survived by two children, James and Colin Taylor. Colin died in pupillarity in 1845. James Taylor, as to whose share the present question arises, died intestate on 9th June 1859, twenty-five years of age and married, but without issue. His widow, Mrs Jessie Watling or Taylor, succeeded to one-half of his estate *jure relictæ*, and the testamentary trustees of his father succeeded to the other half as his next-of-kin. The children of Mrs M'Culloch and Mrs Maclaren claim respectively one-half of the fee of the two-thirds of the estate which were liferented by Jane Gilbert, while the representatives of James Taylor claim that the said two-thirds should be divided into three portions, and that they should be found entitled to one of those portions, the other two falling to the families respectively of Mrs M'Culloch and Mrs Maclaren.

The question which has arisen must of course be decided according to the intention of the testator. Now, there can be no doubt that the testator intended, in the event, which has happened, of the two liferentrices Cecilia and Jane Gilbert dying without children, that the fee of their shares should go to the children of the M'Cainshes, and should fall and accrue to them equally among them *per stirpes*, as provided with respect to their own shares of his estate. I think it is of importance to observe that the shares were to be divided among the children *per stirpes*. The testator takes care to use these words every time he has occasion to refer to the division of the fee among the children of the M'Cainsh nieces, and when he is providing for the fee of the third share which was liferented by these four nieces he not only uses the words *per stirpes*, but apparently, lest there should be any mistake as to his meaning, he adds "or one-fourth share of the said third part to the child or children respectively of each of my said nieces equally among them if more than one in fee." I think this leaves no room for doubt that the testator intended that the children of each niece should take a share of the fee of his estate. No doubt there were personal conditions attached to the children, namely, that they were not to take unless they attained the years of majority or were married. But as soon as these conditions were fulfilled I think the children each became possessed of a vested right in the fee. There was no condition that the children should survive the liferentrices, either their own mothers (the M'Cainshes) or the Gilberts. Of course the payment of the fee was postponed till the death of the liferentrices, but this did not affect the vesting, which I think took effect on the children attaining majority or being married. It is admitted in the Special Case—and there can be no doubt on the point—that so far as concerns the third share of the residue which was liferented by the four M'Cainsh nieces the fee vested in the children who attained majority, and this being admitted *quoad* that share, I am at a loss to understand how it should be disputed *quoad* the shares which were liferented by Cecilia and Jane Gilbert, it having been expressly declared by the testator that the fee of these shares should fall and accrue to the children respectively of the M'Cainshes "equally among them *per stirpes*, as provided with respect to their own shares of my estate." If the fee of their mother's share vested in the children on their attaining majority or being married, I think that the shares which were liferented by the Gilberts vested equally on the same event. No doubt there was a contingency in regard to these latter shares—that the Gilberts might have left children, and so have defeated the right of fee given to the children of the M'Cainshes. But this, I think with the Lord Justice-Clerk, was a mere contingency, and was not a condition suspensive of the vesting. As his Lordship says—"It is in no respect a condition of the legacy. It is only an event, before the arrival of which it cannot be known whether the devolving clause has or has not taken effect in favour of the conditional institute. But when that is once ascertained, James Taylor simply takes from the date of his majority or marriage—that is to say, it vests, and whether he predeceases or survives the liferentrix is a matter of no moment."

I think the Court below had not had its attention directed to what I regard as the important words—that the division of the fee was to be equally among the children of the M'Cainshes "*per stirpes*, as provided with respect to their own share of the estate"—at least none of their Lordships make any remarks on these words in the judgments which they delivered. But I think these words solve any difficulty in the case, and that it is not necessary to consider how the case should have been disposed of if these words had not been used, and I would rather not give any opinion on that point.

I think the representatives of James Taylor are entitled to participate in the division of the fee of the two-third shares which were liferented by Jane and Cecilia Gilbert, along with the children of Mrs M'Culloch and Mrs Maclaren, and that the Court below should have so found, and I therefore think that the judgment appealed against should be reversed.

The Lord Chancellor, Lord Hatherley, and Lord Blackburn concurred.

Interlocutor of Court of Session reversed, and parties excluded by the judgment appealed from held entitled to participate in the residue, and costs ordered to be paid out of the trust-estate.

Counsel for Appellant—Fox Bristowe, Q.C.—A. Young. Agent—William Robertson, solicitor.

Counsel for Respondents — Lord Advocate [Watson]—Kay, Q.C. Agents — Grahames & Wardlaw, solicitors.

Tuesday, June 4.

[Before the Lord Chancellor, Lord Hatherley, Lord Blackburn, and Lord Gordon.]

THARSIS SULPHUR AND COPPER COMPANY *v.* M'ELROY & SONS.

[*Ante*, p. 115, Nov. 17, 1877, 5 Rettie 161.]

Obligation—Construction of Written Contract—Parole Proof—Acquiescence.

A building contract contained the following clause:—"*Twelfth*, The Company reserve power during the progress of the work to make any alterations, additions, or deductions, or to vary from or alter the plans or materials

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