great importance, viz., on whom the *onus* lies, I am of opinion that the *onus* of proving where the fish were taken lies upon the accused, provided (1) it be shown that they were apprehended with the fish in their possession within the jurisdiction of the Sheriff, and (2) that it was close time. These being proved, the *onus* lies on the accused.

Appeal dismissed, with £5, 5s. expenses.

Counsel for Appellant—Moncreiff. Agent—Party.

Counsel for Respondent—Lang. Agents—T. & W. A. M'Laren, W.S.

COURT OF SESSION.

Saturday, February 22.

SECOND DIVISION.

[Lord Young, Ordinary.

WHYTE *v.* LEE.

Sale—Restriction in Feu-Contract—Right to Resile from Purchase of Villa where Minerals Subsequently Found to be Reserved—Missives of Sale.

Two parties exchanged missives of sale of a suburban property, consisting of one-third of an acre of ground with a villa upon it, which was described in the missives as "Eildon Lodge, Granton." The purchaser afterwards refused to implement the sale on the grounds, *inter alia*, (1) that the acceptance of his offer was not holograph of the actual owner, but of the agent entrusted with the sale of the house, and (2) that there was a reservation of mines and minerals in favour of the superior in the feu-contract, which was not revealed to him at the time of the sale. In an action for implement, *held* (1) that what was holograph of the agent was binding on the purchaser; but (2)—*rev.* Lord Young (Ordinary), *diss.* Lord Gifford—that, in respect of the reservation in question, the purchaser could not get a conveyance of the whole subjects purchased by him, and was entitled to refuse to implement the sale.

Opinion per Lord Gifford that in a sale of heritable subjects the effect of restrictions is always a question of the circumstances of the estate, and that in the case of the sale of an urban tenement an undisclosed reservation of minerals could not be said to be unusual, or to afford ground for repudiation of the contract.

The pursuer in this action, George Scott Whyte, was proprietor of a villa with grounds, being about one-third of an acre in extent, at Wardie, near Edinburgh. On 2d March 1878 the defender Mr J. B. W. Lee, S.S.C., wrote a holograph offer for the purchase of the house as follows:—

"*Edinburgh*, 30 *St Andrew Square*, 2*d March* 1878.

"Dear Sir,—I hereby offer to purchase from you Eildon Lodge, Granton, at the price of two thousand one hundred pounds sterling (£2100), payable on 20th May 1878, I getting possession as soon as I please. The feu-duty of the Lodge I understand to be £12, 12s. Your acceptance to-day will close the bargain.—Yours truly,

(Signed) J. B. W. Lee.

"G. Liston, Esq., St Andrew Square.

"*P.S.*—I only pay feu-duty, &c., from Whitsunday 1878."

Mr Liston, who was the house-factor in charge of the selling of the property, replied as follows:—

"*Edinburgh*, 30 *St Andrew Square*, 2*d March* 1878.

"J. B. W. Lee, Esq., 10 George Street.

"Dear Sir,—On behalf of the owner of Eildon Lodge, I accept your offer to purchase it at two thousand one hundred pounds sterling. The grates, gasfittings, blinds, and other fittings to be purchased by you at a valuation (mutual).—I am, dear Sir, yours truly,

(Signed) G. Liston."

This acceptance was holograph of Mr Liston. The keys of the property were then sent to Mr Lee, and on the 1st of April following the title-deeds of the property were also sent to him, but on 3d April Mr Lee wrote to Mr Liston in the following terms:—"Herewith I return the keys of Eildon Lodge, which I do not now wish to occupy. Please to put a ticket on it to sell or let furnished or unfurnished, and do your best to sell or let it. The keys can be left with Mr Stenhouse at Granton Lodge if you cannot leave them where they were before. Perhaps the house should also be put on Mr Patterson's list. You had better advertise to apply to you or to me. All I expect is to get quit without loss." Mr Liston replied acknowledging receipt of the keys, and urging the valuation of the fittings, and the defender thereupon replied that no bargain had been made by him.

The defender afterwards advertised the house to sell or let, but he alleged that while doing so he had not admitted any bargain. The pursuer's agent on the 22d April wrote asking the draft disposition for revisal, but no answer was returned to this and several other applications till the 20th May, when the defender wrote the pursuer's law agent that he denied there was any bargain, this being, the pursuer alleged, the first intimation to him of the position the defender took up. The pursuer then raised this action to have it found that the defender was bound to implement the purchase of the house contained in the offer and acceptance above written.

The fifth article of the condescendence was as follows:—"The pursuer has been all along ready and willing to execute and deliver to the defender a disposition of the said subjects in terms of the said agreement of sale. The 'prior writs' would have been furnished to the defender by the pursuer had they been applied for sooner, but the request for them was made at the last moment, and while the defender was at the same time repudiating the said agreement. As already stated, the pursuer's law agent had on 1st April sent the defender the titles of the property from the constitution of the feu. It is not usual to exhibit the superior's title, but in any case it was the duty of the defender if he required exhibition of any prior writs to have requested their exhibition within a reasonable time before the date of settlement. The pursuer, how-

ever, is quite willing to procure and exhibit to the defender the prior deeds on the footing that the defender is liable to implement his obligations under the said agreement. . . ." To this the defender answered— . . . "Explained that the titles sent were such as to lead the defender to suspect that no good title could be given to the property. The transaction was not a term transaction, and there was ample time to send the whole titles to the defender had there been nothing to conceal in regard to them. They have not yet been produced, and the defender cannot state his defence properly till he has examined them."

The defender's second and fourth pleas were as follows:—"(2) There was no completed contract between the pursuer and defender, in respect, 1st, that they never contracted together at all: 2d, that the alleged acceptance is not holograph of the pursuer or signed by him or a tested document; and 3d, that there was no *consensus in idem placitum*. (4) The defender having right to see and examine the titles before implementing the alleged contract, the present action is premature, and ought to be dismissed as incompetent."

The feu-contract granted by the superiors, who were the trustees of Captain Boswell of Wardie, to the original feuar of the subjects in question, viz., Alexander M'Dougall, contained various restrictions and obligations, and among others the following—"Reserving always to us, the said John Dundas and William Wilson, as trustees foresaid, and our successors, the whole coal, stone, and other mines and minerals within the bounds of the piece of ground hereby disponed; declaring, however, that we and our foresaids shall have no power to work, win, and carry away the same without having previously obtained the written consent of the said Alexander M'Dougal or his foresaids thereto. And it is hereby conditioned that the said Alexander M'Dougal and his foresaids are and shall be prohibited from building or erecting in the piece of ground above disponed any more than one dwelling-house or villa, with suitable offices or outhouses for the same, of which dwelling-house or villa and offices or outhouses, the sites and exterior plan or plans shall require to be approved of in writing by us, the said trustees or our foresaids, before the same shall be erected."

The Lord Ordinary (YOUNG) pronounced an interlocutor repelling the defences, and finding that by the missives referred to on record the property therein mentioned and described in the conclusions of the summons was by or on account of the pursuer as seller sold to the defender as purchaser, and decerning and ordaining him to implement and fulfil the purchase, and that in terms of the conclusions of the summons to that effect. He added the following note:—

"*Note.*—The missives are holograph and conclusive of the bargain. The defender is undoubtedly entitled to a good title, and that was not disputed. The admitted facts show that he attempted to break loose from his contract, not on any question of title, but simply because he had changed his mind. It was his right, nevertheless, to have an opportunity of examining the title offered, and stating any objection that occurred to it before decree for implement was pronounced, and I accordingly delayed the case on two successive occasions to afford him that opportunity. In the result a sufficient title was exhibited, for the objections stated to it by the defender were, I thought, inadmissible. It is subject to some restrictions no doubt, but only to such as are common and familiar in the titles to such property, and not at all to such as will enable a buyer to be free. If the views of the pursuer prevailed it would generally be impossible to make an effective sale of a house in town without a very minute and ponderous written contract specifying all restrictions and conditions (however usual) that applied to it. If a man simply buys a house he must be taken to buy it as the seller has it, on a good title, of course, but subject to such restrictions as may exist if of an ordinary character, and such as the buyer may reasonably be supposed to have contemplated as at least not improbable. Restrictions or burdens of another character it may be, and probably is, the duty of the seller to call the buyer's attention to, even though no inquiry is made on his part."

The defender reclaimed, and at the discussion before the Second Division parties were allowed to amend their statements. The pursuer thereupon averred, *inter alia*—"The defender at the time of the purchase had the means of knowing and was aware that the pursuer's title was subject to the conditions and reservations contained in the original feu-disposition by the trustees of Captain Boswall of Wardie. These conditions and reservations are common in the titles to such property. The defender took no objection to the pursuer's title till after the present action was raised for implement of the purchase." The defender answered that the feu-disposition by Boswall's trustees for the first time made the defender aware that the pursuer was not complete and unrestricted owner of the subjects. He had had no access to it when the defences were prepared.

Argued for the reclaimer—He was entitled to rescind the contract, and was not bound to accept the title offered, in respect that he was getting something less than he had bargained for. The case corresponded with that of *Robertson* v. *Rutherford*, July 18, 1840, 2 D. 1494, and November 27, 1841, 4 D. 121. Besides, the missives were not holograph of the parties, one of them being written by Mr Liston, who was merely the pursuer's agent.

Argued for the respondent—The sole question here was, Was the buyer getting what he contracted for? for there was undoubtedly a completed bargain. What the defender had in view was to buy house property—a town house—for this really was a town house—for the purpose of living in it. He could not therefore truly say that he was making this objection because he was not getting what he intended to buy; he had never thought of minerals till he was anxious in any way to get rid of his bargain. The same objection could have been made with equal force if the game had been reserved. Everyone knew that house property in towns or the neighbourhood of towns was subject to various restrictions, and if a man bought house property he must be held to have made inquiry, and if the restriction was not an utterly unreasonable one he was bound to submit to it. The restriction here was perfectly reasonable and usual, and besides was favourable to the vassal, without whose consent nothing could be done, and who might put his own price on his consent. In *Robertson's* case (quoted *supra*) the neighbourhood

was a mineral one, and the subject was of larger extent. If it had been an urban subject, as here, the decision would have been different.

At advising—

Lord Ormidale—That the defender by letter or missive of 2d March 1878 offered to purchase, at the price of £2100, Eildon Lodge, Granton, being a dwelling-house or villa in the neighbourhood of Edinburgh, with the ground—extending to about a third of an acre—upon which it is situated, is not disputed. But the defender's offer was accepted subject to the condition or qualification that "the grates, gasfittings, blinds, and other fittings to be purchased by you [the defender] at a valuation (mutual)." There could therefore be no completed bargain till this condition or qualification was agreed to by the defender. He has maintained in the present litigation that he never agreed to it. It appears to me, however, that although he did not expressly agree to it in writing, he must be held to have done so by his acts and conduct, or, at any rate, that he has precluded himself from maintaining that he did not. I think that the defender led the seller to believe that he had agreed to or acquiesced in the condition or qualification, and is now barred *rei interventu* from resiling from the transaction on the ground that he had not.

But the defender has taken another objection of a different, and, as it appears to me, a more formidable character, in respect of which he has argued that there has been no binding and conclusive transaction of sale and purchase betwixt him and the pursuer. This objection is to the effect that according to the only title which the pursuer has it in his power to give, or at least the only title which he has offered to give, the whole subject bargained for will not be conveyed to him. This objection is founded upon the terms of one of the title-deeds which is referred to in the proceedings, and which was not produced or otherwise submitted to the defender for his consideration till after the record was closed. According to that disposition, the defender, in place of obtaining a title to Eildon Lodge, and the piece of ground upon which it is situated *a centro ad cœlum*, as he was entitled to expect, and has a right to insist for in the absence of any stipulation to the contrary, will only do so subject to a reservation in favour of the superiors "of the whole coal, stone, and other mines and minerals within the bounds of the piece of ground" in question.

Now, although it may be true that it was not a mineral estate the defender had in view when he offered to purchase the subjects in dispute, and that he did not contemplate working the stone and minerals under the villa and relative ground, it must be taken as equally true that he did not contemplate that there was to be any reservation in the title he was to receive of the "coal, stone, and other mines and minerals within the bounds of the piece of ground" he proposed to purchase. He got no notice of any such reservation, and had no reason to know or anticipate that any such reservation was to be made. Nor does it appear to me that there is any room for holding that the reservation is one which a purchaser might reasonably be held to have calculated upon, for although the pursuer was expressly allowed a proof (amongst other things) that conditions and reservations such as those in question are "common in the titles of such property," they failed to adduce any proof on the subject. It is idle, therefore, to say that such a reservation is usual in suburban property. I am not aware of anything of the kind. The present case is very like that of *Robertson* v. *Rutherford* (27th Nov. 1841, 4 D. 121), where a similar objection was, in substantially similar circumstances, given effect to by this Court. The specialty which it was said attends the present case, to the effect that the superiors in whose favour the reservation of stone and minerals is made are not entitled to take advantage of it without the consent of the vassal, cannot be held to obviate the objection, for that does not give the defender right to the stone and minerals, but leaves him entirely excluded from any property in them. And the case is quite conceivable of the defender or his successors finding that it would be very desirable to have the power of taking out the stone, or even coal or other minerals, that may be found within the bounds of the piece of ground in question.

I am therefore disposed to think that in the present case—and I do not go beyond it—the defender's objection, founded upon the reservation referred to, is well founded.

The defender also objects to the restriction in the same title to the effect that he shall stand "prohibited from building or erecting in the piece of ground" in question "any more than one dwelling-house or villa, with suitable offices or outhouses for the same, of which dwelling-house or villa and offices or outhouses the sites and exterior plan or plans shall require to be approved of in writing by us the superiors before the same shall be erected." This objection, although it might in many cases be a formidable one, I am not inclined to sustain in the present instance. A restriction on the mode of using the subject purchased is a very different thing from reserving or withholding part of the subject altogether.

Without entering into further detail, I am, for the reasons I have stated, of opinion that, in respect of the reservation referred to, the interlocutor reclaimed against is erroneous, and ought to be recalled, and the defender assoilzied.

Lord Gifford—I consider this a difficult case, but on the whole I adhere to the impression I first formed, and that is that the Lord Ordinary's view is the safe one. The missives of lease are holograph of the parties—at all events they are holograph of one of the parties and of the agent of the other. It was maintained on the part of Mr Lee that the holograph missive of the agent was not holograph of the principal, and that therefore it was not binding on him. I cannot give the least countenance to this contention. I think that in a case of this sort—the sale of a house—a missive holograph of an agent, such as a Writer to the Signet or a house-factor, is just as binding on the principal as if he had signed it himself. On the other minor questions I also agree with your Lordships that there was *rei interventus*.

Then comes the question, Can Mr Whyte give a good title? Now, it is quite true that by the titles here the whole mines and minerals within the bounds of the piece of ground in question are reserved to the superior, with the declaration, however, that the superior should have no power to work them without the consent of the feuar.

Then follow certain other restrictions, and it is said on behalf of Mr Lee, the reclaimer, that these reservations and restrictions are such as to entitle him to refuse to go on with his bargain.

Now, the effect of conditions of this kind is always a question of the circumstances of the estate, as, for example, such a reservation in a mineral estate would undoubtedly be a good reason for repudiating a sale; but I am of opinion that such a reservation does not apply to properly urban tenements. I agree with the Lord Ordinary that in this case the reservation does not entitle Mr Lee to disavow the bargain. In the case of a property consisting of a small piece of ground with a villa upon it which covers the most of the ground, a reservation of minerals is not unusual, and here the reservation is particularly harmless, for the superior cannot touch the minerals under the ground without the consent of the vassal. The Lord Ordinary lays down the law very fairly, and unless Mr Lee can show that the working of the minerals was ever thought of between the parties, I am of opinion that he cannot now repudiate the bargain. The ground was feued for the purpose of building a villa upon it, and the superior says—"I shall not touch anything under the villa without your consent." Surely this is quite usual in the feuing of such tenements, and I therefore think that the reservation of minerals, though perhaps unfortunately expressed, will not entitle the purchaser to repudiate the bargain, and therefore I think the Lord Ordinary's view the safer. I agree as to the applicability of the case of *Robertson* v. *Rutherford* to a certain extent, but the circumstances of the cases are different.

Lord Justice-Clerk—I agree as to the first question. With reluctance I concur with Lord Ormidale on the last point, and I do not very well see how a good answer is to be made to the defender's case on this point. I think a purchaser is bound to take a property with the restrictions on it, but that is a totally different thing from not receiving the property bargained for. I cannot hold that when a man sells a heritable subject he does not sell the minerals under it. If a man sells a superficial area, there can be no question at all that if he could not give something on the surface the sale would not be good, and is there any difference when he cannot give something under the ground? This would be a most dangerous principle to affirm, and so it was recognised in the case of *Robertson* v. *Rutherford*, where in very similar circumstances the same principles were applied as we propose to apply here.

It was said that the minerals could be of no value, but I cannot hold that, for the superior reserves them, and we cannot go into their value. I only know this, that not far off from the position of this villa the railway company have driven a tunnel, and we cannot say whether they may not want to drive another tunnel through this property, which might in that event come to be valuable.

Therefore, on the whole matter, and in the end with no difficulty, I think the sale cannot go on, because the seller cannot give possession of part of the subject which he sold.

The Court recalled the interlocutor complained of, sustained the defences, and found the pursuer liable in expenses, subject to modification.

Counsel for Pursuer (Respondent)—Kinnear—A. J. Young. Agent—G. M. Wood, S.S.C.

Counsel for Defender (Reclaimer)—Campbell Smith—Brand. Agent—J. B. W. Lee, S.S.C.

Saturday, February 22.

SECOND DIVISION.

[Sheriff of Lanarkshire.

COUPER & SONS *v.* MACFARLANE.

Reparation—Master and Servant—Liability of Third Party who procures Breach of Contract.

He who wrongfully procures breach of contract between master and servant is liable in damages to the party so injured—the injury being the necessary and natural consequence of the act complained of.

Master and Servant—Reparation—Civil Liability for Intimidation and Coercion of Workmen from Master's Service.

A firm of flint-glass cutters in Glasgow brought some men from England for their works on the occasion of a lock-out. Shortly afterwards these men deserted their work and returned to England, in breach of their contract. The employers sued an old hand, who was also a member of a "glass cutters association," in damages for having seduced and assisted the workmen to desert their master's service by means of threats, promises, and misrepresentations. Circumstances in which *held* (*diss.* Lord Justice-Clerk Moncreiff) that the pursuers had failed to prove their case, the defenders sole object having been shown to be not that of breaking the contract, but of bringing it to a legitimate close.

Observations (*per* Lord Ormidale) as to what is necessary to constitute a relevant allegation of a conspiracy or illegal combination.

Messrs James Couper & Sons were flint-glass manufacturers in Glasgow, and in the summer of 1876 a dispute having arisen between them and their employees as to the rate of wages paid, the bulk of the workmen received notice to leave the works. The defender Macfarlane, who was one of their men at the time, was not dismissed, but after giving the pursuers the fortnight's notice stipulated by the rules of their works, he also left their employment. To fill the places of the men who had been locked-out, the pursuers engaged and brought from various parts of England a number of workmen to serve them in the capacity of glass cutters. These men, very shortly after their arrival, and during the subsistence of their engagement, deserted their employers, and the pursuers averred that they were induced to leave by means of threats, promises, payments of money, and misrepresentations on the part of the defender or others along with him. An action was accordingly raised at the pursuers' instance against Macfarlane in the Sheriff Court of Lanarkshire, concluding for £100 of damages, in respect that he had procured the breach of contract, and so caused material loss and inconvenience to the pursuers.