parents are resident outwith the education area in which the school is situated."

The present case, however, is on a different footing. The natural parents of the children where there are such do not maintain them, and the Parish Council, which has assumed responsibility for them, if it be a parent, is so only in an artificial sense. I am not prepared to affirm that in determining whether the persons with whom the children actually reside are to be deemed their parents under section 10 this is an irrelevant consideration. The case is not in my view on the same footing as if the natural parents of the children resident outwith the school area had made an arrangement with the persons with whom the children reside upon similar lines to those which the Parish Council has made. Every child must have a statutory parent, and if the natural parent is ousted, as is I think the case here, and the competition for statutory parenthood is between two parties neither of whom is the natural parent, the considerations are not the same as in a competition between the natural parent and an artificial one.

I have come to the conclusion, though not I confess without some hesitation, that as between the Parish Council and the local person to whom the child has been entrusted, the latter is the parent within the meaning of section 10. The case appears to me to be distinguishable from the case of *M'Fadzean* v. *Kilmalcolm*, 5 F. 600. There the pursuers, though allowed a certain administrative authority over the children, were really the servants of an institution to the head of which the care of the children had been entrusted. Here the guardians are independent cottagers leading a private family life in their own houses, and they are expected to make the children share in their family life, and to teach them to regard the cottage as their home in a sense which an institution can never be.

If this view be sound it is not necessary to examine the proviso. But if I were in error as to who are in the present circumstances the parents within the meaning of the section, and if the Parish Council were held to be the parents, I should be disposed to negative both the contention that "accessible" means accessible to the child wherever he may happen to be, or accessible to the parent whoever or however situated he may be. I think that the primary intendment is accessible to the child in its home with its parents. If there were special circumstances, such, for example, as the impossibility of the child being at home with its parents in the Parish Council offices, then I think that the matter is one appropriated to the Department.

The Court in answer to the question of law found that section 10 of the Education (Scotland) Act 1918 did not apply to any of the children referred to in the case.

Counsel for the First Parties—Robertson, K.C.—Patrick. Agents—Wallace, Begg, & Company, W.S.

Counsel for the Second Party—Solicitor-General (D. P. Fleming, K.C.)—Crawford. Agents—Laing & Motherwell, W.S.

HOUSE OF LORDS.

Thursday, January 25.

(Before the Lord Chancellor, Lord Dunedin, Lord Shaw, Lord Buckmaster, and Lord Carson.)

JAMES SCOTT & SONS, LIMITED *v.* R. & N. DEL SEL AND ANOTHER.

(In the Court of Session, June 23, 1922, S.C. 592, 59 S.L.R. 446,)

Contract — Frustration — Impossibility of Performance—Arbitration—Application of Arbitration Clause—Contract to Ship Jute — Order in Council Prohibiting Export of Jute.

A firm of jute merchants contracted to ship a specified number of bales of jute from Calcutta to Buenos Ayres. The contract contained, *inter alia*, the following provisions:—"Any delay in shipment caused by fire, strike, breakages, and accidents . . . and for any other unforeseen circumstances, to be excepted, and the quantity short produced in consequence thereof to be deducted from the quantity named in this contract, or delivered soon as possible thereafter, buyers having the option of refusing it after time. . . . Should the vessel by which freight has been engaged be commandeered or delayed by the Government, sellers shall not be responsible for any late shipment or other consequences arising therefrom, and the goods shall be sent forward as early as possible. . . ." It also contained an arbitration clause in the following terms:—"Any dispute that may arise under this contract to be settled by arbitration in Dundee." Before all the bales of jute had been shipped, further export of jute from India to the Argentine was prohibited by an Order in Council of the Governor-General of India. A dispute having arisen between the parties as to whether the contract was rendered void and unenforceable *quoad* the balance of the bales of jute, the sellers maintained that the arbitration clause was inapplicable on the ground that the dispute as to whether the contract had been ended was not a dispute arising under the contract. *Held* (*aff.* the judgment of the Second Division) that as the dispute which had arisen was a dispute as to the meaning of the contract, viz., whether the contract had specifically provided for the events which had happened, it was a dispute under the contract, and that accordingly it fell to be determined by arbitration.

The case is reported *ante ut supra.*

The pursuers appealed to the House of Lords.

At the conclusion of the arguments on behalf of the appellants, counsel for the respondents being present but not called upon, their Lordships delivered judgment as follows:—

LORD CHANCELLOR — This is an appeal from an interlocutor of the Second Division of the Court of Session. The facts may be very shortly stated. The appellants entered into a number of contracts to sell to the respondents certain manufactured jute. The contracts were made in Calcutta, and the effect of them was that the appellants sold to the respondents these goods c.i.f. Buenos Ayres, shipment from Calcutta. Each contract contained the following terms . — "*War Risk for Buyers' Account.* — Any delay in shipment caused by fire, strike, breakages, or accidents, and/or war, and/or civil strife, and/or any other unforeseen circumstances" (I omit a few words which are not material) "to be excepted, and the quantity short produced in consequence thereof to be deducted from the quantity named in this contract, or delivered soon as possible thereafter, buyers having the option of refusing it after time. Sellers must notify buyers within six days of such delay." Then followed another clause — "Should the vessel by which freight has been engaged be commandeered or delayed by the Government, sellers shall not be responsible for any late shipment or other consequence arising therefrom, and the goods shall be sent forward as early as possible"; and each contract concluded with this clause—"Any dispute that may arise under this contract to be settled by arbitration in Dundee" (and then follow some words which are immaterial). As appears from the terms of the contracts, they were made in war time and had in contemplation events which might happen in war, such as the commandeering of a vessel or some other act of the Government consequent upon the war.

The shipments were to be made in July, August, and September 1917, but certain events happened which prevented the shipment of a large part of these goods. On the 12th May 1917 an Order was made by the Governor-General of India in Council prohibiting the export of jute except under licence. Licences were obtained by the appellants, but the two vessels on which they intended to ship the jute and on which space had been engaged were commandeered. There remained in Calcutta one vessel available for this purpose—a vessel called the "Amatonga,"—which was due to sail in the month of August, and the appellants accordingly arranged to ship on board that vessel as much of the jute as she could carry, namely, 925 bales out of a total of 2800 which should have been shipped in July and August. That left a balance of 1875 bales for which arrangements could not be made. But the matter did not stop there. In the month of August it was declared by the Government of India that after the "Amatonga" had sailed, and subject to her sailing, the export of jute to the Argentine should be wholly prohibited. Accordingly the "Amatonga" sailed with the 925 bales, but the 1875 bales remained unshipped. It should be added that in consequence of changes in the Order of the Indian Government arrangements were subsequently made under which the bales which were to be shipped in September were in fact shipped in other vessels, and the only question which arises is as to the 1875 bales not shipped.

On the prohibition of the export of jute to the Argentine in the month of August the appellants cabled to the respondents in these terms — "We are shipping 'Amatonga' nine hundred twenty-five bales. After this steamer leaves Government prohibit further exports River Plate. According Indian contract law balance July/August contracts become void, and September contracts if prohibition is not lifted by end of September. We are selling in Calcutta balance July/August goods on behalf of whom it may concern. Telegraph confirmation"; and the answer sent by the respondents, the buyers, on the 3rd September was in these terms—"Referring to your telegram 29th, do not accept cancelment July/August, neither September shipment. You must abide by your contract and ship as early as possible. Cannot recognise Indian contracts law." Clearly the request in this telegram to "ship as early as possible" had reference to the clause which I have quoted from the contracts providing that if any delay should be caused by war or any other unforeseen circumstances the goods should be delivered as soon as possible thereafter.

A dispute having thus arisen between the parties the respondents, after an interval, proposed to refer the matter to arbitration under the arbitration clause, and accordingly they appointed an arbiter and called upon the appellants to appoint an arbiter on their behalf. The appellants contended that the arbitration clause did not apply, but under protest appointed a gentleman as their arbiter. The arbiters could not agree on the appointment of an oversman, but an oversman was ultimately appointed by the Sheriff-Substitute, and an appeal from that decision to the Sheriff failed. The appellants brought before the oversman the question whether he had jurisdiction to entertain the determination of the dispute above described; he decided that question in the affirmative, and thereupon the appellants commenced this action against the respondents, claiming in effect a declaration that the arbitration clause did not apply and an injunction to prevent the oversman from proceeding to determine the dispute. The decision of the Lord Ordinary in the action was in favour of the respondents, his decision was unanimously affirmed by the Court of Session, and thereupon the present appeal was brought.

The point taken on behalf of the appellants appears to be in substance this—"The dispute which has arisen is not a dispute under the contract but a dispute as to the existence of the contract. Our contention is that by reason of the Order in Council prohibiting the export of jute to the River Plate the contract was, as regards the 1875 bales not shipped, frustrated and destroyed, and this question cannot be determined by the arbiter. The contract having gone, the arbitration clause has gone with it, and the whole jurisdiction of the arbiters and of the oversman falls to the ground."

I do not think it necessary in this appeal

to consider or to determine the general question as to the effect of what is called frustration upon an arbitration clause, because it appears to me that on the facts of this case no such question arises. In order to succeed in their contention the appellants must, I think, in effect say this—"There was in this agreement"—I am using now the somewhat metaphysical language which has been used in other cases—"an implied condition, the effect of which was that if that thing should happen which has happened—that is to say, if the Government of India should prohibit the export of jute—then the contract should fall to the ground and no longer operate; and that implied condition having taken effect, the agreement and the arbitration clause have fallen to the ground and been destroyed." But I confess I cannot understand how in this contract such a condition can possibly be implied, because the contract by its very terms provides, that if by reason of war or of other unforeseen circumstances (among which I should count the issue of an Order in Council of this character), if by reason of any such event, the shipment of jute should be delayed, then (I am paraphrasing and not quoting now) the contract shall not be destroyed, but the jute in respect of which the delay occurs shall nevertheless be shipped, and shipped as early as possible. There being that express term in the contract, I do not understand how it can be said that there is an implied term to the contrary effect; and if it is contended that the express term on its true construction does not apply to the events which have happened, then this is a question as to the meaning of the contract as to which the arbiters clearly have jurisdiction.

I venture to think that that is a sufficient answer to the appeal. The decision of the Court of Session in favour of the respondents practically turned, as I understand, upon that point. I think that the decision was correct, and that this appeal should be dismissed with costs, and I move your Lordships accordingly.

LORD DUNEDIN—I think this is a very clear case. The appellants cannot, and do not, say that the effect of the Government Order prohibiting the export of jute brought *ipso facto* to an end all contracts as regards jute—particularly it obviously did not bring this contract to an end, for a certain amount of jute was delivered under it and has to be paid for. But what he does say is that the effect of that Order was to relieve him from liability to perform the rest of the contract so far as it remained unperformed.

Now they can only succeed in that proposition if they bring themselves within one of two categories. Either they must show that there was an express term of the contract which had that effect, or they must show that there was an implied term in the contract which had the same effect. That an implied term in a contract may have that effect is quite clearly shown by what was decided in this House in the case of *Tamplin S.S. Company, Limited*, and in the case of the *Metropolitan Water Company* v. *Dick Kerr & Company, Limited*. It seems to me therefore that they are in this dilemna, that in either view they have got to have recourse to the contract, and if they have got to have recourse to the contract it seems to me that the dispute is a dispute under the contract. The contract says that the arbitrator shall decide it, and not the Court, and it does not matter if the arbitrator in so deciding has to decide what may or may not be a difficult question of law.

I have one word to add. I think the whole matter is most clearly and succinctly put by Lord Ormidale at the end of his opinion, and what I have said is no more than expressing in different words what he has said before.

LORD SHAW—I decline in the present case to be led into any pronouncement upon the general doctrine of frustration.

The argument presented seems to me sufficiently met by the terms of the contract themselves. That contract provides specifically for the case of delay in the delivery of the goods being caused by the outbreak of war, and adds to the causes enumerated a further inclusion of "unforeseen circumstances." Therefore the contract itself, as my noble and learned friend on the Woolsack has said, covers the exact situation which has arisen in the present case.

The very astute argument delivered at your Lordship's Bar was to this effect, that when the Governor-General of India laid on by Order in Council an embargo against further shipments of Jute from India, the result of that embargo was not merely to cause delay in the performance of the remaining obligations on Mr Macmillan's clients, but actually to go to the very root of the relations of the parties under the contract and to destroy those contract relations altogether. I cannot assent to any such stupendous general proposition, The Orders in Council, it was not disputed, were intelligibly subsumed within the categories of causes, namely, the outbreak of war or "unforeseen circumstances." I must accordingly not be led into any observations on frustration in general in a case in which the acts alleged to constitute frustration in fact seem to have been settled and provided for by the parties themselves. The dispute on that topic is accordingly subject to the arbitration clause, which includes comprehensively disputes arising under the contract.

LORD BUCKMASTER—When we consider the nature of the proceedings in connection with which this dispute has arisen, it will, I think, be plain that this appeal cannot succeed.

The appellants sold to the respondents certain jute goods under 27 contracts, and they have made considerable deliveries under those contracts, leaving only 1875 bales undelivered, and these they refuse to supply. Accordingly proceedings were instituted by the respondents to recover damages due to the alleged breach of contract by non-delivery, and the question apart from special circumstances falls to be

determined by arbitration under the contract. The appellants say, however, that the arbitration clause is inapplicable because the liability to make this delivery has been in some way extirpated from the contract by the action of the Governor-General in Council, or in other words, that there is a defence by reason of the Order in Council. The respondents answer that there is no such excuse at all, as the contract expressly provides for the circumstances that have arisen.

The question therefore is does that dispute arise under the contract? I admit that I find it difficult to understand how it can arise in any other way. The contract is the document that regulates the rights of the parties. The Order in Council is only to be considered for the purpose of seeing whether the rights so conferred have been taken away by overriding authority in a manner which the contract did not contemplate. This clearly is a question under the contract, and I entirely agree with the motion proposed by the noble and learned Lord on the Woolsack.

LORD CARSON—I agree that this appeal ought to be dismissed.

Their Lordships ordered that the interlocutor appealed from be affirmed and the appeal dismissed with costs.

Counsel for Appellants—Macmillan, K.C. —Charles Mackintosh. Agents—Morton, Smart, Macdonald, & Prosser, W.S., Edinburgh—William A. Crump & Son, London.

Counsel for Respondents—Gentles, K.C. —Arthur R. Brown. Agents—Aitken, Methuen, & Aikman, W.S., Edinburgh—Linklaters & Paines, London.

Thursday, January 25.

(Before the Lord Chancellor, Lord Dunedin, Lord Shaw, Lord Buckmaster, and Lord Carson.)

M'KINLAY *v.* DARNGAVIL COAL COMPANY, LIMITED.

(In the Court of Session, July 19, 1922, S.C. 714, 59 S.L.R. 553.)

Reparation—Negligence—Injuries to Children—Heavy Gate in Place Frequented by Children—Children Permitted to Play with Gate—Trap—Averments—Relevancy.

A father brought an action against a colliery company for damages for the death of his son aged nine, who while playing about a gate at the entrance to the colliery was fatally injured owing to the gate, on which other children were swinging, closing and crushing him between the hinge-end of the gate and the gate-post. The pursuer averred that the gate was so constructed that the space between the hinge-end of the gate and the gate-post varied from about one inch when the gate was closed to about one foot when it was open; that the gate when open was in the knowledge of the defenders dangerous owing to its size, construction, and weight; that it was in a state of disrepair, which prevented it from being secured when open by a device which the defenders had provided for that purpose; that children habitually played with the gate with the tacit permission of the defenders; that it formed an allurement which was of the nature of a trap; and that the defenders had taken no precautions to prevent children being injured. *Held* (*aff.* judgment of the First Division) that the pursuer had stated a relevant case for inquiry, and that accordingly the case must go to trial.

The case is reported *ante ut supra.*

The defenders appealed to the House of Lords.

At delivering judgment—

At the conclusion of the arguments on behalf of the appellants, counsel for the respondent being present but not called upon, their Lordships delivered judgment as follows:—

LORD CHANCELLOR — This appeal has been fully and fairly argued by the learned counsel for the appellants, but in the result I agree with the view of the Court of Session that this is a case which should go to trial.

Holding that view, I am unwilling to risk prejudicing the case by entering into a minute analysis of the statements which are made in the pleadings on behalf of the pursuer. Shortly, his allegations seem to me to come to this, that children were regularly permitted to play inside as well as outside this gate and to swing it, as children will, to and fro; that the gate was of such a size, width, and construction as to be unfamiliar and dangerous to children, and to constitute in effect a trap for them; and that this being so it was the duty of the defenders either to protect the children whom they allowed upon their premises against that danger or to exclude them.

Now, of course, I accept the view that if no relevant case is made on the pleadings the course taken in this case by the Lord Ordinary may properly be taken. The practice of stopping a case on what amounts to demurrer is less common in England than it was, but in this case the Scottish practice must of course be followed. But accepting that view I am not prepared to say that if all the allegations of the pursuer, fairly interpreted, are established and the answers are not made out, a jury could not properly find a verdict for the pursuer. I do not wish to put any obstacle in the way of any legal argument which may properly arise when the facts have been ascertained, and it is sufficient to say that the case ought not to be wholly withdrawn from a jury at the present stage.

For these reasons I am of opinion that this appeal fails and should be dismissed, and I move your Lordships accordingly.

LORD DUNEDIN—I agree. It is quite true that the foundation of this action is negligence, and that whenever you have to prove