performance of his part of the contract.

This contention is clearly untenable. Reilingh did not act under his general powers as agent for the company, but under special instructions from the office in Rotterdam, and those instructions were inserted in said letter.

"Accept River Cess, Sinoe, provided Bank of British West Africa guarantee absolute without reserve all payment before shipment."

Any attempt therefore to modify the terms would be beyond the scope of his authority and would not bind his principals. But Reilingh's acts savoured of fraud:

1. When he demanded 50% of the profits from Walker before cabling his directors that they could not cancel the contract.

2. When he accepted the power of attorney from appellee. Both of these acts apparently, having been done without the knowledge and consent of the company.

In law a man can not, to use an expression commonly in vogue, run with the hare and hunt with the hounds; he can not be agent for two contracting parties at the same time. But appellee having participated in said acts he is estopped from bringing action against

the company for wrongs suffered by the fraudulent acts of Reilingh. He had given power of attorney to Reilingh; and had written to del Castillo his principal that he appellee would confirm whatever Reilingh did. Reilingh on his arrival at Las Palmas, finding that the vessel had not yet left for Liberia brought about the termination of the agreement. It should be here observed that Reilingh while in Las Palmas was not acting as agent for appellant, for by the terms of his said power of attorney, he was inhibited from acting as attorney for said company, outside of the Republic; but as agent for appellee. Appellant cannot therefore be held responsible for any fraudulent acts of Reilingh committed in Las Palmas from which appellee sustained damages.

It seems strange that although Walker was ostensibly acting for del Castillo, his principal, yet he brought the action in his own name, and not as agent for the said del Castillo. It is also strange that this point was not raised in the pleadings of appellant. The reason is apparent. The evidence plainly shows that del Castillo acting in concert with the company called Tulome, had afterwards sent a schooner, and received the said kernels, leaving Walker out of the deal.

Had Walker then any cause of action against the appellant in this case? Decidedly not; his remedy was against del Castillo his principal if he sustained injury in the transaction. Let me state the case plainly.

A, agent for B, entered into a contract with C, to purchase from C fifty thousand pounds of coffee at a specific rate, to be shipped on a vessel controlled by B, at a specific time and place, A, before shipment, to pay the purchase money or have same guaranteed. Owing to the failure of the vessel to arrive at the place of shipment at the time agreed upon and of A to pay the purchase money or have it guaranteed, B, in connection with a firm called D, subsequently purchased from C the said coffee, sends a vessel and ships same, leaving A out of the deal. Can A bring an action against C for breach of contract? I am of the opinion that his remedy, if he had suffered any loss in the transaction, would lie in an action against his principal.

It appears to me that the whole affair was a gamble between Walker and Reilingh, a toss-up which resolved itself into the for-

mula "heads, Walker wins, tails the company loses," each trying to double-cross the other; and, as a matter of course, Walker won. According to these views, I do not hesitate to say that in my opinion the judgment of the court below should have been reversed.

Arthur Barclay, for appellant.

L. A. Grimes, for appellee.