J. M. Ferguson, for the appellant.

E. B. Ryckman, K.C., for the defendant Wilson, respondent.

J. Y. Murdoch jun., for the defendant company.

MEREDITH, C.J.C.P., in a written opinion, said that it was plain upon the evidence that the plaintiff was to put into the defendant's house a heating system that would properly heat it; and there was some evidence upon which it might be found, as the trial Judge had found, that that had not been done.

The plaintiff's attempt to put the blame on the defendant for not building a better chimney was not given effect to at the trial, and could not be here: the plaintiff knew the condition of the chimney, and should not have contracted as he did without the condition that better draught should be supplied by the defendant, if the plaintiff then really thought the flue insufficient.

The result was that the plaintiff had not substantially fulfilled his contract, and was not entitled to the price that was to be paid to him under the contract, and to that extent the judgment was right. But the defendant was not entitled to retain the boiler, radiators, pipes, etc., put in by the plaintiff. The defendant recovered according to his defence, on which the judgment in appeal was based, on the ground that the whole work was useless, and must be "scrapped," which means necessarily taking out and discarding the articles mentioned. When so taken out, they must be the property of the plaintiff. The principle of Oldershaw v. Garner (1876), 38 U.C.R. 37, and Munro v. Butt (1858), 8 E. & B. 738, is not applicable to fixtures which are to be unfixed and taken out, or to be utilised for the defendant's benefit under a new contract for the heating.

The judgment should be varied so as to give the plaintiff the right to remove the boiler and the other articles, doing no unnecessary damage, during the month of June next, upon paying to the defendant the amount of his judgment and costs.

The plaintiff thus recovers his goods, and the defendant his money. In addition, the defendant has had two seasons' use of the heating system, such as it was, which is sufficient to compensate him for the plaintiff's breach of the contract.

There should be no order as to the costs of the appeal.

LENNOX and MASTEN, JJ., concurred.

RIDDELL, J., read a judgment in which he said that he considered the case entirely governed by Forman & Co. v. The Ship "Liddesdale," [1900] A.C. 190: the plaintiff had not completed