true construction to be put upon the agreement. The respondents' counsel admitted that there was a closed bargain, but contended that it contained a condition which has never been purified. In this I think he was right. The minor never was in a position to claim until the curator *ad litem* approved of the agreement. If this is so it is not possible to hold that on his decease a right which he himself never possessed was transmitted to his executor. The right which vested in the workman was to a weekly payment and this right remains. The language of the agreement ought, in my opinion, to be taken literally.

LORD SKERRINGTON — The Workmen's Compensation Act 1906 contains its own peculiar provisions for relieving injured workmen (specially including those under any legal disability) from improvident agreements in regard to compensation and for relieving both workmen and employers from agreements obtained by fraud or undue influence or other improper means; and it may be that in a suitable case either party may also appeal to the common law for a remedy. There is, however, nothing in the statute to prevent employers and workmen from stipulating in their agreements for the adoption of some precaution which is not required by the statute but which if adopted would render any subsequent challenge of the agreement very improbable. That is what the parties did in the present case by providing that their agreement "was conditional on its being approved by a curator *ad litem* to be appointed by the Court to the claimant." Obviously this precaution was one which would not have been chosen if the workman had not happened to be a minor, and it was also one which it would be impossible for either party to make use of if the minor should happen to die before a curator *ad litem* had been appointed (as actually happened), or if such an appointment, having duly been made, should fall owing to the ward dying or attaining majority before the curator had signified his approval of the agreement. These considerations, however, prove no more than that the parties (very naturally, as I think) did not attempt to legislate for every possible contingency, but were content that if their agreement should prove inapplicable to the actual circumstances each party should be relegated to his rights and obligations under the statute. On the other hand it seems to me to do violence both to the language and to the spirit of the agreement to argue (as did the appellant's counsel) that the workman's executor was in a different position from his author, whose contractual rights and obligations at the time of his death were undoubtedly subject to a proper suspensive condition. In my judgment the arbitrator has come to a correct decision upon the third question of law—the only one which we were asked to answer.

LORD CULLEN—I am of the same opinion. The agreement between the minor workman and his employers which the appellant seeks to enforce expressly stipulated that it was conditional on its being approved by a curator *ad litem* to be appointed by the Court to the minor. This stipulation appears to me to make a condition suspensive of the efficacy of the agreement. The condition was never purified. The workman died in minority. During his lifetime he never was in a position, standing the said condition unpurified, to enforce the agreement as one entitling him to receive payment *simpliciter* from his employers of the sum of £375, and I am unable to see how he could on his death transmit to his executor-dative a right which he himself did not possess.

LORD PRESIDENT—I concur.

The Court answered the third question of law in the affirmative, and found it unnecessary to answer the first and second questions.

Counsel for Appellant—Fenton—Crawford. Agents—Wallace, Begg, & Company, W.S.

Counsel for Respondents—Wark, K.C.—Burnet. Agents—Alex. Morison & Company, W.S.

Saturday, June 17.

FIRST DIVISION.

[Sheriff Court at Stirling.

CLARK *v.* LORD ADVOCATE.

Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—"*Arising out of and in the Course of the Employment*"—*Injury to Employee's Eye Caused by a Careless Gesture on the Part of a Fellow Servant in the Course of his Employment.*

A post office employee while ascending a stair in the course of his employment was about to pass a fellow employee who was descending in a heedless or careless manner. The latter waved his hand to a third employee standing on the landing above, and in so doing, and without intending to touch the claimant whose approach he had not noticed, struck his eye with one of his fingers and injured it. At the place where the accident happened the stair was so constructed that two persons passing required to exercise care. *Held* that the accident was one arising out of as well as in the course of the employment.

James Key Clark, post office sorting clerk, St Ninians, *appellant*, being dissatisfied with an award of the Sheriff-Substitute (DEAN LESLIE) in an arbitration under the Workmen's Compensation Act 1906 between him and the Lord Advocate acting on behalf of the Postmaster-General, *respondent*, appealed by Stated Case.

The Case stated—"This is an arbitration under the Workmen's Compensation Act 1906, under which the appellant applied to have it found that he was totally incapacitated for work as the result of an accident while in the employment of the respondent. . . . I found the following *facts* proved or

admitted:—From September 1916 until 8th August 1921 the appellant was a sorting clerk in the employment of His Majesty's Postmaster-General at the Post Office, Stirling. His average weekly earnings amounted to £3, 6s. The employee's retiring room of the Stirling Post Office is in the basement flat. Between this room and the working rooms access is had by a stair consisting of six straight steps, nine wheeling steps, and another six straight steps. The upper half of the stair is quite well lighted. The lower half is rather dark. The steps are rather steep, being 7 or 8 inches in height. The straight steps are 3 feet 6 inches in length. The wheeling steps are a little longer, extending into rectangular corners. Two persons passing at the wheeling steps require to exercise care. It is not a dangerous stair. It is not in a part of the office open to the public. On 2nd August 1921 at 2 p.m. the appellant was in the course of his employment ascending the stair. Just after he had begun the ascent a fellow employee in the post office named Ingram began to descend. As Ingram had begun to descend a friendly remark was made to him about his return from camp, by a third employee who was on the landing which Ingram had left. Ingram replied and continued to descend, looking upwards and waved his left hand. As he brought down his hand the spectacles the appellant was wearing were displaced by it and one of Ingram's fingers touched the appellant's left eye. Ingram was going down smartly and the appellant was going up slowly. Ingram did not observe the appellant until his hand came in contact with him. When the accident occurred the appellant and Ingram were at or about the upper portion of the wheeling steps. There the light was not defective. The appellant continued at work until 8th August, when he had to give it up owing to the injury. The accident injured his left eye, and in consequence he was and still is totally incapacitated for work.

"On these facts I found that the appellant was not injured by accident arising out of and in the course of his employment with the respondent, and that the appellant was not entitled to compensation from the respondent under the Workmen's Compensation Act 1906. . . ."

The *question of law* for the opinion of the Court was—"Was I entitled on the facts found proved or admitted to find that the appellant was not injured by accident arising out of and in the course of his employment with the respondent in terms of the Workmen's Compensation Act 1906?"

Argued for the appellant—The accident arose out of the employment. The arbitrator had found that the construction of the stair was such as to require a certain amount of care on the part of those going up or down. Thus this accident, which arose from an absence of such care on the part of one of the persons, was causally connected with the construction of the stairs and resulted from a risk incidental to the employment. The fact that such a risk might also include a risk more or less common to all mankind was irrelevant—*Dennis* v. *A. J. White & Company*, [1917] A.C. 479, *per* Lord Finlay at p. 481. Counsel also referred to the following cases—*M'Kenry* v. *Wright & Greig, Limited*, 1919 S.C. 98, 56 S.L.R. 39; *Simpson* v. *Sinclair*, [1917] A.C. 479, 1917 S.C. (H.L.) 35, 54 S.L.R. 267; *Trim Joint District School* v. *Kelly*, [1914] A.C. 667; *Reid* v. *British and Irish Steam Packet Company*, [1921] 2 K.B. 319; *Arkell* v. *Gudgeon*, (1917) 10 B.W.C.C. 660; *Miller* v. *Refuge Assurance Company, Limited*, 1912 S.C. 37, *per* Lord Kinnear at p. 43, 49 S.L.R. 67; *Fearnby* v. *Bates & Northcliffe, Limited*, (1917) 10 B.W.C.C. 308; *Armstrong, Whitworth & Company, Limited* v. *Redford*, [1920] A.C. 757; *Macfarlane* v. *Shaw (Glasgow), Limited*, 1915 S.C. 273, 52 S.L.R. 236; *Blair & Company, Limited* v *Chilton*, (1915) 8 B.W.C.C. 324. The Lord President referred to *Morgan* v. *Owners of Steamship "Zenaida,"* (1909) 2 B.W.C.C. 19, and to *Pierce* v. *Provident Clothing and Supply Company, Limited*, [1911] 1 K.B. 997, *per* Buckley, L.J., at p. 1003.

Argued for the respondent—The accident did not arise out of the employment. The arbitrator had found in fact that the stair was not dangerous. The accident was one that might happen anywhere. It was not causually connected with the circumstances of the employment. The risk was one common to all mankind, as in *Craske* v. *Wigan*, [1909] 2 K.B. 635, and the respondent therefore was not liable. Counsel also referred to the following cases—*Lancashire and Yorkshire Railway Company* v. *Highley*, [1917] A.C. 352, *per* Lord Sumner at p. 372; *Trim Joint District School* v. *Kelly* (*cit.*); *Reid* v. *British and Irish Steam Packet Company* (*cit.*), *per* Lord Sterndale, M.R., at 322; *Wilson* v. *Laing*, 1909 S.C. 1230, 46 S.L.R. 843; *Wrigley* v. *Nasmyth, Wilson, & Company, Limited*, (1913) 6 B.W.C.C. 90; *Clayton* v. *Hardwick Colliery Company, Limited*, (1915) 9 B.W.C.C. 136; *Hardie* v. *Gain & Sons*, 9 B.W.C.C. 328; *Challis* v. *London & South-Western Railway*, [1905] 2 K.B. 154; *Armitage* v. *Lancashire and Yorkshire Railway*, [1902] 2 K.B. 178, *per* Collins, M.R., at p. 180; *Warner* v. *Couchman*, [1912] A.C. 35; *Hannifin* v. *Fitzmaurice*, (1920) 14 B.W.C.C. 320.

At advising—

LORD PRESIDENT—I have had an opportunity of reading Lord Skerrington's opinion, and I concur in it.

LORD MACKENZIE—In my opinion the question should be answered in the negative. The arbitrator is of opinion that the appellant was in the course of his employment when he was injured. Upon the facts proved it appears to me that there was not evidence from which the arbitrator could come to the conclusion that the accident did not arise out of the employment. The appellant was injured while ascending at a part of the stair where two persons passing required to exercise care. it was just one of the risks incident to his employment that he would meet a person, whether a fellow employee or other person legitimately using the stair, who failed to exercise care. In

this case it was a fellow employee who failed to exercise care and put his hand in the appellant's eye. There is no suggestion of malice or mischief. The facts found are consistent only with misadventure. To say that the appellant was not injured by accident arising out of his employment seems to me to be contrary to the words of the Act.

LORD SKERRINGTON—This case seems to me to be a simple one, but it was made to appear difficult by a copious citation of authorities. The facts speak for themselves, and I do not think it necessary to do much more than state them.

The proximate cause of the appellant's injury was found by the arbitrator to have been a careless gesture on the part of a person named Ingram who was employed along with the appellant in the post office at Stirling. The accident occurred upon a stair leading from the post office on the ground floor to the employees' retiring room in the basement. The appellant was going up slowly, but Ingram was coming down "smartly" and was not looking in the direction in which he was going. After waving to a third employee who had made a friendly remark about Ingram's return from camp, the latter without intending to touch the appellant, whose approach he had not noticed, brought down his hand in such a way as to touch the appellant's left eye with one of his fingers and so injure it. The question which the arbitrator had to consider was whether the appellant's employment, though not the proximate cause of the accident, was "one of the contributing causes without which the accident which actually happened would not have happened." The words quoted are from the opinion of Lord Loreburn, L.C., in *Clover, Clayton, & Company, Limited* v. *Hughes*, [1910] A.C. 242, at p. 245.

The arbitrator has found as matter of fact that "the appellant was in the course of his employment ascending the stair." It follows that at the time of the accident he was doing something which was part of or incidental to his service in the Post Office —*Officer* v. *Davidson*, 1918 S.C. (H.L.) 66. The only question which remains is whether the stair which the appellant was ascending was so constructed that he was necessarily brought into such close proximity with any employee who might be descending at the same time as to expose him to the risk of being injured in his person by a careless though otherwise innocent gesture on the part of that employee. This question admits of only one answer, viz., in the affirmative. Although the stair was unobjectionable as regards construction and lighting, it was at the place where the accident occurred formed of "wheeling steps" a little more than 3½ feet in length, and such that "two persons passing . . . required to exercise care." It is irrelevant to point out (what is quite true) that even if there had been no stair and no narrow passages in the Post Office, but simply one large chamber, two employees might have found a reason—good or bad—for coming into close proximity and thus exposing themselves to injury from each other's clumsiness. It is equally irrelevant to point out that in most employments the employees are more or less often brought into close proximity with each other, and that persons who are not in any employment come into similar proximity with each other on many occasions in every twenty-four hours. As regards this argument, I respectfully adopt what was said by Buckley, L.J., in a passage from his opinion in the case of *Pierce* v. *Provident Clothing and Supply Company, Limited* ([1911] 1 K.B. 997), which was quoted with approval by Lord Finlay, L.C., in his speech in *Dennis* v. *White & Company*, [1917] A.C. 479. The passage is as follows:—"The question whether the accident is the result of a risk to which all mankind are more or less exposed is in my judgment not an exhaustive test of the question whether or not the accident arises out of the employment. The words 'out of' necessarily involve the idea that the accident arises out of a risk incidental to the employment. An accident arises out of an employment where it results from a risk incidental to the employment as distinguished from a risk common to all mankind, although the risk incidental to the employment may include a risk common to all mankind."

For the reasons indicated I think that the question of law should be answered in the negative, and that the case should be remitted to the arbitrator in order that he may assess the compensation due to the appellant. I express no opinion as to what the legal position would have been if the appellant had been injured in circumstances which made it possible to argue that the connection between his employment and the accident had been broken by the intervention of a new and independent cause, *e.g.*, if Ingram had put forward his hand with the intention of touching the appellant's face either in anger or as a joke, or if the appellant had been assaulted by a criminal or a lunatic who was lurking in one of the "rectangular corners" of the stair. In the absence of any contrary statement in the case or suggestion in the argument, I have, of course, assumed that Ingram was entitled to use the stair, and was doing so for a lawful purpose at the time of the unfortunate occurrence.

LORD CULLEN—I concur in the opinions which have been delivered.

The facts found by the arbitrator show in my opinion that it was incidental to the appellant's employment at the Post Office, Stirling, to use the stair in question during business hours, and in ascending the stair at any particular time he ran the risk of a collision or impact with some one of his fellow-workers in the office who might be descending in a heedless or careless manner. On that footing it appears to me in accordance with the more recent authoritative pronouncements regarding the meaning of the statute to hold that the accident in question arose out of the appellant's employment. I accordingly concur in answering the question in the Stated Case as your Lordships propose.

The Court answered the question of law in the negative.

Counsel for Appellant — Wark, K.C. — Paton. Agents—Maxwell, Gill, & Pringle, W.S.

Counsel for Respondent—Solicitor-General (Constable, K.C.)—Skelton. Agent—John S. Pitman, W.S.

Wednesday, June 21.

FIRST DIVISION.

MORGAN, PETITIONER.

Bankruptcy—Sequestration—Gazette Notice — Failure to Insert Notice Correctly — Application to Rectify—Nobile Officium—Bankruptcy (Scotland) Act 1913 (3 *and* 4 *Geo. V, cap.* 20), *sec.* 44, *and Schedule B.*

A notice of sequestration under section 44 of the Bankruptcy Act 1913 was timeously inserted in the *Edinburgh* and *London Gazettes*, but did not contain the sentence "All future advertisements relating to this sequestration will be published in the *Edinburgh Gazette* alone," conform to Schedule B. The statutory meeting was held and a trustee elected, to whose appointment objections were lodged. The Sheriff having difficulty in dealing with the appointment of the trustee and the objections owing to the omission from the *Gazette* notice, a petition was presented to the First Division appealing to the *nobile officium* of the Court to rectify the notice and to authorise the sequestration to proceed.

The Court *authorised* the petitioner to insert a notice in the *Edinburgh* and *London Gazettes* correcting the omission, and authorised the Sheriff upon proof of such notice having been duly inserted to proceed in the sequestration as if the first notice had been correctly given.

The Bankruptcy (Scotland) Act 1913, sec. 44, *inter alia* enacts—"... The party applying for sequestration shall, within four days from the date of the deliverance awarding the sequestration (if awarded in the Court of Session), or if it is awarded by the Sheriff within four days after a copy of the said deliverance could be received in course of post in Edinburgh, insert a notice in the form of Schedule B hereunto annexed in the *Gazette*, and also one notice in the same terms within six days from the said date in the *London Gazette*."

Schedule B is as follows:—

"*Notice to the Gazettes.*

"The estates of A B (name and designation) were sequestrated on (date, month, and year) by the (Court of Session or sheriff of).

"The first deliverance is dated the (date).

"The meeting to elect the trustee and commissioners is to be held at (hour) o'clock on (day of the week), the (date, month, and year), within (specify particular place) in (town).

"All future advertisements relating to this sequestration will be published in the *Edinburgh Gazette* alone."

Mrs Margaret Morgan, Douglas Hotel, Stirling, presented a petition appealing to the *nobile officium* of the Court, which set forth—"That of this date (May 18, 1922) the petitioner, with the concurrence of Alexander Stewart & Son of Dundee, creditors of the petitioner to the extent required by law, presented a petition to the Sheriff of Stirling, Dumbarton, and Clackmannan at Stirling for the sequestration of the petitioner's estates. That of the same date the Sheriff awarded sequestration in common form. That as required by section 44 of the Bankruptcy (Scotland) Act 1913 the petitioner duly presented to the Keeper of the Register of Inhibitions and Adjudications at Edinburgh an abbreviate of the petition and deliverance in the form prescribed, which was recorded of this date (May 20, 1922). That in terms of section 44 of the said Bankruptcy Act there should also have been inserted in the *Edinburgh Gazette* within four days, and in the *London Gazette* within six days after, a copy of the said deliverance could be received in course of post in Edinburgh, a notice in the form of Schedule B annexed to the said Bankruptcy Act. That of this date (May 23, 1922) a notice was timeously inserted in the *Edinburgh* and *London Gazettes*, but *per incuriam* the notice did not conform to the terms of said Schedule B, the sentence 'All future advertisements relating to this sequestration will be published in the *Edinburgh Gazette* alone' being omitted therefrom. That in terms of the said first deliverance, and as advertised in the said *Gazette* notices, the meeting of creditors for the purpose of electing a trustee and commissioners was held of this date (June 2, 1922). That the said meeting unanimously elected three commissioners and by a majority elected a trustee, to whose appointment objections have been lodged. That the Sheriff has difficulty in proceeding to deal with the appointment of the trustee and the disposal of the said objections by reason of the said notices calling the meeting of creditors not having been in the form prescribed by Schedule B although the whole other formalities prescribed by the said Bankruptcy Act have been duly observed, and no further advertisements of any proceedings in the sequestration have been necessary."

The prayer of the petition was as follows:—"May it therefore please your Lordships to authorise the petitioner to insert in the *Edinburgh* and *London Gazettes*, within six days from the date of your Lordship's interlocutor hereon, a notice in the following terms:—'Sequestration of Mrs Margaret Morgan, widow, carrying on business at Douglas Hotel, Arcade, Stirling.—All future advertisements relating to this sequestration will be published in the *Edinburgh Gazette* alone. This intimation was omitted from the notice published in the *Gazette* on 23rd May 1922, and is now given by authority of the First Division of the Court of Session, in terms of interlocutor dated 21st June 1922.