boy, who chanced to come there without their consent, and certainly without their invitation, express or implied.

LORD GUTHRIE—I agree that the case fails, as your Lordships have put it, through the absence of connection in the way of averment between the defenders' alleged fault and the accident. The nature of the material is important. The words used in the condescendence are "an extremely dangerous explosive," but these words cannot be used in a technical sense. This was not in a technical sense an explosive, because it was not an explosive within the meaning of the Explosives Act 1875 (38 and 39 Vict. c. 17). If it had been, then the mere possession of explosive material of more than a certain amount would of itself have been sufficient to make the defenders responsible if an explosion occurred, even without any averment of direct negligence to infer fault. But the material is not of that nature, and it is not denied, although the record does not admit it, that without the application of light it is perfectly safe.

I do not know that there was any necessity for the pursuer averring either exactly how the accident occurred or who applied the light. It might have been sufficient if he had averred that the place where barrels with a certain residuum of naphtha in them were placed was a place where they were bound to anticipate that lights would be, or would probably be, encountered. But in fact the accident took place in broad daylight, and there is no suggestion that there was any reason whatever to anticipate that any light would be met with in this particular place.

On the other question of the legal category under which the boy fell at the time, it does seem to me that the pursuer, on his own averment, discloses what would be a sufficient ground for holding the action irrelevant, because he states that the place where the accident happened was in the defenders' yard, that is, an enclosed place. He might in the way of averment have made his case relevant if he had said that this place was a place where the public, and in particular children, were allowed habitually to resort; but all he says is that the defenders' servants allowed the pursuer's son to enter the yard and remain there on the lorry.

He does not even say that they saw him come in on the lorry. He merely says that he was not stopped from coming into the yard. That raises the question whether it can be said that he was legitimately there. Mr Watt said he might be legitimately there, but still if he were reasonably there without any moral fault on his part he was not a trespasser. I am not aware that a person can be in any place except either legitimately or illegitimately; and if he is illegitimately there it is difficult to see that he is not in the position of a person who goes there at his own risk. But it is enough, as your Lordships have said, to decide the case on the first question.

LORD JUSTICE-CLERK—I am of the same opinion. As regards the latter question I agree with what has been said by Lord Guthrie. The case will be dismissed, and with expenses.

The Court recalled the interlocutor of the Lord Ordinary, sustained the first plea-in-law for the defenders, and dismissed the action.

Counsel for Defenders and Reclaimers—Horne, K.C.—J. H. Henderson. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for Pursuer and Respondent—Watt, K.C.—Duffes. Agents—Mackay & Young, W.S.

Friday, July 12.

SECOND DIVISION.

[Sheriff Court at Cupar.

WEMYSS COAL COMPANY, LIMITED *v.* SYMON.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—"*Out of and in the Course of the Employment.*"

A message-clerk who was sent a message by his employers, and had been provided with money to pay his tramway fare, was seriously and permanently injured while attempting to board, a short distance from its stopping-place, a car which was moving at the rate of five miles an hour. He acted without invitation and contrary to a notice on the car, of which he was aware. The arbiter having awarded him compensation, *held*, in a stated case, that the accident did not arise out of and in the course of his employment.

John Kirk Symon, Buckhaven, with the advice and consent of his father Frank Symon, as his curator and administrator-in-law, *respondent*, having claimed compensation under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) from the Wemyss Coal Company, Limited, *appellants*, the matter was referred to the arbitration of the Sheriff-Substitute at Cupar (ARMOUR HANNAY), who found the respondent entitled to compensation, and at the request of the appellant stated a Case for appeal.

The Case stated—"(1) The claimant on 29th October 1910, being the date of the accident after mentioned, was fourteen years of age, and had been employed as message clerk in the appellants' service at their Muiredge office for about five months prior thereto.

"(2) On said date he was sent a message from the appellants' Muiredge office to the appellants' head office at East Wemyss, which is situated westwards from Muiredge, and was given money to pay his tram-car fares both ways.

"(3) The tramway line runs alongside the public road, and is properly fenced off

from it, but access is obtained to the tramway line by gates or openings in the fence to the west of the railway crossing. A line of railway belonging to the North British Railway Company, but worked by the appellants, intersects the public road and tramway line at right angles. There is a tram-car stopping-place about 80 feet or thereby from the appellants' Muiredge office immediately to the west of the point where the railway crosses the tramway line. At the stopping-place there is a gate in the fence giving access from the public road to the tramway premises for tramway passengers, and at that point there is a notice on a tramway standard—'Cars stop here.' Cars do not always stop for passengers; sometimes they only slow down. The claimant came to the car stopping-place, but, the car being late, he walked eastwards a few yards to look for the car coming, though there was no necessity for his doing so. Cars do not stop at the place where the claimant attempted to get on, but on the car coming to the railway level-crossing where it had slowed down, as required by the Board of Trade Regulations, he attempted to board the car, as he had frequently done before, about two yards to the east of the railway line, and just opposite appellants' office.

"(4) In boarding the car he slipped and fell, breaking his left thigh and injuring his right leg so severely that it had to be amputated below the knee. His injuries were serious and permanent.

"(5) The car had a trailer or baggage car behind it, which introduced an element of danger, and it caught the claimant and dragged him several yards westwards over the railway crossing, but as its pace was only about five miles an hour neither the tramway conductor nor the claimant considered there was any danger in what the claimant did. At the pace the car was going the conductor would not have stopped the claimant jumping on even if he had seen him, which he did not.

"(6) The claimant admits he knew there was a notice in the car against jumping off or on while the car was in motion, but no attempt has ever been made to enforce this notice by a prosecution or otherwise, and the conductors only interfere if they think there is danger from the car going fast. In attempting to get on the car the claimant was acting not for his own purposes but on the business of his employer. Although the appellants were aware that their employees generally were accustomed to get on and off cars while in motion, they never prohibited or questioned the practice, and they never warned the claimant against it. At the rate the car was travelling at the time of the accident the operation was reasonably free from danger, and was not reckless.

"(7) If the claimant had been waiting alone at the stopping-place, as would have been the case on this particular occasion, the car would probably only have slowed down to let him jump on.

"(8) At the spot where the claimant attempted to board the car the ground was quite level, and it has for long been a common practice for miners on leaving their work, and others in the appellants' employment (including the claimant), to board the cars while in motion, and this practice has never been objected to by the appellants or the Tramway Company or their servants. One of the appellants' servants was stationed at said level-crossing at the time of the accident, and had been stationed there for many months prior to the accident. Neither he nor any other person ever suggested that the claimant and appellants' other workmen were not entitled to board the cars at said point.

"(9) The *solum* of the ground where the accident happened belongs to the North British Railway Company, but the Tramway Company have a way-leave right over it.

"(10) There is a railway trespass notice close to the spot where the claimant was injured, and similar notices erected by the appellants and the Tramway Company. The claimant, however, had not read these notices, and was unaware that he was trespassing. No prosecution or other means had been taken to warn trespassers.

"(11) It was part of the claimant's duty to travel over said level-crossing and up the railway line every day to collect waybills belonging to the appellants. The line is a private line belonging to the North British Railway Company, and worked by the appellants.

"(12) The claimant's average weekly earnings were 9s. per week.

"On the above facts I *found* that the claimant sustained personal injury by accident arising out of and in the course of his employment with the defenders and appellants, and that he is entitled to compensation at the rate of 9s. per week from 29th October 1910, with expenses of process on the higher scale."

The *question of law* was—"Was I right in holding that claimant's accident arose out of and in the course of his employment with the defenders and appellants?"

Argued for the appellants—The accident did not arise "out of" the respondent's employment. To do so it must arise from a risk reasonably incident to the employment. In the present case the respondent had taken an unnecessary risk, and the accident had taken place on the public street and not on the employer's premises where the employee had a special duty—*Rodger* v. *School Board of Paisley*, 1912 S.C. 584, 49 S.L.R. 413; *Murray* v. *Denholm & Company*, 1911 S.C. 1087, *per* Lord Salvesen, p. 1102 middle, 48 S.L.R. 896; *Millar* v. *Refuge Assurance Company, Limited*, 1912 S.C. 37, *per* Lord Kinnear, p. 42, 49 S.L.R. 67; *Revie* v. *Cumming*, 1911 S.C. 1032, 48 S.L.R. 831; *Richard Evans & Company, Limited* v. *Astley*, [1911] A.C. 674, *per* Lord Chancellor, p. 678, 49 S.L.R. 675; *Traynor* v. *Addie & Sons*, December 6, 1910, 48 S.L.R. 820.

Argued for the respondent—The question was one of pure fact, and the arbitrator's finding should not be disturbed. On the facts found there was no risk in what the

respondent had done, and he could not have been dismissed for doing it. Even disobedience would not take the workman outside the Act, which was based not on fault or duty but on accident. The fact that the accident did not happen on the employers' premises was immaterial. In this respect the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) differed from the Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), which was limited in locality — *Whitehead* v. *Reader*, [1901] 2 K.B. 48; *Conway* v. *Pumpherston Oil Company, Limited*, 1911 S.C. 660, 48 S.L.R. 632; *Moore* v. *Manchester Liners, Limited*, [1910] A.C. 498; *Praties* v. *Broxburn Oil Company, Limited*, 1907 S.C. 581, 44 S.L.R. 408; *Wallace* v. *Glenboig Union Fireclay Company, Limited*, 1907 S.C. 967, 44 S.L.R. 726; *Johnson* v. *Marshall, Sons, & Company, Limited*, [1906] A.C. 409; *Smith* v. *Lancashire and Yorkshire Railway Company*, [1899] 1 Q.B. 141; *Bist* v. *London and South-Western Railway Company*, 1907, 23 T.L.R. 471; *George* v. *Glasgow Coal Company, Limited*, 1908 S.C. 846, 45 S.L.R. 686, *affd.* 1909 S.C. (H.L.) 1, 46 S.L.R. 28; *Mackinnon* v. *Millar*, 1909 S.C. 373, 46 S.L.R. 299. [LORD SALVESEN referred to *Martin* v. *Fullarton & Company*, 1908 S.C. 1030, 45 S.L.R. 812.]

At advising—

LORD JUSTICE-CLERK — The pursuer in this case was at the time of the accident which has led to the present proceedings a boy of fourteen years of age, and was sent from the works of the appellants with a message to a place at some distance, his employers providing him with money to pay tramway fares for his going and returning. He met with his injury by falling in attempting to mount a tramcar in the circumstances which I shall now state in detail. There was a fixed stopping-place where in ordinary course he would have boarded the car. On arriving at the stopping-place he found that the car had not reached it, and he left the stopping-place and went forward towards the coming car for some little distance. When the car came opposite to him, and when it was moving at about five miles an hour, he endeavoured to mount on to the car and fell and received his injury. No one invited him to go forward to meet the running car, and no one invited him to get on to it while it was still in motion. There was a notice in the car forbidding this, and the boy, who had used the tramway before, was aware of this notice.

The question in these circumstances is whether the master is bound to pay compensation in respect that the accident occurred during the course of employment and arose out of his employment. The Sheriff-Substitute has answered in the affirmative. I am unable to agree with him. He seems to hold that a boy such as the respondent does not run much risk in mounting a car going at five miles an hour, and to deduce from that idea the conclusion that if an accident happens when the risk is taken it happens as an incident of the employment. I cannot assent to that. Where vehicles running on rails are to take up or put down passengers it is the rule that they must stop to do so, and in this case the rule was specially brought to notice. The rule is established because there is danger when mounting or alighting is attempted when the vehicle is in motion. So much is the danger realised that on railways it is a punishable offence to enter or leave a train when in motion. It is of course often done, and with the result that from time to time accidents do occur. But nothing can be more clear than that if such an act is dangerous and for that reason forbidden, the person who breaks the rule which is known to him does so at his own risk. It may be different if a servant of the railway or tramway company invites a person to step on to a car or carriage when in motion. There the company by its servants is setting aside its own rule and must answer for the consequences. I cannot therefore see how it can be held that the doing of an act forbidden and known to be forbidden can be held to make a master liable for an accident to his message boy on the footing that the accident arose out of his employment. He is doing knowingly what he has no need to do and no right to do in order to fulfil his duty. It is not in any way like an accident such as making a false step upon a stair or falling where steps are not in good order. Such a case as the insurance canvasser does not seem to resemble the present case in the least. Having to go on to a stair with worn steps may in the words of the Court in *Murray's* case (1911 S.C. 1087, 48 S.L.R. 896) be reasonably incident to the employment. But in that case nothing is done which is prohibited; and what was done, namely, going on the stair, was a necessary action in the fulfilment of the duties of the employment. What happens is a pure accident in the course of doing what it was right to do. Here what happens is no doubt an accident, but it is an accident the action leading to which was not reasonably incident to the employment. The boy had no cause to do what he did — he was doing what his employment in no way required him to do. The Sheriff-Substitute seems to think that it is a ground for holding as he has done that it was proved that other people mounted cars at this place when they were in motion, and that this has not been objected to by the Tramway Company's servants nor by the appellants. As regards the Tramway Company, the appellants cannot be affected by their failure to see that their own rules were observed, and I cannot hold that the appellants were called upon to watch their servants outside their own premises and to attend to the working of the tramways. The Sheriff-Substitute holds that in "attempting to get on the car the pursuer was not acting for his own purposes but on the business of his employer." I cannot agree with that, which the Sheriff-Substitute puts in his finding of facts, but which is really a finding in law. When

the respondent left the stopping-place and walked up the line to board the moving car, and when trying to do it, he was not acting on the business of his employer. The business of his employer in no way called upon him so to act. His doing so in no way facilitated or promoted his employers' business. It could not do so.

Further, when the Sheriff-Substitute puts in his findings in fact a statement that if the boy had waited at the proper stopping-place the car might not have stopped, he is plainly not stating a fact proved, but stating what he imagines was likely. It was the duty of the conductor to stop if a passenger was waiting, and it is quite irrelevant to state guesses as to whether he would have done his duty.

I do not think it necessary to go over the cases quoted to us for the respondent. They were nearly all cases where the work was being done on the master's premises, while the acts in course of being done were of the nature of fulfilment of work for the master. The sufferers were not going outside their duty, though they might be careless in doing what they did. But there is one case which I think has a strong bearing upon the present, viz., the case of *Revie* (1911 S.C. 1032, 48 S.L.R. 831). In that case a man whose duty it was to stay by and attend to a brake on the back of a lorry, left the place where he should have been and went forward to sit with the driver in front. When a time came when his driver told him to put on his brake he proceeded to get down and go back in order to apply the brake. In getting off the front of the lorry he fell and was run over. It was held that he had put himself in circumstances not incidental to the duty he was to perform, and so what happened did not arise out of his employment. The Lord President in that case expressed himself to the effect that the test is whether the risk of the accident is one which may be reasonably looked upon as incident to the employment, using the phrase which he found in the case of *Brice* v. *Lloyd* ([1909] 2 K.B. 804). I can see no distinction between going to a wrong place and there trying to jump on to a car not intended to stop at that place, and going to a wrong place on a lorry and jumping off. In the one case as in the other the person injured was not doing what was incidental to his duty to his master—he was not doing a thing for his master. His position was for the time being away from what duty prescribed. The brakesman chose to go to the front of the lorry; the boy here chose to go forward away from the stopping-place. The one jumping off and the other jumping on were each wilfully taking an outside risk not incident to the reasonable requirements of duty.

I therefore am of opinion that the question put in this stated case should be answered in the negative.

LORD SALVESEN—The facts in this case are extremely simple. The respondent, who is fourteen years of age, was employed as a message clerk by the appellants, and had been in their service for about five months prior to the accident. On 29th October 1910 he was sent a message from the appellants' Muiredge office to East Wemyss, and was given money to pay his car fare both ways. He went to a stopping-place of the tramcar, but as it did not arrive for some little time he walked a short distance in the direction from which it was coming, there being no occasion for his doing so. When the car passed him he attempted to board it while it was proceeding at five miles an hour, and in so doing he fell and sustained a serious permanent injury. He was not invited by the conductor to join the car while in motion, and he knew that there was a notice in the car against his doing so. No question of serious or wilful misconduct arises in the case, because that cannot be pleaded where an accident to which the Workmen's Compensation Act applies results in the permanent disablement of the workman. The sole question in the case is whether the accident arose out of and in course of the respondent's employment.

The Sheriff-Substitute has evidently given great weight to two considerations which I think are entirely irrelevant in considering the only question which we have to decide. The first is that there is not much danger in an active lad of fourteen jumping on to a car which is proceeding at five miles an hour. That there is some danger is obvious from the fact that the accident happened; and as wilful and serious misconduct is not in the case, it seems to me to be a matter of no moment whether the car was going at five miles an hour or at twice or three times that speed. I daresay that an active lad can, without serious risk, board a car which is going no faster than he can run, although of course the risk increases with the increase of speed. If it be held to be incidental to the employment of a messenger who is directed to use a public conveyance that he should run the risk of joining it in motion, it appears to be quite immaterial in a case of this kind what is the speed at which the conveyance is moving. The second circumstance is that the employers knew that their employees were accustomed to get on and off the cars while in motion and never questioned the practice or warned the men against it. I cannot see that the employer's duty in a matter of this kind goes beyond his own premises. If he permits a dangerous practice there, even although it is prohibited by his own rules, he may bar himself from pleading that the knowledge of the rule put his workmen in the wrong whenever they violated it. But I apprehend that it is no part of his duty to warn his workmen not to infringe the rules of a tramway company or railway company over which he has no control, more especially when the workman is quite aware of the existence of the rule. I think it is common knowledge with which a boy of fourteen may quite well be credited that if he joins a moving car he does so at his own risk.

There is a third circumstance on which the Sheriff-Substitute also lays some stress, namely, that even if the boy had been at the stopping-place the car might not have stopped for a single active passenger. That is of course a mere speculation; and at any rate it is certain that it was the duty of the conductor, if the boy had signalled to him, to stop the car. If he had failed to do so, and had invited the boy to join the car when in motion, the Tramway Company would have incurred liability for the accident which resulted, just as a passenger has been found entitled to get damages from a railway company for being run over while crossing the line instead of using a foot-bridge when he had been invited by a railway servant to cross the line.

We were favoured with an elaborate citation of authorities more or less in point, of which the cases of *Whitehead*, [1901] 2 K.B. 48; *Martin*, 1908 S.C. 1030, 45 S.L.R. 812; *Conway*, 1911 S.C. 660, 48 S.L.R. 632; *Revie*, 1911 S.C. 1032, 48 S.L.R. 831; *Evans*, [1911] A.C. 674, 49 S.L.R. 675; and *Johnson*, [1906] A.C. 409, were the most important. The circumstances in most of these cases were entirely different from those that we have here. In all of them except *Revie's* the accident occurred on the master's premises while the injured workman was doing his proper work, although, it may be, in a negligent manner; but that is just the kind of case for which the Workmen's Compensation Act was passed to provide. The only exception is the case of *Revie*, where the accident occurred on a road; and the circumstances there more nearly resembled those which are found in the present case, and indeed appear to me to be *a fortiori*, for the workman when he met with his accident was actually obeying an order with which he was bound to comply. In other respects it is very similar, because the risk of jumping off a moving conveyance is similar to that of jumping on to it. I humbly think that that case was well decided, and at all events it is binding upon us. If so, the question of law falls to be answered in the negative, and I propose that we should so answer it.

LORD GUTHRIE—I concur. It is sufficient in this case to found, as your Lordships have done, on the specialty that the boy got on, not only when the car was moving, but at a place which was not a stopping-place. It is not necessary to decide what would have been the result had the accident happened at a stopping-place, or if not happening at a stopping-place, the accident had resulted from the boy slipping while getting on a car which was at rest. But I am not satisfied that there are any facts before us which would assimilate the case to that of *Millar* v. *Refuge Assurance Company*. The boy was a clerk with many duties—one of which was to go messages. The case is not comparable to that of a boy messenger such as there are in London, whose sole duty is to go messages, and who are compelled to be regularly and constantly in public vehicles.

LORD DUNDAS, who was present at the advising, gave no opinion, not having heard the case.

The Court answered the question of law in the negative.

Counsel for the Appellants—Horne, K.C. —Hon. W. Watson. Agents—W. & J. Burness, W.S.

Counsel for the Respondent—D.-F. Dickson, K.C.—Wilton. Agent—D. R. Tullo, S.S.C.

Saturday, July 13.

FIRST DIVISION.

[Lord Skerrington, Ordinary.

MONTGOMERIE-FLEMING'S TRUSTEES *v.* KENNEDY.

Superior and Vassal — Feu-Contract — Restrictions—Self-contained Lodging.

Ground was feued out for the formation of part of a terrace under a feu-contract, which in addition to a general nuisance clause applicable to the whole estate of which the terrace formed part, contained a clause binding the vassal to "maintain and uphold in good repair . . . the three lodgings now erected . . . which shall be occupied as self-contained lodgings." All the restrictions in the deed were made real burdens on the ground. In an action of declarator and interdict at the instance of the superior against the vassal, *held* (*rev.* judgment of Lord Skerrington, Ordinary) that the latter was not entitled to occupy the basement floor of one of the houses in the terrace for the purpose of a cabinet-making or upholstery business.

Hugh Tennant, Holland House, West Kilbride, and others, trustees acting under the trust-disposition and settlement of the late James Brown Montgomerie-Fleming, of Kelvinside, Glasgow, *pursuers*, brought an action against Alexander Kennedy, cabinetmaker and upholsterer, Byres Road, Hillhead, Glasgow, *defender*, in which they sought to have it found and declared that the defender as proprietor of the *dominium utile* of No. 1 Grosvenor Terrace, Kelvinside, Glasgow, being feu 38 of the estate of Kelvinside under a feu-contract between Matthew Montgomerie and John Park Fleming, writers, Glasgow, on the first part, whose successors as proprietors of the *dominium directum* the pursuers were, and Thomas Philip, builder, in Glasgow, on the second part, "is not entitled to convert the basement floor of the self-contained lodging, forming No. 1 Grosvenor Terrace aforesaid, erected on said feu No. 38, into premises for or in connection with a cabinetmaking and upholstery business, or to a purpose other than occupation as a part of the said self-contained lodging: And further, it ought and should be found and declared, by decree foresaid, that the said conversion, if so