waggons which the deceased was ordered to uncouple had been intended to carry coals from the pit-mouth to the Caledonian Railway, or materials for the use of the colliery from the railway to the pit. But they were intended to be taken to a sand-hole 300 or 400 yards off and there to be loaded with sand, brought back to the respondents' siding and weighed, and thereafter removed by the Caledonian Railway Company; and it is stated that the said traffic had to do with the collieries only in so far as the colliery engine was used by agreement to carry the sand to Caledonian trains which were made up at or near the siding. This makes it clear enough that the carrying of sand for hire was not part of the proper business of the respondents as a colliery company. But that seems to me to be nothing to the purpose. They are not undertakers in respect of their mercantile business, but in respect of their ownership of the mine and siding, and their employment of workmen in these dangerous places. The question therefore is, not what load the waggons were to carry, but whether the making up of the train of waggons in the manner described was work which the injured man was employed by the respondents to do on the siding in respect of which they are undertakers in the sense of the statute? I think that on the statement before us the answer must be in the affirmative. The injured man's employment was not to carry any particular load. What we are told is that he was employed as brakesman of a pug-engine. It must be assumed—for there is no suggestion to the contrary—that the order to detach waggons from a train on the Caledonian line and to attach them to his own engine was a lawful order which the man was bound to obey. In other words, when the accident happened he was acting in obedience to orders, in the discharge of his duty, and in the course of the work he was employed to do. It appears to me irrelevant to inquire what was the contract under which the respondents engaged to carry sand to their siding, or what their reason was for using their engine in that way. They were still undertakers in respect of the siding, they employed the injured man to work upon it, and while he was working on or about it in the ordinary course of his employment he met with the injury which caused his death.

The Court answered the question in the affirmative.

Counsel for the Appellant—Glegg—W. Thomson. Agent—Charles George, S.S.C.

Counsel for the Respondents—W. Campbell, Q.C.—J. C. Watt. Agents—Anderson & Chisholm, Solicitors.

Friday, November 30.

FIRST DIVISION.

[Lord Low, Ordinary.

JAMIESON *v.* WELSH.

Sale—Sale of Moveables—Sale of Moveable "Fittings" along with Heritable Subjects—Missives—Disposition—Missives quoad "Fittings" not Superseded by Disposition—Sale of Heritage.

By missives of sale it was agreed that the proprietor of certain heritable subjects should sell them "with the fixtures and fittings therein." By a disposition following thereon granted by the seller in favour of the purchaser, and accepted by him, the seller disponed merely the heritable subjects in question, no mention being made of either fixtures or fittings. The disposition did not bear to be granted or accepted in implement of the contract as embodied in the missives, nor did it contain any reference to them. The sum in consideration of which the disposition bore to be granted was the same as the price stipulated in the missives.

In an action at the instance of the purchaser against the seller, for the value or cost of replacing or repairing certain articles described as "fixtures and fittings" which were alleged to have been removed or damaged by the defender, the defender maintained that the disposition granted to the pursuer was the sole measure of his right, and that he was not entitled to claim any articles which were not in law fixtures as between seller and purchaser.

Held that, as the missives gave the purchaser right not only to the heritable subjects and their accessories, which were capable of being conveyed by a disposition, but also to "fittings," which were corporeal moveables, and as the disposition did not purport to be granted in implement of any contract, the missives, *quoad* the "fittings," were not superseded by the disposition, and the purchaser's acceptance of the disposition did not prejudice his right to the "fittings" under the missives.

By letter dated 29th March 1899, addressed by Mr Campbell, S.S.C., on behalf of Mr James Jamieson, contractor, Musselburgh, to Messrs Welsh & Forbes, S.S.C., agents for Mr John Welsh, Mr Campbell offered the sum of £1475 "for the subjects known as Greenhall, Musselburgh, as advertised . . . with the fixtures and fittings therein so far as belonging to the proprietor."

On the same date Messrs Welsh & Forbes appended to this offer an acceptance in these terms, "We hereby accept the foregoing offer."

By disposition dated 16th May 1899 Mr Welsh as "heritable proprietor of the subjects and others hereinafter disponed," in consideration of the sum of £475 instantly paid to him by Mr Jamieson, and in consideration of the pursuer freeing and

relieving him of the sum of £1000 in a bond and disposition in security therein mentioned, disponed to and in favour of Mr Jamieson and his heirs and assignees, heritably and irredeemably, "All and whole that house of two storeys or floors and garrets called Greenhall, and two smaller houses on the west end thereof, with 23 falls and 4 ells of ground or thereby belonging thereto, . . . together with the teinds, both parsonage and vicarage, and whole parts, pendicles, privileges, and pertinents of the subjects above disponed." The disposition contained no reference to the contract embodied in the missives set out above, and there was no mention of the "fixtures and fittings."

Mr Jamieson raised an action against Mr Welsh, and also against another defender who did not lodge defences, concluding for payment of £75 made up of (1) £50, the value of certain articles which the pursuer averred had been removed from the premises by the defender; and (2) £25, the cost of repairing and replacing certain other articles damaged or removed by the defenders.

The pursuer averred that on taking possession of the property bought by him he found that certain "fixtures and fittings" had been removed wrongfully and in contravention of the missives by the defender or with his consent. The articles so alleged to have been removed were specified as follows—"(Cond. 3) . . . (1) in drawing-room, grate built in, large gasalier with crystal drops and finger-plates; (2) in dining-room, grate built in, two finger-plates, pedestal with gas-bracket in lobby; (3) in east bedroom, grate, two finger-plates, gas-bracket unscrewed; (4) west bedroom, grate, two gas-brackets unscrewed; (5) back bedroom, grate, gas-bracket unscrewed; (6) attic, gas-bracket and grate removed. In Greenhall Cottage—(1) gas-bracket in scullery, and in the small bedroom off scullery, one gas-bracket; (2) in kitchen, range, with high-pressure boiler, and double-jointed gas-bracket; (3) in lobby, square-shaped gas lamp from ceiling; (4) in parlour, grate, gasalier, and finger-plates; (5) in front sitting-room, grate, gas-fittings, and finger-plates; (6) in east and west bedrooms, grate, and gas-fittings; (7) in dressing-room, gas-bracket; and (8) gas-bracket. In the principal greenhouse, window opening rods and handles." He averred that these were "fixtures and fittings belonging to the proprietor, sold in the sense of the missives."

He further averred (Cond. 5) that damage to the amount of the second branch of his claim had been done to the subjects by the defender; and that it had cost him £75 to replace the articles removed or damaged.

The defender Welsh pleaded, *inter alia*—"(4) The disposition granted to the pursuer being the sole measure of his right, he is not entitled to any of the articles claimed, and this defender is entitled to absolvitor. (5) In any event, the said articles not being of the nature of fixtures, the defender should be assoilzied."

The Lord Ordinary (Low) on 14th July 1900 pronounced the following interlocutor:—"Finds (1) that the pursuer having accepted a disposition of the subjects at Greenhall, Musselburgh, purchased by him from the defenders, the said disposition is the sole measure of the rights and liabilities of the parties; (2) that under and in terms of the said disposition the pursuer has right to all articles in the said house and cottage, and in the grounds annexed thereto, which are in law fixtures in a question between seller and purchaser, but that he has no right to articles which, in the absence of express stipulation to the contrary, a seller is in law entitled to remove; and (3) that the articles enumerated in article 3 of the condescendence (with the exception of the kitchen range with high-pressure boiler, and the opening rods and handles of the greenhouse) are not fixtures, and that the pursuer has no right thereto: Before further answer allows the pursuer a proof as to the nature and construction of the said kitchen range and boiler and the said opening rods and handles, and as to the manner in which the same are attached to the dwelling-house and greenhouse respectively, and to the compearing defender a conjunct probation; and further, allows the pursuer a proof of his averments in article 5 of the condescendence of damage done by the defenders to Greenhall House and Greenhall Cottage, and to the defenders of their answers thereto: Appoints the same to proceed on a day to be afterwards fixed, and reserves the question of expenses."

Opinion.—"In the missives of sale the pursuer's offer is to purchase Greenhall House and Greenhall Cottage 'with the fixtures and fittings therein so far as belonging to the proprietor.'

"I do not think that the mention of 'fixtures' adds anything to the offer, because the ordinary meaning of the word, when used in reference to such a transaction, is such articles as, in the absence of special stipulation, pass to the purchaser of the house, although capable of being removed.

"The word 'fittings,' however, is in a different position, and presumably means such things as ordinary grates or gas-brackets, which in the absence of a special agreement the seller would be entitled to remove.

"If, therefore, the question raised in this case depended upon the construction of the missives, I should be disposed to hold that the articles enumerated in the condescendence (article 3) were included in the sale.

"The pursuer, however, has accepted a disposition in which there is no mention of fixtures and fittings. That disposition will carry all those things which the law regards as part of the building in a question between seller and purchaser, but will not carry anything more, and I think that it is settled that articles which are so slenderly affixed to the building as grates and gas-brackets, and which can be removed without injury to themselves or to the building, are not part of the building, and do not

pass to a purchaser under a disposition of the building.

"The question therefore is, whether it is competent for the pursuer to go behind the disposition and to found upon the missives of sale? I am of opinion that that question must be answered in the negative. There were not here two contracts, one in regard to the heritable subjects and the other in regard to the fittings. There was only one contract, and the disposition was intended to give effect, and was accepted as giving effect, to that contract. It is the disposition alone, therefore, which regulates the rights of parties, and it is not said that the disposition is in any way ambiguous. The pursuer, accordingly, is entitled to everything which is embraced within the dispositive clause, and to nothing more.

"Now, most of the articles enumerated in the condescendence appear to me not to be fixtures. Grates which are built in in the ordinary way, and which can be removed without injury to themselves or to the walls, are not fixtures, and it is not said that there is anything peculiar in the way in which the grates in the house in question are built in. Again, gas-brackets and finger-plates which are merely affixed by screw-nails are not fixtures. There are, however, two of the articles enumerated in regard to which I am doubtful. There is a kitchen range with high-pressure boiler, and I think that very probably that may be a fixture. Then in the principal greenhouse opening rods and handles are said to have been taken away. I assume that it is admitted that the greenhouse is a fixture, and if the opening rods and handles were attached to a moveable part of the framework of the greenhouse whereby it could be opened or shut, I am inclined to think that they would form part of the structure, although they might be removable merely by unscrewing a nut.

"I therefore think, that as regards the kitchen range and the greenhouse fittings I must ascertain the precise facts.

"The pursuer further avers that the defenders have removed the lock of a door in Greenhall House and unscrewed a gas-bracket. I presume that that is a gas-bracket which the defenders have not removed, but if they were entitled to remove it, as I think they were, there can be no claim for their having unscrewed it. As regards the lock of the door, I apprehend that a seller is no more entitled to remove the lock of a door than he is to remove the door itself. The pursuer further avers that in Greenhall Cottage the defenders have broken a door and cut the water and gas-pipes. *Prima facie* if that is the case the pursuer has a claim against the defenders.

"I am therefore of opinion that there must be inquiry in regard to the character of the kitchen range and the opening rods and handles in the greenhouse, and also in regard to the averments in condescendence 5 of damage done to the subjects."

The pursuer reclaimed, and argued—It was permissible to look at the missives with regard to the moveables. The pursuer had bought two distinct things, the house and the fittings. The latter comprised such articles as in the absence of any stipulation with regard to them would not go to the purchaser of a house. "Fixtures" as distinguished from "fittings" were those things which in the absence of special stipulation would pass to the purchaser. The disposition carried all which could legally be carried by it, *i.e.*, the house and fixtures, and natually there was no mention of the fittings, which as moveables could not be carried by such a disposition. Accordingly the contract with regard to them must be found in the missives, and on turning to them it appeared that the fittings as well as the fixtures were included in the sale. The disposition was not intended to embody and give effect to the whole contract contained in the missives, but merely that part which it could legally carry out, the transfer of the heritage. The transfer of the fittings could not be completed by a disposition.

Argued for the respondent—The formal disposition superseded all prior communings and agreements, and it was not competent for the pursuer to go behind it and found upon the missives of sale—*Orr* v. *Mitchell*, March 20, 1893, 20 R. (H.L.) 27; *Lee* v. *Alexander*, August 3, 1883, 10 R. (H.L.) 91. Accordingly the pursuer was entitled to nothing but what was embraced in the dispositive clause. There were not two contracts, one with regard to the heritable subjects, and the other with regard to the fittings. Certain fittings and fixtures were by presumption of law covered by the disposition, and to these alone was the pursuer entitled. The fact that the consideration for which the disposition was granted was the exact sum offered and accepted in the missives, showed that the pursuer was only entitled to what was conveyed in the disposition.

At advising—

LORD PRESIDENT—[*After narrating the facts and averments as set forth supra*]—Amongst other pleas, the defender states as plea 4—"The disposition granted to the pursuer being the sole measure of his right, he is not entitled to any of the articles claimed, and this defender is entitled to absolvitor," and the Lord Ordinary has given effect to this plea as regards the fittings which would not pass under a disposition of the house.

I fully accept the doctrine laid down in the House of Lords in the case of *Lee* v. *Alexander*, 10 R. (H.L.) 91, that "The execution of a formal conveyance, even when it expressly bears to be in implement of a previous contract, supersedes that contract *in toto*, and the conveyance thenceforth becomes the sole measure of the rights and liabilities of the contracting parties;" and in the *dictum* of Lord Watson in the case of *Orr* v. *Mitchell*, 20 R. (H.L.) 27, that "when a disposition in implement of sale has been delivered to and accepted by the purchaser, it becomes the sole measure of the contracting parties'

rights, and supersedes all previous communings and contracts, however formal;" but it appears to me that that doctrine does not apply to the present case. The contract in this case related to two separate and distinct classes of things—(1) the proper heritable subjects, which I shall for the present assume with the Lord Ordinary would include such "fixtures" as would pass with a conveyance of the house; and (2) the "fittings" which would not pass under such a conveyance, and which for the purposes of the present question are to be treated as moveables. The subjects of the contract were thus (1) the heritage, and (2) certain corporeal moveables, viz., the "fittings." It is quite in accordance with principle that where a disposition bears to be in implement of a contract mentioned in it, or where the kind of property to which a contract related has been made the subject of a disposition, this should conclude all question as to the meaning of the contract in so far as it relates to that property, as, for example, the extent or incidents of it, but I am unable to see any ground upon which it could be held to conclude all question in regard to property which it does not purport to convey, *e.g.*, corporeal moveables, merely because the two kinds of property were dealt with in one contract, especially as such corporeal moveables would not be made the subject of a conveyance, but would pass by delivery as the appropriate mode of transferring them. If, for example, a contract was entered into for the sale of a house, and of all the furniture and plenishings, including pictures, silver plate, china, and the like, in it at the date of the contract, these articles would not be made the subject of any conveyance or assignation, but would be transferred by delivery and by possession of them being taken, while the house would be conveyed by a disposition which would make no mention of the moveable articles. I am unable to see any principle upon which it could be held that an acceptance of a conveyance of the heritable estate, for the transfer of which conveyance is the appropriate mode, should be held to imply a surrender of the right of the purchaser to corporeal moveables, of perhaps as great or greater value purchased under the same contract, but for the transfer of which no written title was either required or appropriate. The parts of the contract relating to the heritage and the moveables respectively were as separate as if they had been expressed in different instruments. In this connection it is to be kept in view that, as already pointed out, the disposition does not bear to be granted or accepted as in implement of any contract, so that its terms do not import that the contract is discharged in so far as it related to anything not conveyed by the disposition.

It was, however, maintained by the defender that, even assuming that this would have been so if separate prices had been stipulated to be paid for the heritage and the moveables respectively, the result should be different, where, as in the present case, a *cumulo* price was stipulated to be paid for the heritage (including the fixtures) and the fittings. But I am unable to see how this can make any difference if the views above expressed are correct. The obligation would still remain to deliver the corporeal moveables, unless the claim to them had been discharged by accepting delivery of the conveyance of the separate heritable estate, which, for the reasons already given, I think it could not be.

I am therefore of opinion that the Lord Ordinary's interlocutor should be recalled, and that a proof should be allowed to the parties of their respective averments.

LORD M'LAREN—I concur, and will confine myself to an illustration of the difficulty of applying the Lord Ordinary's principle without considerable reserve. Take, for example, a contract of sale for an interest in heritable estate and an interest in ships. This might take place in the sale of a commercial company carrying on trade on the sea, or in the case of the sale of a landed estate with a yacht. It would be impossible to carry out the Lord Ordinary's principle in such a case. Gas-brackets, or a horse and cart, might perhaps be included in a deed of conveyance of land, though this would be a clumsy way of giving delivery; but it would not be possible to make an effective transfer of a ship in a conveyance of land, because by Act of Parliament ships have to be transferred in a special manner, viz., by bill of sale, registered in a special register. The Lord Ordinary's proposition would be sound if qualified to this extent, that it is not competent to go behind a deed of conveyance which exhausts the subject-matter of the contract; but in the case of a deed which either bears to be in part performance, or can be shown by comparison to be only a part performance, the contract subsists until performance is complete.

LORD KINNEAR—I agree with your Lordship. It is perhaps to be regretted that in a case of this kind we should be compelled to allow a proof which may involve the parties in expenses out of all proportion to the value of the matter in dispute. But that is for them to consider. We must determine the legal rights of litigants, and must leave it to themselves to consider whether it is wise to carry on a costly litigation about matters of little importance.

I am unable to assent to the Lord Ordinary's view of the question at issue. He says the question is, whether it is competent for the pursuer to go behind the disposition and to found on the missives of sale. He answers this question in the negative, but it seems to be very doubtful whether he has carried out that answer to its logical conclusion, because after having decided that he cannot go behind the disposition he proceeds to decide the case upon a construction of the missives of sale. He says there is one contract not two, and on that ground he holds that the disposition was merely intended to carry into effect the previous contract. I do not advert to this

as mere criticism of the Lord Ordinary's judgment, because I think it enters into the essence of the whole question between the parties. If a disponee tables a disposition and says it is in itself conclusive of the contract between him and the disponer, he is in a very strong position; but when he says, Compare the disposition with an independent contract and you will find that the contract contains nothing which is not dealt with in the disposition, and therefore that the contract is superseded, his position is totally different. That cannot be determined without interpreting both instruments. I therefore cannot agree with the Lord Ordinary's statement that the rights of parties depend entirely on the disposition. There is no doubt as to the soundness of the proposition, that when a disposition has been delivered and accepted in performance of a contract for the sale and purchase of land, it is final and conclusive as the expression of intention of the parties in regard to all rights which it is intended and adapted to carry. But a disposition is not a habile mode of transferring corporeal moveables, except such as have been so attached to the soil as to be made part of it, and accordingly, where there is a sale of land and of separate moveables together, the proper method of completing the purchaser's right, according to our former practice, was to execute a conveyance of the land and to deliver the moveables, and if in any such case the property of the moveables must now be held to pass without delivery, still where anything beyond the contract itself is required to transfer the right, it is quite certain that it cannot be transferred, and the moveables cannot be delivered by conveyance and infeftment. Accordingly, a sound conveyancer in framing a disposition for carrying out such a sale will not think it necessary to insert a futile conveyance of the moveables which would carry nothing. It seems to follow that the mere omission to mention moveables in this disposition affords no indication of a departure by the purchaser from his right to obtain delivery of any moveables he was entitled to under the missives. But then it was said that there is more than mere omission, and the argument is deserving of consideration. It is said that the disposition conveys the land and fixtures for a price of £1475 which has been paid; and when the previous contract is looked at, we find that exactly the same price in a lump sum is agreed to be paid for the subjects included in the missives, and that, accordingly, it would seem to follow that the subjects conveyed by disposition are all that the purchaser was entitled to under the missives. I am not prepared to say that this argument is sound on other grounds, but the true answer to it is, that it is a mere inference of fact, which must yield to the actual fact as ascertained by the contract which, *ex hypothesi* of this argument, is the proper record of the transaction. Nor will it do to say that this contract cannot be looked at because of the subsequent disposition, because it is only by looking at it that the argument arises at all; and secondly, because for the reasons stated by your Lordship the disposition does not supersede the contract in this matter. The disposition is a written instrument for its own purposes, and has nothing to do with the sale of corporeal moveables, as to which the rights of parties must depend on the terms of the original missives, which constitute the contract, and which are the only writings having any bearing on this part of the subject-matter.

LORD ADAM concurred.

The Court pronounced this interlocutor:—

"Recal the said interlocutor: Allow to both parties a proof of their respective averments, and decern," &c.

Counsel for the Pursuer and Reclaimer—Craigie—D. Anderson. Agents—Alexander Campbell & Son, S.S.C.

Counsel for the Defender and Respondent—W. Campbell, Q.C.—Welsh. Agents—Welsh & Forbes, W.S.

Tuesday, November 20.

SECOND DIVISION.

[Sheriff of Ayrshire.

FERGUSSON *v.* FERGUSON.

Nuisance—Rifle Range—Interference with Use of Foreshore by Public — Army — Volunteers.

The use of a rifle range, leased by certain corps of volunteers and yeomanry, and sanctioned by the Secretary of State for War, rendered the foreshore in the vicinity of the targets unsafe for persons passing along there while firing was going on. The public had from time immemorial enjoyed a right of passage and recreation on the foreshore at the place in question. The consent of the Board of Trade had not been obtained to any bye-laws made by a Secretary of State restricting the rights of the public in order to enable the range to be used.

Held that a member of the public was entitled to interdict against the use of the range for rifle practice.

Nuisance — Rifle Range — Firing Points near Public Road—Army—Volunteers—Road.

Two of the firing points upon a rifle range used by certain corps of volunteers and yeomanry were situated 10 and 20 feet respectively from a public road, and were found in fact to be a source of danger to horse traffic on the road. The use of the range had been sanctioned by the Secretary of State for War, but no bye-laws with regard to the use of it had been issued by a Secretary of State with consent of the road authority.

Held that a member of the public was entitled to interdict against the use of the range for rifle practice.