danger. If *Taylor* v. *Caldwell* is explained, not on the ground of the destruction of the subject-matter of the contract, but of the implication of a clause, then, since a similar clause may be implied in other circumstances, it becomes possible to apply the doctrine of frustration to other types of cases.

Discharge by supervening impossibility of performance seems now so well established as a doctrine independent of its manifestations in specific circumstances that there would appear to be no more need to employ the fiction of the implied term as a safeguard of this independence. The use of fictions for the development of the law is a commonplace of English legal history. But the art of using fictions requires courage to abandon them as soon as they have served their purpose. According to *Tatem* v. *Gamboa* this moment has now arrived. In support one may refer to recent developments in the law of quasi-contract. The change introduced into the law of impossibility of performance is exactly the same as that effected by *Craven-Ellis* v. *Canons Ltd.*[14] and *Brook's Wharf and Bull Wharf Ltd.* v. *Goodman Bros.*[15] in the law of quasi-contract.[16] The fiction of a notional contract is being sacrificed to give place to the dictates of natural justice as represented by the doctrines of unjustified enrichment and impossibility of performance.[17] It may well be argued that the forces which have been working successfully in the field of quasi-contract against the ideas of freedom and sanctity of contract, which lie at the root of the fiction of contracts implied in law, should now be permitted to transform the doctrine of frustration. The extent of that transformation will appear from an attempt to sum up the result of *Tatem* v. *Gamboa* in terms of the law of evidence. Before this case it would still have been correct to assert the existence of a presumption against discharge by impossibility of performance, although this presumption had been considerably weakened by the greater ease with which terms providing for frustration could be implied, once the law began to consider the parties as reasonable men or "fair dealers" rather than as the "hard bargainers"[18] which in fact they might be. The presumption has been reversed by *Tatem* v. *Gamboa*. As a result of this decision nothing short of an express agreement providing against discharge will prevent the operation of the doctrine of frustration.

J. UNGER.

Abortion: Medical Aspects of Rex *v.* Bourne.

The case of *Rex* v. *Bourne*, so recently concluded, has been one of outstanding interest to the medical and legal professions, and has not been without its interest for the public in general. To consider its significance it is as well to review briefly the circumstances of the case.

Mr. Alec Bourne, a gynaecologist of the highest repute amongst his colleagues was asked to see a girl of fourteen who had become pregnant

[14] [1936] 2 K.B. 403. For comment see 1 *Mod. L.R.*, p. 76, and Friedmann, "The Principle of Unjust Enrichment in English Law," 16 *Can. Bar Rev.* 243 at p. 250.

[15] [1937] 1 K.B. 534. See Friedmann, *op. cit.*, at p. 251.

[16] A comprehensive survey of the present state of the controversy containing a full list of references, is given by Logan, "Restatement on Restitution," 2 *Mod. L.R.* 153.

[17] In *Hirji Mulji* v. *Cheong Yue Steamship Co.*, [1926] A.C. 497, 510 Lord Sumner described frustration as "a device, by which the rules as to absolute contracts are reconciled with a special exception which justice demands."

[18] Lord Sumner in *Bank Line, Ltd.* v. *Capel, supra*, at p. 453.