as they may consider advisable, without in any respect vitiating this contract. This shall only be done under a written order from the Company's engineer, and allowance will be made for such alterations at the rates in the schedule. The contractors shall not at their own hand, or without a written order from the Company's engineer, be entitled to make any such alterations or additions, and no allegation by the contractors of knowledge of acquiescence in such alterations or additions on the part of the Company, their engineers or inspectors, shall be accepted or available as equivalent to the certificate of the engineer, or as in any way superseding the necessity of such certificate as the sole warrant for such alterations or additions." In a claim for payment on account of greater weight of metal in certain iron girders than was specified in the contract, where it was contended that there had been verbal consent and acquiescence on the part of the employers, and that the extra weight had been certified under the certificates of the defenders' engineer—*held* [*rev.* judgment of majority of Court of Session] that the terms of the contract excluded any such claim as was made, looking to the circumstances of the case, and to the fact that the forms of certificate by the engineer did not in any way bear out the view that there had been a ratification.

The question involved in this case arose out of a contract by M'Elroy & Son, the respondents, to erect certain works for the Tharsis Sulphur and Copper Company at Cardiff. The contract expressly provided that no extras should be allowed for unless ordered in writing by the appellants or their engineers. Some iron girders were made much thicker, and about £1000 more expensive, than the specification required, and the respondents brought an action against the appellants, *inter alia*, for the price of their alleged acquiescence on their part in the alterations, and sanction by their engineer's written certificate. The Second Division [*diss.* Lord Gifford—*revg.* Lord Curriehill] gave decree in this branch of the case in favour of the pursuers, *ante*, Nov. 17, 1877, p. 115, 5 Rettie 161.

The Tharsis Company appealed.

At delivering judgment—

Lord Chancellor—When once the facts are fully understood there is no difficulty in disposing of this case. The respondents have undertaken to construct buildings and to do iron work, including certain cast-iron girders. According to the contract the respondents are to supply the material and work according to certain written specifications, and the various obligations are very clearly set forth in the contract. In particular, it is expressly stated that no extra work is to be paid for unless there is a written order for the same by the appellants' agent or engineer. Now, in casting certain iron girders, owing to the unequal cooling of the iron, it was found difficult to make the girders of the precise thickness specified. So far as the Company were concerned they had no interest in having the girders made thicker. On the contrary, the lighter the girders were so much the better. At all events, if the girders could not be made of the precise thickness specified, that was a matter which the respondents ought to have known beforehand. The question now is, whether the evidence shows that when a variation was made for the convenience of the respondents, that was authorised by the Company? I confess that I cannot find a single word uttered which can bear the interpretation that the Company promised to pay for the extra thickness of this metal, nor is there a word to encourage or induce the respondents to make the girders thicker than the contract. So far as the evidence goes there is no mention of any written order, nor is there any ratification afterwards. The form of certificate by the engineer of the Company does not in any sense bear out the argument that there was any such ratification. Such certificates were all of a provisional character, and equivocal. I I am of opinion that the decision of the majority of the Second Division was wrong, and must be reversed. The Judges, including the Lord Ordinary, were in fact equally divided. The order of the House will be to reverse the judgment, and to require the respondents to pay the costs of the appellants in this House.

Lord Hatherley concurred.

Lord Blackburn—I concur. It is said that the law of Scotland, following the civil law, releases one from an obligation to do what is impossible. But that rule refers to a natural impossibility. Here all that is shown is that it requires greater care to cast the girders of the thickness specified in the contract than it would require to cast them thicker. In fact it would have been by no means difficult to cast the girders of the required thickness if the right course had been taken. I agree with Lord Gifford and the Lord Ordinary rather than with the majority of the Second Division.

Lord Gordon concurred.

Interlocutor of Court of Session appealed from reversed, and appeal allowed, with costs against the respondents.

Counsel for Appellants—Lord Advocate [Watson] — Benjamin, Q.C. — Darling. Agents—Clarkes, Rawlins, & Clarkes, solicitors.

Counsel for Respondents—Southgate, Q.C.—Rhind. Agents—Smith, Fawdon, & Low, solicitors.

Friday, July 5.

[Before the Lord Chancellor, Lord O'Hagan, Lord Blackburn, and Lord Gordon].

MATSON *v.* BAIRD & CO.

[*Ante*, p. 73, Nov. 9, 1877, 5 Rettie 87].

Reparation—Private Railway—Erection of Gates and Fences—Statutes 2 *and* 3 *Vict. cap.* 45; 5 *and* 6 *Vict. cap.* 55, *sec.* 9; *and Railways Clauses Consolidation (Scotland) Act* 1845 (8 *and* 9 *Vict. cap.* 33), *sec.* 99.

A horse having strayed from the public road by a level-crossing, which was without gate or fence, upon a branch line of railway

belonging to the proprietors of the ground, and from that at a distance of about half-a-mile having got upon the main line of the North British Railway Company, which was likewise without gate or fence, and been killed—in an action of damages the proprietors of the branch line were [*aff.* judgment of Court of Session] assoilzied, there being no obligation under the Railway Statutes to erect gates and fences on private lines.

A horse belonging to the appellant [Matson] escaped from a field by night, through no fault of the owner, and strayed along an adjoining turnpike road, from which it got upon a private branch railway, the property of Baird & Co., the respondents, at a level-crossing where there were no gates either across the railway or the road, and no one in charge. It then proceeded down the branch railway till it reached the North British main line, where it was killed by a passing train. Matson brought an action of damages in the Sheriff Court of Lanarkshire against Baird & Co. and the North British Railway (the latter of whom were not parties to the present appeal), contending that Baird & Company were under a statutory obligation to have gates at level-crossings of their railway over the public road, and that if this were not so, they failed in their duty at common law in leaving open to the public road both their own line and the main line of the North British. The First Division of the Court of Session—*rev.* the Sheriff of Lanarkshire (CLARK)—assoilzied the defenders (Nov. 9, 1877, *ante*, p. 73, 5 Rettie 87).

Matson appealed to the House of Lords.

The respondents were not called on.

At delivering judgment—

LORD CHANCELLOR—I quite adopt the view stated by the Lord President in his opinion in this case, that the Public Railway Statutes apply only to public railways authorised by Parliament. When level-crossings on public roads were sanctioned, fencing was enforced as a corresponding burden or obligation. In the present case the horse was killed, not on the private line of the respondents, but on the public line of the North British Railway. The case originally included that Company, but they are not embraced in the present appeal. There being no statutory obligation on the respondents to erect or maintain fences along their private line, they had, in regard to the level-crossing in question, only to deal with the trustees of the turnpike road crossed, and with them they made satisfactory arrangements. There is no ground whatever for holding the respondents liable on the ground of negligence or on any other ground, and the appeal must therefore be dismissed with costs.

LORD O'HAGAN, LORD BLACKBURN, and LORD GORDON concurred.

Interlocutor of Court of Session affirmed, and appeal dismissed with costs.

Counsel for Appellant — Herschell, Q.C. — Collyer. Agent—Andrew Beveridge, solicitor.

Counsel for Respondent — Lord Advocate (Watson) — M'Clymont. Agents — Morton & Cutter, solicitors.

Tuesday, July 9.

[Before the Lord Chancellor, Lords Hatherley, O'Hagan, Blackburn, and Gordon.]

BORJESSON AND MANDATORY *v.* CARLBERG AND OTHERS.

[*Ante*, p. 112, Nov. 21, 1877, 5 Rettie, 188, and Dec. 22, 1877, p. 257, 5 Rettie, 390.]

Diligence — Arrestment—Execution — Ship—Nature and Extent of the Powers of a Messenger-at-Arms under a Warrant to Arrest a Vessel.

Arrestments were used upon a vessel lying in Glasgow harbour for the purpose of founding jurisdiction. A messenger-at-arms who was employed to execute a second warrant of arrestment upon the dependence of the action, when he found that the vessel had in the meantime sailed from harbour, pursued her on board a tug-steamer with thirty men, overtook, seized, and brought her back to port when she was some way down the Clyde and fairly started on her voyage. *Held* [*aff.* judgment of Court of Session] that as the mode of executing the second warrant of arrestment was clearly illegal, the arrestments fell to be recalled, and without caution.

Diligence — Arrestment — Re-arrestment where Ship illegally arrested and brought back to Port—Mandate.

Where arrestments had been used against a ship which had been pursued on her voyage and illegally brought back to port at the instance of certain parties and their mandatory, to the latter of whom the illegality was directly due, and where these arrestments were recalled without caution—*held* [*aff.* judgment of the Court of Session] that the ship could not then be arrested at the hands either [1] of the granter of the mandate, or [2] of the mandatory in his private capacity, or [3] of parties who had granted authority to the mandant to act for them, and who had a common end to serve with him in executing the diligence.

On 3d October 1877 the Swedish vessel "Edgar Cecil" was arrested *ad fundandum jurisdictionem* at the instance of the appellants, Borjesson and his mandatory, the object being to found jurisdiction against the respondents as representing the owners. Borjesson had claims against the owners for wages and advances, besides being part-owner. The ship had left Glasgow harbour, and had passed Greenock when the warrant to arrest was put into the hands of the appellants' agents at Greenock. A messenger-at-arms was at once despatched with thirty men in a tug, which overtook the ship, boarded her, and brought her back to Greenock, where she was dismantled. The managing owner (Carlberg) then applied to the Court of Session by petition to recall the arrestments as illegal. The Court unanimously held that the arrestment of a ship on her voyage was illegal and unwarrantable and an abuse of the process (Nov. 21, 1877, *ante*, p. 112, 5 Rettie, 188).

Borjesson and mandatory appealed to the House of Lords.

Another appeal arose from persons who were