It was not made illegal to employ a boy for such duties if he was fit to discharge them. The Roads and Bridges Act, with the Act of Will. IV., which it incorporated, referred merely to carts or carriages drawn by animal power, and had no application to locomotives, the legislation with regard to which had gradually become more favourable.

The respondent replied—The word "person" is open to construction; a child of six or seven would obviously not have fulfilled the conditions required by the statute. The interpretation is supplied by the duties imposed upon the person by the statute of 1878, and by the requirements of the Turnpike Statute of Will. IV., with regard to persons in charge of any waggons or carts on the highroad. The 99th section of the Act of Will. IV. is not only incorporated in the Roads and Bridges Act of 1878 so as still to regulate all drivers of vehicles drawn by animal power, but is also applied by the 12th section of the Locomotives Act of 1861 to all "drivers and attendants on locomotives." This "person," who is to go in front, must be regarded in the same light as the two "persons" on the locomotive, for he is to be "one of such" three "persons." It would be absurd to say that they might all three be boys.

At advising—

Lord Young—The appellant here was accused of not having one of three persons employed to drive or conduct a locomotive accompanying the same on foot while it was in motion upon a public road, and in case of need assisting horses and carriages drawn by horses passing the same, and the Justices found that he had not a person so employed accompanying the locomotive on foot. This is appealed against on the ground that it was proved that there was a boy of thirteen years of age performing that duty on the occasion in question. The question put to us in the case is, Whether the employment of a boy of thirteen years of age is a compliance with the requirements of the Act 28 and 29 Vict. c. 83, as amended by the Act 41 and 42 Vict. c. 58? I am not prepared to assent, in point of form, to the proposition that a conviction is bad because it is proved that a boy of thirteen was walking in front of the locomotive in order to perform the duties imposed by the Act. The Justices had jurisdiction to determine whether the boy was in fact competent, and they in substance have found that he was not competent, and I am not in the least degree prepared to interfere with their judgment upon the point; and upon the question whether, that being so, he is nevertheless disqualified from performing this duty from the absolute provision of the Legislature, as he certainly is from performing the duty of driving a cart or other vehicle when propelled by animal power along the highroad, I am not prepared in this case to decide. It was for the Justices to judge whether the requirements of the statute had been complied with, and I am not inclined to interfere with their decision. The Legislature has not expressly specified the age under which a boy shall not be permitted to perform the duties in question with reference to a locomotive. But whether by a process of reasoning the provision in the 99th section of the Act of Will. IV. restricting the age of a person who shall be entitled to drive waggons upon turnpike roads is to be imported into this statute, and to be applied to locomotives, I am not going to determine in this case.

I should therefore, without determining any question of law, decline to interfere with the conviction here complained of.

Lord Craighill—It is not necessary to decide whether one of the three persons employed to conduct and to accompany a locomotive on foot must be a boy over fourteen years of age, because the Justices have proceeded, not merely upon the construction of the Act of Parliament, but upon evidence, in finding that the employment in this capacity of a boy of thirteen on the occasion was not a compliance with the requirements of the Act 28 and 29 Vict. c. 83, as amended by 41 and 42 Vict. c. 58. But were it necessary to deal with the general question whether a boy of thirteen could competently, in terms of the provisions of the statutes, perform the duties in question, I would be influenced by the reading of the statute in dealing with analogous circumstances with regard to waggons drawn by animal power on turnpike roads. The statutes do not make any distinction in reference to this matter between locomotives and such waggons. And no distinction is made between any one of the parties who are to be employed to drive or conduct them on the public road, and whether they are employed to drive or accompany the locomotive on foot. It rather appears to me that the implication is that any one of the three persons is to be entitled and fit to do any one of the duties.

Lord Justice-Clerk—I entirely concur. I hold a very strong opinion in favour of the action of the Justices in this case.

The Court sustained the conviction and dismissed the appeal.

Counsel for Appellant—M'Kechnie. Agent—W. P. Anderson.
Counsel for Respondent—Gillespie. Agent—Party.

COURT OF SESSION.

Thursday, December 7.

FIRST DIVISION.

FRY *v.* THE NORTH-EASTERN RAILWAY COMPANY.

Process—Jury Trial—Motion to Apply Verdict—Extract Superseded.

In a jury trial a verdict was returned for a sum less than the amount of a tender made by the defenders previous to the trial. The defenders were therefore entitled to expenses subsequent to the date of the tender. On the defenders' motion the Court *applied* the verdict of the jury, and *superseded extract* of the decree for the sum to which the pursuer was found entitled by the verdict, until the expenses since the tender should be paid to the defenders.

This was an action of damages for personal injury

at the instance of William Fry against the North-Eastern Railway Company, the damages being laid at £1700. The case was tried before the Lord President and a jury at the Summer Sittings, when a verdict for the pursuer was returned assessing the damages at £50. The defenders had made a tender of £105 before the trial. The defenders now moved the Court to apply the verdict, and on the ground that the expenses to which the defenders were entitled since the tender would extinguish the amount awarded to the pursuer by the verdict, to supersede extract of the decree till these expenses should be paid.

At advising—

LORD PRESIDENT—I am not aware that this point was ever raised before. I do not refer to any specialties in this case, except that the verdict was returned after a tender was made and refused, and is a verdict for so small an amount that the expenses to which the defenders are entitled, viz., those incurred since the date of the tender, will swallow up the sum for which the pursuer can obtain decree. In these circumstances I think it fair and just that extract should be superseded until the matter of expenses has been settled.

LORD DEAS concurred.

LORD MURE—When a defender makes a tender, and the verdict is for less than the tender, and when it is likely that the expenses will be more than the amount of the verdict, then I think it is fair to supersede extract.

LORD SHAND—My impression is that extract would not be given out by the extractor until the question of expenses had been disposed of, but assuming that he will give out an extract of this decree at once, I am of opinion with your Lordships that extract should be superseded.

The Court therefore applied the verdict, and superseded extract till the defenders' expenses since the date of the tender should be paid.

Counsel for Pursuers — Scott — M'Kechnie. Agents—J. & A. Hastie, S.S.C.

Counsel for Defenders — Trayner — Graham Murray. Agents — Millar, Robson, & Innes, S.S.C.

Friday, December 8.

OUTER HOUSE.

[Lord Kinnear.

DOIG AND OTHERS, PETITIONERS.

Sequestration of Trust Estate—Judicial Factor.

A judicial factor *appointed* on heritable estate which was conveyed by trust-disposition and settlement of a testator to a number of beneficiaries, several of whom were at the date of the petition abroad, and whose addresses were unknown; and power to make up a title to and to sell the estate given him.

James Doig, wright at Grange Distillery, near Burntisland, died on 13th May 1859, leaving a trust-disposition and settlement by which he gave, granted, assigned, and disponed to Ann Henderson or Doig, his wife, in liferent, and in fee to his eleven children, and the survivors of them, equally among them, share and share alike, a piece of ground at Burntisland, with dwelling-house and offices thereon, and also his household furniture and whole moveable estate. He also nominated his said wife and children, or the survivors of them, his executors and legatories, and declared that it should be in the power of his daughter Ann, who lived with him, to take, instead of the share of fee which would fall to her, a liferent of his whole means, heritable and moveable. Mrs Doig died in 1861. Ann Doig elected to take this liferent, and enjoyed it till she died in September 1880. Of Doig's children three predeceased him leaving issue. The son of one of these three was one of the present petitioners. Of the remaining children, four survived the liferentrix, two of whom were in this country and were petitioners, and two others were abroad, while three predeceased the liferentrix, of whom two left children. The annual value of the subjects was £31. Three of the persons entitled to share in the fee, viz., one of the testator's children and two of his grandchildren, were, abroad, but had executed powers of attorney in favour of a law-agent in Burntisland. Of the other beneficiaries a number were abroad, and their places of residence were unknown. There was no one in this country entitled to act for them. The period of division having arrived by the death of the liferentrix, this petition was presented by the two surviving children of the testator and his grandson mentioned above, setting forth that on account of the number of persons entitled to share in the fee of the estate whose place of residence, if they were alive, were unknown, it was impossible to complete a title to the property, or have it properly managed or realised. The petitioners also stated that meanwhile the subjects were getting out of repair and being much depreciated in value, and they craved the Court to sequestrate the estate and appoint a judicial factor, and to give him warrant to make up a title to and then to sell the estate.

Authority—*Morrison*, Dec. 11, 1857, 20 D. 276.

The Lord Ordinary, after having heard counsel and made avizandum, pronounced these interlocutors:—

"Sequestrates the estate of the deceased James Doig designed in the petition, and nominates and appoints William Wood, C.A., Edinburgh, to be judicial factor upon the said estate, with the usual powers, he finding caution before extract, and decerns."

"Grants warrant to the judicial factor to complete a feudal title in his person *habili modo* to all and whole the subjects specified and described in the prayer of the petition, which specification and description are held as repeated herein *brevitatis causa*: Further, authorises the judicial factor to sell the said heritable subjects, all as craved, and decerns."

Counsel for Petitioner—Jameson. Agents—Melville & Lindesay, W.S.
