House of Lords before Viscount Simonds; Lord Morton of Henryton; Lord Reid ; Lord Radcliffe; Lord Somervell of Harrow. 19th April 1956.

Viscount Simonds MY LORDS,

This appeal arises out of arbitration proceedings to which the parties were the Appellants Davis Contractors Limited, a firm of building contractors, and the Respondents the Fareham Urban District Council. On the 9th July, 1946, the parties had entered into a building contract whereby the Appellants agreed to build for the Respondents 78 houses at Gudgheath Lane, Fareham, in the county of Southampton within a period of eight months for a sum of £85,836.

For various reasons, the chief of them the lack of skilled labour, the work took not eight but twenty-two months. The Appellants were in due course paid the contract price which, together with stipulated increases and adjustments, amounted to £94,424. They contended, however, that owing to the long delay the contract price had ceased to be applicable and that they were entitled to a payment on a quantum meruit basis.

The Appellants put their claims on alternative grounds (a) that the contract price was subject to an express overriding condition contained in a letter of the 18th March, 1946, that there should be adequate supplies of labour and material and *(b)* that the contract had been entered into on the footing that adequate supplies of labour and material would be available to complete the work within eight months, but, contrary to the expectation of both parties, there was not sufficient skilled labour and the work took twenty-two months, and that this delay amounted to frustration of the contract. It was conceded by the Respondents that, if the contract was frustrated as alleged, the Appellants were entitled to a further sum upon the basis of a quantum meruit. With this aspect of the case which might have presented some difficulty your Lordships will not be troubled. These two grounds of claim have persisted through the long course of these proceedings which have included a prolonged hearing before an arbitrator, an award in the form of a special case, a hearing of the case by the Lord Chief Justice, an appeal to the Court of Appeal, a reference back to the arbitrator, a supplemental award by him, a further hearing by the Court of Appeal, and an order of that Court rejecting the Appellants' claim.

My Lords, with the first ground of claim I will deal very briefly. I am in full agreement with the opinion of Lord Justice Parker on this part of the case, which will be elaborated by my noble and learned friend, Lord Radcliffe. The Appellants' letter of the 18th March. 1946, to which I have referred, was a covering letter in which, while enclosing their tender prepared in accordance with the Respondents' Bills of Quantities and Specifications, they made a number of statements about the basis of that tender. The material statement was as follows: " Our tender is subject to adequate supplies of material and labour being available as and when required to carry out the work within the time specified ". It is possible that, if this letter had been followed by an immediate acceptance, the parties must have been deemed to enter into a contract which contained some such term, though its precise content and effect would have been extremely difficult to define. But that is not what took place nor what might be expected to take place. On the contrary, there were negotiations following the tender and these resulted in the formal agreement of the 6th July, which did not incorporate the letter of the 18th March. It would as it appears to me be contrary to all practice and precedent to hark back to a single term of preceding negotiations after a formal and final agreement omitting that term has been signed. The reference to the letter in an appendix to the tender is clearly confined to the matter with which that appendix dealt, namely the so-called "escalator" clause of the conditions of contract.

The second ground of claim demands more serious consideration not because it has any intrinsic merit but because it has acquired from the course of the proceedings a certain specious validity.

I cannot avoid reciting to your Lordships some of the findings of the Arbitrator. After stating that the site was handed to the Appellants and work was begun on the 20th June, 1946, and completed on the 14th May, 1948, the Arbitrator proceeded thus:

"(6) At the time of entering into the said agreement the Claimants and the Respondents anticipated that there would be available in the building industry a sufficient labour force and a sufficient supply of materials to enable the work specified in the agreement to be carried out substantially within the time stipulated in the agreement.

(7) The conditions in which the work had to be carried out were different from those anticipated by the Claimants and the Respondents in that:

(a) At all times there was a serious shortage of skilled labour in the industry and the Claimants were unable to obtain an adequate supply of such skilled labour ;

(b) There was difficulty in obtaining adequate supplies of bricks, " timber and plumbers' goods ;

(c) There was an adequate supply of unskilled labour in the industry but not at all times within the locality of Fareham where the Claimants were required under the General Conditions of Contract to recruit such labour unless the importation of labour from elsewhere were specially sanctioned by the Respondents.

(8) As a result of the said shortage of labour and materials the Claimants were unable to complete the work within the time specified in the agreement and the Respondents accepted the position and allowed the work to continue until finally completed on 14th May, 1948, without serious objections by the Respondents.

(9) As a result of the longer time taken to complete the work the Claimants incurred additional expense and the actual cost to them of carrying out the contract was £115,233 14s. 0d. The Claimants have been paid by the Respondents the sum of £94,424 17s. 9d."

He then referred to the Appellants' claim for further payment in respect of their additional cost and expense, which he found to have been partly due to the circumstances set out above, over which they had no control, and to exceptional

weather conditions and partly due to matters for which they were themselves to blame, and came to the conclusion that the sum of £17,651 13s. 1d. (which was afterwards slightly reduced) represented the amount of additional cost properly and unavoidably incurred by them. He then stated the submission of the Appellants on this point, viz.: that the contract was entered into on the " basis" that adequate supplies of labour and materials would be available at the times required and that because they were not so available the "footing" of the contract was removed and that they were entitled to be paid on the basis of a quantum meruit. The question of law stated by him which was intended to cover this point was put baldly thus "*Whether the Claimants* [the Appellants] *are entitled to be paid any sum in excess of £94,424 17s. 9d. already paid them?* "

Upon the matter coming before the Court the Lord Chief Justice was of the opinion which your Lordships have rejected that the letter of the 18th March, 1946, was incorporated in the contract and upon that basis was further of opinion that there was an implied promise by the Respondents to pay a further reasonable sum if the conditions of the letter were not satisfied. The learned Judge referred to the case of ***Bush v. Whitehaven Trustees***, which must be discussed later, but observed *" I do not think that it is necessary to go as far as that because I do not think that it is a destruction of the whole foundation of the contract".*

An appeal was taken to the Court of Appeal. Upon the question of the letter of 18th March being incorporated in the contract the Court, though no order to that effect was drawn up, expressed a view adverse to the Appellants, but upon the alternative ground of claim, with which I am now concerned, thinking that the findings of the arbitrator were inadequate referred the case back to him with this direction *"that the said Arbitrator may make further findings of fact for the information of this Court relevant to the application of the principle in the case of* ***Bush v. Whitehaven*** *and the contentions of the parties on this issue. The Arbitrator to state his own conclusions on the contentions of the parties if he intends his award to be a final award ".*

My Lords, I do not find it easy to interpret this direction. The case of *Bush* v. *Whitehaven Trustees,* which is reported only in Hudson on Building Contracts, if it can be said to embody any principle, illustrates an early stage in the development of the doctrine of frustration which has since been the subject of many decisions in this House. And it was, I think, to this issue that the contentions of the parties and the further findings of the Arbitrator were directed. Thus, while the Appellants repeated their former contention that, because adequate supplies of labour and material were not available, the footing of the contract was removed, the Respondents contended that *"in any event the footing on which the contract was agreed was not so changed that the contract could be declared or treated as void or the Claimants be entitled to payment on a quantum meruit"* and " That any claim on a *quantum meruit* basis was precluded by reason of *"the conduct of the parties after a claim for additional payment was first intimated by the Claimants "* and "*That the Respondents so far from allowing the Claimants to continue work on a different basis consistently maintained that the contract was still applicable ".*

The Arbitrator then stated *(inter alia)* the following question of law "*Whether the Claimants are entitled to be paid any sum in excess of the £94,424 17s. 9d. already paid them, namely on a quantum meruit, by reason of: (a) the footing upon which the contract was made having been so changed in the course of its execution that its provisions no longer applied or (b) an implied term in the contract that it ceases to bind in the circumstances* as found ".

Having been asked to state his own conclusions he further found that both parties entered into the contract on the basis that adequate supplies of labour and material would be available at the times required, that such supplies were not so available and that, as the duration of the work was unavoidably extended from a period of eight months to one of twenty-two months, the footing of the contract was removed. I do not think it necessary to state all his conclusions but it is proper to add that, for reasons which are set out, he found that *"the footing of the contract was so changed that it became void and the Claimants are entitled to a fair and reasonable price for the work they have done ".* I do not refer to his findings about the conduct of the parties except to say that at an early stage they were at issue, the Appellants making and pressing a claim for additional payment which the Respondents steadfastly resisted. Giving effect to his own conclusions the Arbitrator found that the Appellants were entitled to be paid a further sum of £17,258 13s. 1d.

Now the matter came back to the Court of Appeal, which was not constituted as on the former occasion. The alternative grounds of claim were again fully argued. The first ground, that of the incorporation of the letter of the 18th March in the contract, was rejected either because it was held not to be incorporated or because, even if incorporated, it had not the effect for which the Appellants contended. Upon this I will say no more.

The second ground of claim remains, and upon this the learned Judges of the Court of Appeal were unanimously against the Appellants and they were, in my opinion, clearly right. If the matter had in the first instance come before a Court of Law which after finding the facts as found by the Arbitrator had then to consider the law applicable to those facts, there could only have been one answer. The Lord Chief Justice was, in my opinion, stating the obvious when he said in the passage that I have cited " I do not think it is a destruction of the whole foundation of the contract".

The doctrine of frustration of a contract (for it is that doctrine and nothing else which must be invoked) has never been applied or, so far as I am aware, been sought to be applied to such a case unless indeed ***Bush v. Whitehaven*** was one. The contract was for completion of certain work in eight months: the contractors made their tender in the expectation that they would be able to do the work in the time and made a price accordingly. It may then be said that they made the contract on the "basis" or on the "footing" that their expectations would be fulfilled. Nor presumably were the expectations, or at least the hopes, of the Respondents in any way different. Let it be said, then, of them, too, that they contracted upon the same basis or footing. But it by no means follows that disappointed expectations lead to frustrated contracts. I do not propose to revive the controversy about the juridical basis of the doctrine of frustration. If it rests on

an implied term of the contract to the effect that the parties will not be bound if a certain event happens or does not happen, I can see no ground for saying that such a term must be implied in this contract. If it is permissible to judge by the event, it is clear that the parties would not have agreed on any such term. I pause to observe that it is not enough to say that in the event of something unexpected happening some term must be implied: it must be clear also what that term should be. In such a case as this I can see no reason for supposing that the parties would have agreed either at what moment the frustrating event was to be deemed to happen or what was to be the position when it in fact happened. Equally, if, as is held by some, the true doctrine rests not on an implied term of the contract between the parties but upon the impact of the law on a situation in which an unexpected event would make it unjust to hold parties to their bargain, I would emphasise that in this aspect the doctrine has been and must be kept within very narrow limits. No case has been cited in which it has been applied to circumstances in any way comparable to those of the present case. It is sufficient to ask when in the course of this twenty-two month contract that unexpected disruptive event happened which put an end to it. *"Rights",* said Lord Sumner in ***Bank Line, Limited v. Arthur Capel & Company*** [1919] A.C. 435, "ought *not to be left in suspense or to hang on the chances of subsequent events ".* It is wholly inconsistent with this, as I think, fundamental condition that a building contractor should without intermission work upon his contract over a period which by much or little exceeds the contract time and at the end of it say, as the Appellants say here, *"A twenty-two month project is not an eight month project "* or less formidably *"An expenditure of £111,000 is not an expenditure of £94,000, therefore the original contract must be regarded as frustrated and for all the work that has been done we must be paid not the contract price but upon the basis of a quantum meruit".* My Lords, I say it with all respect to the arguments of learned Counsel but it appears to me that that is to make nonsense of a doctrine which, used within its proper limits, serves a valuable purpose.

But, it was urged, this case cannot be regarded in the manner that I postulated. There are the findings of the Arbitrator, a man experienced in the matter of building contracts, and they should not be set aside. I will say at once that the Arbitrator has clearly done his work with great care and skill. But his findings involve a blend of law and fact and, deliberately using the words that he has chosen, "basis" and " footing", I can see no justification for a conclusion of law that the contract was frustrated.

It remains to say something about the case of *Bush* v. *Whitehaven Trustees* which has loomed so large in the earlier stages of this case and. in the argument before this House. I must say for myself that I find it an extremely puzzling case and, if it had been a decision of this House and therefore binding on us, I should have felt grave difficulty about it. But two things may be said: first it is not binding on us; secondly in so far as it is an authority on the law of frustration for which purpose alone I conceive it to have been cited, it must be read in the light of the numerous decisions of higher authority which have since been given. I am not satisfied that it can be supported on the ground suggested by Lord Justice Denning nor, on the other hand, do I say that the decision is a wrong one. But I do emphatically say that it cannot in the light of later authority be used to support the proposition that where, without the default of either party, there has been an unexpected turn of events which renders the contract more onerous than the parties had contemplated that is by itself a ground for relieving a party of the obligation he has undertaken. I agree with the learned Lord Justice that that is the import of the decision of this House in ***British Movietonews Ltd. v. London & District Cinemas Ltd.***, [1952] A.C. 166 and that it precisely covers this case.

I would dismiss this appeal with costs.

Lord Morton of Henryton MY LORDS,
Two questions of law arise on this appeal:

1. Was the letter of 18th March, 1946, from the Appellants to the Respondents, incorporated in the contract under seal which was entered into by the parties on the 9th July, 1946?
2. Was that contract frustrated, with the result that the Appellants, who have erected 78 houses for the Respondents, are not bound to accept the contract price, but are entitled to a further sum of over £17,000, which the arbitrator has awarded to them?

My Lords, in my opinion the letter of 18th March, 1946 merely formed part of the negotiations between the parties which led up to the contract of 9th July and its terms were not incorporated into that contract. This matter is dealt with fully in the opinion which will be delivered by my noble and learned friend, Lord Radcliffe, and I am content to say that I agree with his reasoning and his conclusion.

I can state quite briefly my views on the second question, since I understand your Lordships are all of opinion, as I am, that the Court of Appeal reached the right conclusion. The Appellants contracted to complete 40 houses within six months, 70 within seven months, and all the 78 houses within eight months. It is agreed that the work started on the 20th June, 1946, and should, therefore, have been completed in February, 1947. In fact, the progress of the work was delayed, because, as the arbitrator held, "*adequate supplies of labour and materials were not available at the times required ".* Nevertheless, the Appellants went on with the work, without any actual interruption, and completed it in a period of 22 months. They now contend that the contract was frustrated, and they rely on certain findings by the arbitrator, which have already been read, and on the decision of the Court of Appeal in ***Bush v. Whitehaven,*** reported in Hudson on Building Contracts, fourth edition, volume 2, page 122.

My Lords, it is clear that the Appellants are entitled to no more than the contract price, unless they can satisfy your Lordships that at some time the contract of 9th July, 1946, came to an end, so that in continuing to erect houses they were no longer working under that contract. I am not so satisfied. I agree with the observation of Morris, L.J. that *"though the basis or footing of the contract was removed in the limited sense that the anticipations of the parties were not realised, the*

facts found do not require an implication in the contract that it was to come to an end if these anticipations were not realised. It is, I think, impossible to hold that a contract has been frustrated unless it can be said as and from such and such a date, at latest.the contract ceased to bind the parties ".

In the course of the hearing Counsel for the Appellants were asked: *"When do you say that the contract came to an end?",* and they replied that they were unable to specify any time. I think that this answer was correct and inevitable, but it reveals the inherent weakness of the Appellants' case.

The facts in the case of ***Bush v. Whitehaven*** are very briefly stated in the report, but I think it is clear that the judgments of the Court of Appeal in that case were based upon the findings of the jury, and in particular the fifth finding. The question put to the jury was: "*Were the conditions of the contract so completely changed, in consequence of the defendant's inability to hand over the sites of the work as required, as to make the special provisions of the contract inapplicable?",* and the jury replied: " *Yes ".* This question was, I think, a question of law, or at least of mixed fact and law, but the Court of Appeal accepted the jury's answer, and on that footing held that by 8th October, 1886, when the contractors got possession of the required sites, the contract had ceased to exist. In my opinion ***Bush v. Whitehaven*** was a decision upon very special facts, which enabled the Court to find that, although the contractors finished the work specified in the contract, they were not working under the contract from 8th October, 1886, onwards. For this reason the case does not, in my opinion, assist the Appellants. I would add that since the decision in the case just cited, the doctrine of frustration has frequently been considered in your Lordships' House, and for an authoritative exposition of the doctrine one should turn to the speeches in this House rather than to the judgments of the Court of Appeal in ***Bush v. Whitehaven***.

I would dismiss the appeal.

Lord Reid MY LORDS,
The arbitrator has found in his supplementary award that "*the footing of the contract was removed* ", and his reason for so finding is that *" both parties entered into the contract on the basis that adequate supplies of labour and materials would be available at the times required "* but that adequate supplies were not available with the result that the duration of the work was unavoidably extended from 8 months to 22 months. It seems clear that he has used the words "footing" and "basis" because the Special Case was referred back to him for further findings of fact relevant to the application of the principle in the case of ***Bush v. Whitehaven,*** and the contentions of the parties on this issue, and the parties used these words in their contentions. The Appellants' submissions as stated in the award are almost identical with the arbitrator's findings, and the Respondents' submission is that the footing on which the contract was agreed was not so changed that the contract could be treated as void. This form of award gives rise to considerable difficulty. But I have some sympathy with the arbitrator: he may have found as much difficulty as I have in discovering "*the principle in the case of* ***Bush v. Whitehaven*** *".*

In order to determine how far the arbitrator's findings are findings of law and therefore subject to review I think it is necessary to consider what is the true basis of the law of frustration. Generally this has not been necessary: for example, Lord Porter said in ***Denny, Mott & Dickson v. Fraser & Co,*** [1944] A.C. 265 at p. 281: "*Whether this result follows from a true construction of the contract or whether it is necessary to imply a term or whether again it is more accurate to say that the result follows because the basis of the contract is overthrown, it is not necessary to decide".* These are the three grounds of frustration which have been suggested from time to time and I think that it may make a difference in two respects which is chosen. Construction of a contract and the implication of a term are questions of law, whereas the question whether the basis of a contract is overthrown, if not dependent on the construction of the contract, might seem to be largely a matter for the judgment of a skilled man comparing what was contemplated with what has happened. And if the question is truly one of construction I find it difficult to see why we should not apply the ordinary rules regarding the admissibility of extrinsic evidence whereas, if it is only a matter of comparing the contemplated with the actual position, evidence might be admissible on a wider basis. Further, I am not satisfied that the result is necessarily the same whether frustration is regarded as depending on the addition to the contract of an implied term or as depending on the construction of the contract as it stands.

Frustration has often been said to depend on adding a term to the contract by implication: for example, Lord Loreburn in ***Tamplin Steamship Co. Ltd. v. Anglo Mexican Petroleum Products Co. Ltd.*** [1916] 2 A.C. 397 at p. 404, after quoting language of Lord Blackburn, said: *"That seems to me another way of saying that from the nature of the contract it cannot be supposed the parties, as reasonable men, intended it to be binding on them under such altered conditions. Were the altered conditions such that, had they thought of them, they would have taken their chance of them, or such that as sensible men they would have said: **' If that happens, of course, '** it is all over between us"?* What, in fact, was the true meaning of the contract? Since the parties have not provided for the contingency, ought a court to say it is obvious they would have treated the thing as at an end? ".

I find great difficulty in accepting this as the correct approach because it seems to me hard to account for certain decisions of this House in this way. I cannot think that a reasonable man in the position of the seaman in ***Horlock v. Beal*** [1916] 1 A.C. 486 would readily have agreed that the wages payable to his wife should stop if his ship was caught in Germany at the outbreak of war, and I doubt whether the charterers in the *Bank Line* case could have been said to be unreasonable if they had refused to agree to a term that the contract was to come to an end in the circumstances which occurred. These are not the only cases where I think it would be difficult to say that a reasonable man in the position of the party who opposes unsuccessfully a finding of frustration would certainly have agreed to an implied term bringing it about.

I may be allowed to note an example of the artificiality of the theory of an implied term given by Lord Sands in ***Scott & Sons v. Del Sel*** [1922] S.C. 592 at p. 595: *"A tiger has escaped from a travelling menagerie. The milk girl fails to deliver the milk. Possibly the milkman may be exonerated from any breach of contract: but even so it would seem hardly reasonable to base that exoneration on the ground that ' tiger days excepted ' must be held as if written into the milk contract".*

I think that there is much force in Lord Wright's criticism in ***Denny, Mott & Dickson*** at p. 275: *"The parties did not anticipate fully and completely, if at all, or provide for what actually happened. It is not possible, to my mind, to say that, if they had thought of it, they would have said: **'Well, if that happens, all is over between us** '. On the contrary, they would almost certainly, on the one side or the other, have sought to introduce reservations or qualifications or compensations ".*

It appears to me that frustration depends, at least in most cases, not on adding any implied term but on the true construction of the terms which are in the contract read in light of the nature of the contract and of the relevant surrounding circumstances when the contract was made. There is much authority for this view. In ***British Movietonews Ltd. v. London & District Cinemas, Ltd.*** [1952] A.C. 166 at p. 185 Lord Simon said: *"If, on the other hand, a consideration of the terms of the contract, in the light of the circumstances existing when it was made, shews that they never agreed to be bound in a fundamentally different situation which has now unexpectedly emerged, the contract ceases to bind at that point - not because the court in its discretion thinks it just and reasonable to qualify the terms of the contract, but because on its true construction it does not apply in that situation*". In ***Parkinson v. Commissioners of Works*** [1949] 2 K.B. 632 Asquith, LJ. said (at p. 667): *" In each case a delay or interruption was fundamental " enough to transmute the job the contractor had undertaken into a job of a different kind, which the contract did not contemplate and to which it could not apply, although there was nothing in the express language of either contract to limit its operation in this way ".* I need not multiply citations but I might note a reference by Lord Cairns so long ago as 1876 to *"additional or varied work so peculiar so unexpected and so different from what any person reckoned or calculated upon "* (***Thorn v. The Mayor and Commonalty of London,*** 1 App. Cas 120 at p. 127). On this view there is no need to consider what the parties thought or how they or reasonable men in their shoes would have dealt with the new situation if they had foreseen it. The question is whether the contract which they did make is, on its true construction, wide enough to apply to the new situation: if it is not then it is at an end.

In my view, the proper approach to this case is to take from the arbitrator's award all facts which throw light on the nature of the contract or which can properly be held to be extrinsic evidence relevant to assist in its construction and then, as a matter of law, to construe the contract and to determine whether the ultimate situation as disclosed by the award is or is not within the scope of the contract so construed.

The Appellants on 18th March, 1946, sent to the Respondents with their tender a covering letter. I agree with your Lordships that this letter was not incorporated in the contract of 9th July, 1946, and I do not think that it can be used in construing this contract. It was simply part of the preliminary negotiations and we do not know and cannot enquire why it was not incorporated in the contract.

The arbitrator has found that both parties *"anticipated that there would be available in the building industry a sufficient labour force and a sufficient supply of materials to enable the work specified in the agreement to be carried out substantially within the time stipulated in the agreement".* The nature of the contract is such that they must have expected this. The contract required the Appellants to complete the work within 8 months and provided for payment of liquidated damages if the Appellants failed to do so subject to the surveyor being required in certain events to allow such additional time as he might deem fair and reasonable: and it was clearly of great importance to the Appellants that there should be no substantial delay because any such delay was bound to add considerably to their costs. It appears from the arbitrator's findings that the parties did not make their expectations known to each other, and I do not think that a finding that the parties in fact expected that there would be no substantial delay adds anything material or alters the legal position.

The arbitrator then found that the conditions in which the work had to be carried out were different from those anticipated in that at all times there was a serious shortage of labour and difficulty in obtaining adequate supplies of bricks and other material. He found that as a result of this shortage and the consequent delay in completing the work the actual cost to the Appellants of carrying out the contract was £115,233 whereas the sum paid to them under the contract was £94,424. The arbitrator has not awarded the whole of the difference between these sums. He held that to some extent the Appellants were themselves to blame and awarded £17,651 as the additional cost and expense properly and unavoidably incurred by them.

If the contract continued to apply then the Appellants are not entitled to more than they have already received; but if it was brought to an end then the Respondents admit that the Appellants are entitled to the sum awarded subject to a very small adjustment.

The arbitrator found that *"the Respondents accepted the position and allowed the work to continue until finally completed on 14th May, 1948, without serious objections by the Respondents".* I do not think that that means or was intended by the arbitrator to mean that at some time while the work was in progress the parties agreed or must be held to have agreed that their contract should no longer apply and that the work should proceed on some other basis. There is no finding as to when any such agreement must be held to have been made or what were its terms and there are no facts found from which such an agreement could be inferred. The Respondents no doubt recognised that the delays were not due to the fault of the Appellants: they made no claim for liquidated damages, and they made no attempt to take the work out of the hands of the Appellants as they could have done if the Appellants had been at fault. But that is no ground for inferring an agreement to terminate the contract and proceed on some different basis.

The Appellants' case must rest on frustration, the termination of the contract by operation of law on the emergence of a fundamentally different situation. Using the language of Asquith, L.J. (as be then was) which I have already quoted, the question is whether the causes of delay or the delays *were "fundamental enough to transmute the job the contractor had undertaken into a job of a different kind, which the contract did not contemplate and to which it could not apply".* In most cases the time when the new situation emerges is clear, there has been some particular event which makes all the difference. It may be that frustration can occur as a result of gradual change, but if so the first question I would be inclined to ask would be when the frustration occurred and when the contract came to an end. It has been assumed in this case that it does not matter at what point during the progress of the work the contract came to an end, and that, whatever the time may have been, if the contract came to an end at some time the whole of the work must be paid for on a *quantum meruit* basis. I do not pursue this matter because the Respondents have admitted that if there was frustration at any time the Appellants are entitled to the sum awarded. But even so, I think one must see whether there was any tune at which the Appellants could have said to the Respondents that the contract was at an end and that if the work was to proceed there must be a new contract, and I cannot find any time from first to last at which they would have been entitled to say that the job had become a job of a different kind which the contract did not contemplate. There is a difficulty about a party being entitled to go on and finish the work without raising the question that a new agreement is necessary and then maintain that frustration occurred at some time while the work was in progress, but again I do not pursue that matter because it does not arise in view of the course this case has taken.

In a contract of this kind the contractor undertakes to do the work for a definite sum and he takes the risk of the cost being greater or less than he expected. If delays occur through no one's fault that may be in the contemplation of the contract and there may be provision for extra time being given: to that extent the other party takes the risk of delay. But he does not take the risk of the cost being increased by such delay. It may be that delay could be of a character so different from anything contemplated that the contract was at an end, but in this case in my opinion the most that could be said is that the delay was greater in degree than was to be expected. It was not caused by any new and unforeseeable factor or event: the job proved to be more onerous but it never became a job of a different kind from that contemplated in the contract.

Bush v. Whitehaven Trustees appears to me to be a very special case and it must be read in light of the development of the law in later cases. I agree with your Lordships' comments on it and I can get little assistance from it for the decision of the present case. I agree that this appeal should be dismissed.

Lord Radcliffe MY LORDS,
I agree that this appeal fails. Of the two main grounds upon which the Appellants rely the shorter is that which concerns the question whether their building contract was made subject to a condition as to the availability of adequate supplies of labour and material by incorporating in its terms the relevant part of a letter from the Appellants to the Respondents dated 18th March, 1946. I will deal with that point first. But at the outset I must remark that if I thought, as I do not, that the Appellants were right in their argument that such a condition was incorporated, I should not necessarily conclude from that that they were entitled to succeed in their appeal. For their success would depend upon a further question, What significance should be attached to the words of the condition as part of the whole contract and what legal consequences should flow from them? As I believe that your Lordships are at one in thinking that the incorporation claimed never took place, I do not think that I need say anything more with regard to this further question except that it is itself a difficult one upon which some difference of view has already shown itself in the Courts.

The building contract is contained in a written agreement under seal dated the 9th July, 1946. The agreement itself is quite short and its main purpose is to identify a number of separate documents which, it states, are to *"form and be read and construed as part of this Agreement."* These other documents had come into existence for the purpose or during the course of the negotiations which had proceeded the making of the formal agreement.

Thus, early in the year 1946 the Respondents had drawn up Bills of Quantities and a Form of Tender which indicated the nature of their requirements, and had invited inspection of their Drawings, Specifications and Conditions of Contract. Contractors wishing to tender for all or part of the projected work were to deliver their tenders on the form prescribed by the 19th March, 1946.

On the 18th March, the Appellants sent in a signed Tender on the appropriate form undertaking the erection of (inter alia) 78 houses at Gudgeheath Lane, Fareham, at a price of £92,425 and within the time limits specified. With it went a covering letter of the same date. As this is the letter which contains the alleged contractual term it is desirable to set it out in full.

" davis contractors limited
325, Kilburn High Road,
London, N.W.
18th March, 1946.
RL/JEM

Clerk of the Council,
Fareham Urban District Council,
Westbury Manor,
Fareham,
Hants.

dear sir,

Re Gudgeheath Lane, Fareham.

We have pleasure in enclosing herewith our Tender prepared in accordance with your Bills of Quantities, and Specifications submitted by your Engineer and Surveyor for One hundred and fifty two houses on four sites.

Our tender is subject to adequate supplies of material and labour being available as and when required to carry out the work within the time specified.

It is also based on the present published market prices of materials delivered to site and existing established rates of wages in the various trades for the district.

Purchase tax has not been allowed for in our Tender and payment of such will form a nett addition to the Contract's sum. Also any variation in price of labour or materials will form nett additions or omissions to or from the Contract's sum, as may be determined by calculation.

We have based our price for facings on a p.c. amount of 20s. on the present quoted price for Fletton bricks delivered Fareham station. This has been necessary as we have been unable to get firm quotations for facings delivered to site.

Thank you for this opportunity of serving you, and we assure you always of our best attention.

Yours faithfully,

For and on behalf of davis contractors ltd. (sd) W. B. W. C. Curd. Director. contracts manager."

The Form of Tender which the Respondents prescribed had an Appendix attached to it, bearing the heading *"Materials and Goods to be purchased directly by the Contractor, in respect of which variation of the Contract sum is desired in accordance with Clause 68a of the Conditions of Contract."* There was then a blank space left under two column headings "*Materials or Goods"* and "B*asic Price."* In this blank space the Appellants had written the words *"As terms of letter attached dated 18th March, 1946, reference RL/JEM."* There was nothing else in the Appendix except a Clause limiting to some extent the contractor's right to vary the contract sum in respect of price variations of materials and goods. As the Arbitrator found in his original Award, the purpose of the Appendix was *"to enable contractors tendering for work to make a list in that Appendix of all materials or goods which might be subject to a rise or fall in price so that both parties to the contract would be protected from the effect of fluctuation of prices ..."*

Between the 18th March and the date when the formal Agreement was entered into the Appellants in fact supplied the Respondents with a detailed Schedule of Prices, which was intended to constitute the list of materials and goods called for by Appendix I and was accepted. No further reference appears to have been made to the letter of the 18th March.

These are the circumstances in which it has to be decided whether the second paragraph of this letter formed a qualifying condition incorporated into the building contract. As the formal Agreement of 9th July was evidently intended to sum up everything that had emerged from the preceding negotiations, it is necessary for the Appellants to show that that Agreement somehow carried into its terms the stipulation contained in that second paragraph. Nor did their argument before your Lordships proceed on any other basis.

It is put in two ways. I do not agree with either of them. On the contrary, I agree with the way that this question was disposed of by Lord Justice Parker in the Court of Appeal: but, since the Appellants' argument on this point commended itself both to the Lord Chief Justice in the Queen's Bench Division and to a majority of the Court of Appeal on the occasion of each hearing, it is only right that I should notice it with some particularity.

The formal Agreement, as I have said, referred to and incorporated a number of the preliminary documents. These were listed in Clause 2 as follows: - "

(a) The said Tender
(b) The Drawings
(c) The General Conditions of Contract
(d) The Specification
(e) The Bill of Quantities
(f) The Schedule of Rates and Prices (if any)."

Now what was the " said Tender"? The actual form of the words is due to the only recital of the Agreement, it which it is stated that the Employer " has accepted a Tender by the Contractor for the sum of £92,425 8s. 4d.," etc. The first way that the Appellants put their case is that the Tender referred to is the whole offer made on the 18th March, and that this offer included the second paragraph of the covering letter which was intended as a qualification of the terms of the Form of Tender.

My Lords, I think that this argument is a misreading of what the Appellants and Respondents intended by the formal Agreement. Certainly all the other documents incorporated by Clause 2 are separate named documents which the parties were at some pains to identify by their respective signatures. Everything points to the " said Tender" being, similarly, the document called Form of Tender which the Appellants had signed on the 18th March and forwarded by their letter. Nothing else in fact could properly be referred to as a " Tender " : for there is a contradiction in terms in speaking of a letter which states that " our Tender " is enclosed as if it were itself part of that very Tender. As I see it, the truth of the matter is that in forwarding their Tender the Appellants proposed a qualification of the expected contract which the Respondents did not accept and to which the Appellants did not themselves return. I do not think it unfair to add the point that if they had, their stipulation could hardly have been left in its existing form which is at once sweeping and inconclusive.

The alternative argument rests upon the fact that the Appendix to the Form of Tender had had written in it by the Appellants a reference to the letter of 18th March. But I do not see how this can avail them with regard to the second paragraph of that letter. For the whole purpose of the Appendix was to provide a list of materials and goods that were to rank in allowing variations of the contract sum. In so far as parts of the letter did refer to prices of materials and goods, as indeed some did, I think that it would be correct to say that those passages formed part of the Form of Tender and, as such, might have been incorporated in the formal Agreement. I say " might " have been ", because I think that the Arbitrator's finding that the later Schedule of Prices supplied on 20th May was intended to constitute Appendix I of the tender must mean that the original reference to the letter of 18th March ceased to have any contractual significance by the time that the formal Agreement was made. But, however that may be, I think it plain that the reference in the Appendix could only bear upon matters relating to the prices of materials and goods and could not possibly have been understood by the parties as bearing upon the general question of the availability of supplies of labour and material. The context of the Appendix makes it impossible to suppose that the reference was intended to introduce the letter of 18th March as a whole.

If the second paragraph of that letter did not form part of the contractual arrangements, the Appellants' right to claim any payment beyond the original contract sum rests upon the argument that at some date before completion the original contract became frustrated by the continued shortage of the necessary supplies of labour and material and that as from that date the building work was carried on under a new working arrangement which admitted of further payment. The supplemental Award of the Arbitrator was drawn up on the basis that this argument succeeded. Despite his findings I think that the law is against the Appellants on this point and that the award in their favour cannot be sustained.

Before I refer to the facts I must say briefly what I understand to be the legal principle of frustration. It is not always expressed in the same way, but I think that the points which are relevant to the decision of this case are really beyond dispute. The theory of frustration belongs to the law of contract and it is represented by a rule which the Courts will apply in certain limited circumstances for the purpose of deciding that contractual obligations, *ex facie* binding, are no longer enforceable against the parties. The description of the circumstances that justify the application of the rule and, consequently, the decision whether in a particular case those circumstances exist are, I think, necessarily questions of law.

It has often been pointed out that the descriptions vary from one case of high authority to another. Even as long ago as 1918 Lord Sumner was able to offer an anthology of different tests directed to the factor of delay alone, and delay though itself a frequent cause of the principle of frustration being invoked is only one instance of the kind of circumstance to which the law attends (see ***Bank Line Ltd. v. Arthur Capel & Co.*** [1919] A.C. 435, 457/460). A full current anthology would need to be longer yet. But the variety of description is not of any importance so long as it is recognised that each is only a description and that all are intended to express the same general idea. I do not think that there has been a better expression of that general idea than the one offered by Lord Loreburn in ***F. A. Tamplin Steamship Co. Ltd. v. Anglo-Mexican Petroleum Products Co. Ltd*** [1916] 2 A.C. 397, 403/404. It is shorter to quote than to try to paraphrase it: " A court can and ought to examine the contract and the circumstances in which it was made, not of course to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. And if they must have done so, then a term to that effect will be implied, though it be not expressed in the contract ... no court has an absolving power, but it can infer from the nature of the contract and the surrounding circumstances that a condition which is not expressed was a foundation on which the parties contracted." So expressed, the principle of frustration, the origin of which seems to He in the development of commercial law, is seen to be a branch of a wider principle which forms part of the English law of contract as a whole. But, in my opinion, full weight ought to be given to the requirement that the parties "must have made" their bargain on the particular footing. Frustration is not to be lightly invoked as the dissolvent of a contract.

Lord Loreburn ascribes the dissolution to an implied term of the contract that was actually made. This approach is in line with the tendency of English courts to refer all the consequences of a contract to the will of those who made it. But there is something of a logical difficulty in seeing how the parties could even impliedly have provided for something which *ex hypothesi* they neither expected nor foresaw; and the ascription of frustration to an implied term of the contract has been criticised as obscuring the true action of the Court which consists in applying an objective rule of the law of contract to the contractual obligations that the parties have imposed upon them- selves. So long as each theory produces the same result as the other, as normally it does, it matters little which theory is avowed (see ***British Movie- tone News Ltd. v. London & District Cinemas Ltd.*** [1952] A.C. 166, 184 per Viscount Simon). But it may still be of some importance to recall that, if the matter is to be approached by way of implied term, the solution of any particular case is not to be found by inquiring what the parties themselves would have agreed on had they been, as they were not, forewarned. It is not merely that no one can answer that hypothetical question: it is also that the decision must be given " irrespective of the individuals concerned, their temperaments and failings, their interest and circumstances " (***HirjiMulji v. Cheong Yue Steamship Co.*** [1926] A.C. 497 at 510). The legal effect of frustration "does not depend on their intention or their opinions, or even knowledge, as to the event" *(loc cit* at 509). On the contrary, it seems that when the event occurs the " meaning of the contract must be taken to be, not what the parties did intend (for they had neither thought nor intention regarding it), but that which the parties, as fair and reasonable men, would presumably have agreed upon if, having such possibility in view, they had made express provision as to their several rights and liabilities in the event of its occurrence " (***Dahl v. Nelson, Donkin & Co.***6 App. Cas. 38, at 59 per Lord Watson).

By this time it might seem that the parties themselves have become so far disembodied spirits that their actual persons should be allowed to rest in peace. In their place there rises the figure of the fair and reasonable man. And the spokesman of the fair and reasonable man, who represents after all no more than the anthropomorphic conception of justice, is and must be the Court itself. So perhaps it would be simpler to say at the outset that frustration occurs

whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. *Non haec in foedera veni*. It was not this that I promised to do.

There is, however, no uncertainty as to the materials upon which the Court must proceed. " The data for decision are, on the one hand, the terms and " construction of the contract, read in the light of the then existing circumstances, and on the other hand the events which have occurred " (***Denny, Mott v. Dickson Ltd. & James B. Fraser & Co. Ltd***. [1944] A.C. 265, 274/5, per Lord Wright). In the nature of things there is often no room for any elaborate enquiry. The court must act upon a general impression of what its rule requires. It is for that reason that special importance is necessarily attached to the occurrence of any unexpected event that, as it were, changes the face of things. But, even so, it is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for.

I am bound to say that, if this is the law, the Appellants' case seems to me a long way from a case of frustration. Here is a building contract entered into by a housing authority and a big firm of contractors in all the uncertainties of the post-war world. Work was begun shortly before the formal contract was executed and continued, with impediments and minor stoppages but without actual interruption, until the 78 houses contracted for had all been built. After the work had been in progress for a time the Appellants raised the claim, which they repeated more than once, that they ought to be paid a larger sum for their work than the contract allowed: but the Respondents refused to admit the claim and, so far as appears, no conclusive action was taken by either side which would make the conduct of one or the other a determining element in the case.

That is not in any obvious sense a frustrated contract. But the Appellants' argument, which certainly found favour with the Arbitrator, is that at some stage before completion the original contract was dissolved because it became incapable of being performed according to its true significance and its place was taken by a new arrangement under which they were entitled to be paid not the contract sum but a fair price on *quantum meruit* for the work that they carried out during the 22 months that elapsed between commencement and completion. The contract, it is said, was an eight months contract, as indeed it was. Through no fault of the parties it turned out that it took twenty-two months to do the work contracted for. The main reason for this was that, whereas both parties had expected that adequate supplies of labour and material would be available to allow for completion in eight months, the supplies that were in fact available were much less than adequate for the purpose. Hence, it is said, the basis or the footing of the contract was removed before the work was completed: or, slightly altering the metaphor, the footing of the contract was so changed by the circumstance that the expected supplies were not available that the contract built upon that footing became void. These are the findings which the Arbitrator has recorded in his Supplemental Award.

In my view these are in substance conclusions of law: and I do not think that they are good law. All that anyone, arbitrator or Court, can do is to study the contract in the light of the circumstances that prevailed at the time when it was made and. having done so, to relate it to the circumstances that are said to have brought about its frustration. It may be a finding of fact that at the time of making the contract both parties anticipated that adequate supplies of labour and material would be available to enable the contract to be completed in the stipulated time. I doubt whether it is: but, even if it is, it is no more than to say that when one party stipulated for completion in eight months and the other party undertook it each assumed that what was promised could be satisfactorily performed. That is a statement of the obvious that could be made with regard to most contracts. I think that a good deal more than that is needed to form a "basis" for the principle of frustration.

The justice of the Arbitrator's conclusion depends upon the weight to be given to the fact that this was a contract for specified work to be completed in a fixed time at a price determined by those conditions. I think that his view was that, if without default on either side the contract period was substantially extended, that circumstance itself rendered the fixed price so unfair to the contractor that he ought not to be held to his original price. I have much sympathy with the contractor: but, in my opinion, if that sort of consideration were to be sufficient to establish a case of frustration, there would be an untold range of contractual obligations rendered uncertain and, possibly, unenforceable.

Two things seem to me to prevent the application of the principle of frustration to this case. One is that the cause of the delay was not any new state of things which the parties could not reasonably be thought to have foreseen. On the contrary, the possibility of enough labour and materials not being available was before their eyes and could have been the subject of special contractual stipulation. It was not made so. The other thing is that, though timely completion was no doubt important to both sides, it is not right to treat the possibility of delay as having the same significance for each. The owner draws up his conditions in detail, specifies the time within which he requires completion, protects himself both by a penalty clause for time exceeded and by calling for the deposit of a guarantee bond and offers a certain measure of security to a contractor by his escalator clause with regard to wages and prices. In the light of these conditions the contractor makes his tender, and the tender must necessarily take into account the margin of profit that he hopes to obtain upon his adventure and in that any appropriate allowance for the obvious risks of delay. To my mind, it is useless to pretend that the contractor is not at risk if delay does occur, even serious delay. And I think it a misuse of legal terms to call in frustration to get him out of his unfortunate predicament.

The arbitrator had put upon him the duty of making further findings of fact *" relevant to the application of the principle in the case of* ***Bush v. Whitehaven*** *"*. This may have been hard upon him, for it implies that that decision can be ascribed to one ascertainable principle. In my opinion, it cannot. The judgment of the Court of Appeal applied a different principle of law from that upon which the trial judge's questions to the jury (and their answers) were based: and the judgment of

the Divisional Court was more or less evenly balanced between the two. According to the findings of the jury taken together the case was one in which all the work done by Bush had been done under the original contract; the contract was such that it carried an implied term that the Whitehaven Trustees should give possession of the whole site without delay; the delay which had taken place changed the conditions of the contract to such an extent that the " special provisions " precluding Bush from making any complaint of delay could no longer be applied ; and Bush was entitled to damages for breach of contract arising from the Trustees' failure to keep the implied term, the damages being represented by the additional cost of the work to him over and above the contract price. It may be difficult to say by what principle of law the "*special provisions*" of the contract became inapplicable while the contract itself remained enforceable: but I suppose that judge and jury had in mind that the parties by their conduct had waived the enforcement of the particular clause. There is nothing out of order in such a finding, so long as the facts proved are clear enough to warrant it, though normally one would expect them to include some discussion, oral or written, between the parties. I daresay that everyone felt that rough justice had been done.

The Court of Appeal, however, decided the case upon a basis which had only a slight resemblance to the findings of the jury. By ignoring all the findings except that which related to the change in the "*conditions of the contract* " and by treating that as if it applied to the contract as a whole and not merely to whatever was to be understood by the words *"special provisions* ", they arrived at a new view of the facts upon which they thought that a case of frustration could be made out. At some time, apparently unknown to and unmarked by the parties concerned, the original contract had disappeared with all its incidents and obligations and in its place had been set up the legal relationship expressed in Bush's claim (though he had not made it) to be paid on the basis of a " *quantum meruit ".* I should have thought that it would have been much simpler to say, had the findings of the jury warranted it, that the parties had abandoned the original contract by mutual consent and substituted for it a new contract containing the substance of the old terms but a reasonable price clause instead of the former fixed price. But that is not frustration: it is fulfilment with variations.

My Lords, I think that *Bush* v. *Whitehaven* may be worth remembering as an instance of what can happen to a case during its passage through successive Courts, but I do not think it worth recording as an exposition of any principle of law. In that regard the editors of the Law Reports, who ignored it, showed a sounder judgment than Mr. Hudson, who enshrined it. In so far as it applied the principle of frustration to the facts of the case, the principle was in my view misapplied. In so far as the judgments of the Court of Appeal contain general statements as to the law of frustration, I think that the subject has been so fully explored in later cases of higher authority that the particular exposition is of no real value. I am sincerely sorry if our decision embarrasses builders, who may in some cases have found in the second volume of Hudson on Building Contracts a way of mitigating the risks of tenders to which the law did not truly entitle them. But in my view their safety lies in the insertion of explicit conditions in any fixed price contracts they may undertake; it does not lie in an appeal to the principle of frustration.

Lord Somervell of Harrow MY LORDS,
I agree that the words on which the Appellant seeks to rely in the letter of 18th March were not incorporated in the contract.

I have had the advantage of reading the opinion which has just been read by my noble and learned friend Lord Reid. I agree with him that it is desirable to decide what is the proper basis of "*frustration*". I also agree with his conclusion on that matter and I should add nothing except the possibility of confusion if I sought to restate it in my own words.

I therefore turn to its application to the issues in the present appeal. As the senior member of the Court of Appeal which remitted the case to the arbitrator, I would like to express my regret that we did not give more assistance to enable him to distinguish the "facts" from his conclusion on them. Fortunately, one or two questions put to counsel in the course of the argument showed that there was now no conflict as to relevant facts.

Contracts to be performed *in future* are based on expectations. If each party is equally well informed as to the data on which expectations must be based, it may be said that these expectations are the "basis" or "footing" on which the contract is made. It would, of course, be absurd to suggest that if such expectations are not realised the "basis" has gone and the contract is frustrated. As Lord Sumner said in the ***Larrinaga*** case (29 Com. Cas. 1 at p. 18)*: "In effect most forward contracts can be regarded as a form of commercial insurance, in which every event is intended to be at the risk of one party or another."* Later he says: *"No one can tell how long a spell of commercial depression may last; no suspense can be more harrying than the vagaries of foreign exchanges, but contracts are made for the purpose of fixing the incidence of such risks in advance, and their occurrence only makes it the more necessary to uphold a contract " and not to make them the ground for discharging it."*

Under the present contract, was the risk of shortage of skilled labour fixed on the Appellant? A builder who undertakes to finish a building by a certain day is, on the face of it, plainly taking such a risk. There are provisions in the present contract which re-enforce this construction, were it necessary to do so. With regard to prices of certain materials and rates of wages there are what are called escalator clauses. The Appellant was not prepared to take the risk of increases in these matters. The parties also directed their minds to the possibility of the work not being completed in the specified time. The Appellant was to pay so much per week in damages. Extra time could, however, be allowed if there was delay by strikes or if the work was stopped by order of the surveyor. This is to me a somewhat obscure clause, but it is sufficient that there was an exception clause for delay which did not cover shortage of labour, and provided only for relief from penalties and not for any extra cost that the delay might cause the Appellant. The shortage of skilled labour as is shown by the admitted figures set out in the points of claim was very substantial. Evidence was called, which may not have been admissible, to show that the expectations were based on statements on behalf of the government as to the probable availability of skilled labour. A party contracting in the light of expectations based on data of that or any

other kind must make up his mind whether he is prepared to take the risk of those expectations being disappointed. If not then he will refuse to contract unless protected by some specific provision. There is no such provision here. The Appellant took the risk under the contract, and it seems to me quite impossible to maintain that the contract did not apply in the situation as it remained, the expectations on which the estimate was based not having been realised.

But for the decision in ***Bush v. Whitehaven Trustees*** (2 Hudson's Building Contracts 4th edn. p. 122) I doubt if the issue of frustration would ever have been raised. I will give my reasons as shortly as I can for thinking that that case should not hereafter be citable as a decision relevant to the law of frustration. The case was fully examined by Cohen, L.J., as he then was, in ***Parkinson (Sir Lindsay) & Company Limited v. Commissioners of H.M.'s Works and Public Buildings*** [1949] 2 K.B. 632). The plaintiffs' claim was for extra expenses incurred on work and labour in that the defendants had not made the site on which the plaintiffs were to do the work available as required. The delay was substantial and turned a summer contract into a winter contract. The defendants relied on an exception clause providing that a failure to make the site available when required should not "*vitiate or affect the contract*". I think that the jury took the view, whether sound in law or not, that the delay was so great that it ought not to be covered by the exception and that the defendant should be treated as in breach. It is the form of two of the questions left to the jury that led the courts to deal with the case as one of frustration. The first two questions and answers were as follows: -

"(1) Was it the duty of the defendants under the contract to be in a position at the commencement of and at all times during the contract to give the contractor the use of so much of the site of the works as might, in the opinion of the engineer, be required to enable the contractor to commence and continue the execution of the works in accordance with the contract? A. Yes.

(2) Was the contract made upon the basis that the defendants would be in a position to act as aforesaid? A. Yes."

I doubt if this second question was a proper question to put. It was in any event liable to mislead. " Basis " may mean no more than "expectation". If it means more it is difficult to reconcile questions (1) and (2) with giving any effect to the exception clause. The fifth question is also difficult. *"Were the conditions of the contract so completely changed, in consequence of the defendants inability to hand over the sites of the work as required, as to make the special provisions of the contract inapplicable? A. Yes."* This does not suggest that the contract is gone altogether but only that the special provisions are inapplicable. The jury, in my view, took these words as referring to the exception. Question 8 was as to the "damage suffered", and the jury awarded £600 over and above the contract price.

It appears that Lord Esher had some doubt as to whether the answer to the fifth question should be taken as a binding finding. Findings by juries on mixed questions of law and fact are not precedents. That is no doubt why the case was not reported in any law report. I doubt myself, with respect, whether on the findings of the jury taken with the terms of the contract it was possible to treat it as a frustration case. I am clear that it cannot be regarded as a precedent in the law of frustration as applied to building or any other contracts.

I would dismiss the appeal.