delivered to the lender with or without an express obligation to make them furthcoming to the borrower. Now, the pleadings here are certainly somewhat vague as to the actual state of matters with regard to the possession of the titles in question; but it seems pretty clear that the petition proceeds upon the footing that the titles were delivered to the defenders at the time when the transaction was carried out, and it must be assumed, in the absence of any averment to the contrary, and of the bond, that it (the bond) contains no express obligation to make them forthcoming to the pursuer. Taking that to be the position of matters, the defenders maintain that while they are bound to exhibit the titles to the pursuer (as they have admittedly offered to do), they are not bound, except upon repayment of their loan, to part even temporarily with the possession of them; and this contention appears to me to be a sound one. It is true that it is matter of everyday practice for an agent to hand over titles which he holds for a client to a brother agent upon a borrowing receipt, but this is done as a matter of professional courtesy, and it is done, moreover, in a way which prevents the borrowing agent from acquiring an hypothec over them. The question to be determined here, however, is whether a borrower is entitled as matter of right to have possession, even for a limited period, of title-deeds which he has delivered unconditionally to a person in whose favour he has granted a bond and disposition in security which is still in force. I can find no authority in favour of such a proposition, and am not prepared to affirm it. It is urged that the borrower, the owner of the property, may be put to great inconvenience by not having possession of the titles, as the want of them may hamper him in selling the property or in effecting a second loan over it, but there are two answers to this argument. In the first place, if inconvenience does result, the owner has himself to blame, for he might have provided against it by a covenant in the bond; and in the second place, the inconvenience is more apparent than real, seeing that he can always get exhibition of the deeds, his interest in them being clearly sufficient to entitle him to that. It is further said that the lender has no legitimate interest to resist such a demand as is made here. I am, however, by no means satisfied as to that. To mention only one point. If the documents were handed over as ordered by the Sheriff-Substitute, the first thing the pursuer would do with them would be to put them into the hands of an agent with a view to his effecting a sale or procuring an additional loan, and, so far as I can see, there is nothing (assuming there to be room for a plea of personal bar) to prevent that agent getting an hypothec over them for any account that he may have against the pursuer. The result would be that the defenders might be subjected to much inconvenience, delay, and expense before they regained possession.

"I may add that even if I had been of a different opinion upon the merits, I would, in view of the averment at close of answer to Cond. 3, have felt a difficulty about disposing of the case without Mr Smith (the defenders' agent) being called into the field; and I may also point out that in no view could the defenders be called on to part with the possession of the bond and disposition in their favour."

The pursuer appealed to the Court of Session, and argued that they were entitled to the production of the titles for a reasonable time, to be safeguarded by a borrowing receipt, or in any way that the Court thought proper. It would be extremely difficult to find a purchaser or lender if he could only see the titles by going to the office of the defenders' agent. [*By the Court*—Exhibition, although possibly less convenient, is surely quite sufficient for your purpose. Is it quite clear that you are entitled to demand even the exhibition which has been offered?]

Counsel for the defenders was not called upon.

At advising—

LORD JUSTICE-CLERK—I think the judgment of the Sheriff is right, and should be adhered to.

LORD RUTHERFURD CLARK—I entirely agree with the judgment of the Sheriff.

LORD TRAYNER—So do I absolutely.

LORD YOUNG was absent.

The Court refused the appeal.

Counsel for the Pursuer and Appellant—Salvesen. Agents—Gill & Pringle, W.S.

Counsel for the Defenders and Repondents—M'Clure. Agent—

Saturday, January 23.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

TAYLOR *v.* EARL OF MORAY.

Landlord and Tenant—Removing—Decree of Removing—Charge—Delay by Landlord to Charge on Decree.

A tenant against whom a decree had been obtained at the instance of the landlord, ordaining him to remove at the next Whitsunday term, continued in possession of his holding after that term. On 18th June he was charged under the decree to remove on pain of ejection. In a suspension of the charge brought by the tenant the Court *repelled* a plea to the effect that the landlord by his delay in enforcing the decree had allowed his remedy under it to lapse.

Landlord and Tenant—Holding—Agricultural Holdings Act 1883 (46 *and* 47 *Vict. c.* 62), *sec.* 35.

A tenant occupied a dwelling-house, garden and land, for which he paid

a rent of £3 a-year. The whole subjects embraced an area of three quarters of an acre, and the value of the land apart from the house was estimated at 15s. per annum. *Held* that the provisions of the Agricultural Holdings Act did not apply to such a holding, in respect that the land was occupied as a mere accessory to the house, and the holding was not in the sense of section 35 of that Act "either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral."

Peter Taylor presented a note for suspension of a charge to remove from the possession of a house and land at Crook of Alves, which had been served upon him at the instance of the Earl of Moray on 18th June 1891.

The facts which led to the application were as follows—The complainer was a travelling grocer, and since Whitsunday 1878 he had been in occupation, as a tenant from year to year, of certain subjects belonging to the respondent, situated in the village called Crook of Alves. He paid a rent of £3 per annum. The subjects consisted of a dwelling-house, stable, pig-house, sheds, a piece of garden ground, and a field surrounding the garden. The whole subjects embraced an area of three quarters of an acre, of which the field occupied about half an acre, and the remaining quarter of an acre was taken up by the house and garden, The complainer lived in the house, kept his horse in the stable, and his van in one of the sheds. Prior to 1884 the field had been occasionally cropped, but since that year the complainer had kept it in permanent pasture. He grazed his horse in the field, and sometimes cut the grass to make hay for it. The value of the land apart from the house was estimated at 15s. a-year.

On 5th November 1890 a summons of removing at the instance of the respondent was brought against the complainer in the Sheriff Court at Elgin; and on 20th November the Sheriff, in respect of no appearance having been entered for the complainer, pronounced decree of removing. The decree was in the form prescribed by the Act of Sederunt of 27th January 1830, and decerned the complainer to remove at Whitsunday 1891, and ordained the officers to charge the complainer to remove at the said term "if the charge to remove be given forty-eight hours before that term, or within forty-eight hours after the charge in case the same is not given forty-eight hours before that term, under pain of ejection." The complainer did not remove at Whitsunday 1891, and accordingly in pursuance of the decree he was on 18th June charged to remove on pain of ejection within forty-eight hours. He thereupon presented this note of suspension to stop the process of ejection.

The complainer pleaded—"(1) The said decree and charge are inept and invalid, and ought to be suspended and set aside, with expenses, for these reasons—(*c*) Assuming the validity of the decree, the petitioner allowed his remedy thereunder to lapse: (*d*) The complainer being tenant of a holding in the sense of the Agricultural Holdings Act 1883 (46 and 47 Vict. cap. 62), got no notice in terms of section 28 thereof."

Section 35 of the Agricultural Holdings Act 1883 provides—"Nothing in this Act shall apply to a holding that is not either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral, or in whole or in part cultivated as a market garden, or to any holding let to the tenant during his continuance in any office, appointment, or employment of the landlord."

On 16th December 1891 the Lord Ordinary (KYLLACHY), after a proof, repelled the reasons of suspension, found the charge orderly proceeded, and decerned, &c.

"*Opinion.*— . . . The first question the complainer raises is this, and Mr Watt stated it very distinctly. He said that although the charge was in conformity with the decree, yet it came too late, because while the decree authorised a charge either before or after the term of removal, yet that merely permitted a latitude of a day or two beyond the term, and did not authorise the postponement of the charge for a period of three weeks. In other words, the term being allowed to pass, and three weeks after it being allowed to pass, the tenant was entitled to assume that the decree was passed from, and he was to be allowed to remain in possession for another year. That is the first point. Now, I say nothing against the argument that a decree of removal may be passed from. It may well be that if the charge under such a decree is delayed for a lengthened period beyond the term of removal the tenant is entitled to infer that he is to remain in possession for another year. But this case does not seem to me to raise any question of that kind. Three weeks is certainly not an undue period for the necessary steps to be taken, and for the decree to be put in force, and therefore I am not prepared to hold that there was any undue delay in enforcing the charge, or that there has been anything so far irregular in the proceedings.

"But then the complainer takes this second point; and he says rightly it is a point of more general importance. He contends that this is a subject to which the Agricultural Holdings Act of 1883 applies, and he maintains that, assuming that the Act did apply, he did not have the statutory warning. Now, it is admitted that if the Agricultural Holdings Act applied, the warning was not sufficient. It was sufficient in point of time, because it was given fully six months before the term of removal, but it was given, it is said, not in the statutory form prescribed by the Act, but in the form of a summons of removal, and therefore the question comes to be, whether the Agricultural Holdings Act applies to subjects of this description? Now, I am of opinion that it does not. I consider that the Agricultural Holdings Act, by the 35th section, excludes from its

operation holdings of this description. This is not a subject which, in my opinion, is either wholly agricultural or wholly pastoral, or partly agricultural and partly pastoral. To the extent of a third of its area it is occupied by this travelling grocer as a dwelling-house and garden, and it is, I think, impossible to contend that the house and garden are here, as in the case of an ordinary farm, mere adjuncts or accessories of an agricultural or pastoral subject. On the contrary, it is, I should say, clear that the field or park, or whatever it may be called, is a mere adjunct or accessory of the house; and that being so, the house is the principal subject, and it cannot by any stretch of construction be held to be an agricultural or pastoral subject within the meaning of the Agricultural Holdings Act. In short, I think this case is *a fortiori* of the case of *Lovat* v. *Mackintosh*, decided in 1886, and I therefore refuse the note of suspension, with expenses."

The complainer reclaimed, and argued—1. The respondent having failed to put his decree in force until 18th June, had allowed his remedy to lapse and tacit relocation to operate—*Robertson & Company* v. *Drysdale*, February 21, 1834, 12 S. 477. 2. The subjects occupied by the complainer fell within the scope of the Agricultural Holdings Act—*vide* section 42—and as it was admitted that the complainer had not received warning in the form prescribed by that Act, the respondent was not entitled to remove him—*Mackintosh* v. *Lovat*, December 18, 1886, 14 R. 282.

Counsel for the respondent were not called upon.

At advising—

LORD PRESIDENT—I cannot say that I entertain any doubt on the questions in this case. I agree on both points with the Lord Ordinary.

On the first point his Lordship observes—"I say nothing against the argument that a decree of removal may be departed from." With that I agree. I can figure cases in which the lapse of time between the granting of the decree and its enforcement was so great as to give rise to a presumption of waiver on the part of the landlord requiring to be rebutted by explanation. I can also figure cases where the lapse of time, and the fact that the tenant had acted in the belief, created by the landlord's delay, that he was to be allowed to remain on his holding, would present a composite case giving rise to a plea of bar against the landlord if he attempted to enforce his decree. But if we were to decide in favour of the complainer in this case, our decision would necessarily be taken as meaning that in all cases unless a decree ordering a tenant to remove at the Whitsunday term was put in force before the 18th June, the landlord must be held to have waived his right to enforce it. I am not prepared to be a party to such a decision. I think it is unwarranted by authority, and would be injurious in its effect on tenants against whom decree of removal had been obtained, as it would close the door to any indulgence being granted them by their landlords.

As regards the question whether the Agricultural Holdings Act applies to such a holding as the complainer's, the Lord Ordinary has dealt with that question thus—"This is not a subject which, in my opinion, is either wholly agricultural or wholly pastoral, or partly agricultural and partly pastoral. To the extent of a third of its area it is occupied by this travelling grocer as a dwelling-house and garden, and it is, I think, impossible to contend that the house and garden are here, as in the case of an ordinary farm, mere adjuncts or accessories of an agricultural or pastoral subject. On the contrary, it is, I should say, clear that the field or park, or whatever it may be called, is a mere adjunct or accessory of the house; and that being so, the house is the principal subject, and it cannot by any stretch of construction be held to be an agricultural subject within the meaning of the Agricultural Holdings Act. In short, I think this case is *a fortiori* of the case of *Lovat* v. *Mackintosh*, decided in 1886." These sentences express my views so accurately and comprehensively that I propose to add only one observation. Mr Watt asked whether the size of a holding could be held to affect the question whether it was a subject within the meaning of the Agricultural Holdings Act? My answer is—Yes, if the size of the holding bears so small a proportion to the size of the house that the land is an adjunct or accessory of the house. Then the legal quality of the holding is determined, and it is seen that the subject is not wholly agricultural or wholly pastoral, or partly agricultural and partly pastoral.

LORD ADAM concurred.

LORD KINNEAR—I am of the same opinion. The complainer puts his case upon tacit relocation, but tacit relocation operates only where neither party has given notice within forty days of the stipulated termination of the lease that he means to take advantage of that termination. It has no application here unless it can be said that the landlord departed from the right which his decree gave him, in such a way as to indicate that he meant to allow the tenant to remain in his holding for another year. The only circumstance upon which the plea is founded is, that instead of putting his decree into force immediately on the arrival of the term, which might have been an extremely harsh proceeding, he delayed doing so until 18th June. If it had been said that the tenant had been induced by this delay, after the date at which he was ordained to remove had passed, to expend money or labour upon the cultivation of the land, and therefore that his position had been altered to his prejudice by the landlord's delay, one could have understood that there might have been some ground for the contention that the landlord had lost the right to enforce his decree. But there is no allegation that the tenant did anything whatever in the belief that the decree was not to be en-

forced. All that is relied on is the mere lapse of time. I agree that it is possible to imagine cases where the delay might be long enough to ground a plea of bar, but it is quite out of the question to maintain such a plea in the present case.

I agree also on the second question. We are asked to consider this point on the assumption that both parties are agreed that the decree of removing is not good if the subject occupied by the complainer falls under the provisions of the Agricultural Holdings Act, in respect that warning was not given in the form prescribed by the statute. I desire to reserve my opinion on that point. It is unnecessary to consider it, because I think the Agricultural Holdings Act inapplicable for the reasons stated by your Lordship and by the Lord Ordinary.

LORD M'LAREN was absent.

The Court adhered.

Counsel for the Complainer — C. N. Johnston—Crabb Watt. Agent—Charles Garrow, Solicitor.

Counsel for the Respondent — Æneas Mackay—C. K. Mackenzie. Agents—Melville & Lindesay, W.S.

Wednesday, January 27.

SECOND DIVISION.

[Sheriff of the Lothians.

MIDDLETON (HEWAT'S MARRIAGE-CONTRACT TRUSTEE) *v.* SMITH.

Trust—Antenuptial Contract of Marriage—Sale of Subjects Conveyed to Marriage-Contract Trustees—Bona fides.

By antenuptial contract of marriage the intending husband disponed to trustees—"(Third) All and sundry the whole household furniture, . . . pictures, and other effects of every description in his house" for the purposes mentioned in the deed. After the marriage the husband fell into financial difficulties, and obtained a guarantee for the payment of a certain instalment to his creditors. In security he assigned to the guarantor, *inter alia*, certain pictures, of which six were in the house at the time of the marriage, and were conveyed to the marriage-contract trustees. The guarantor sold the pictures by public roup.

The sole surviving marriage-contract trustee sued the guarantor for recovery of the pictures or their value. It was proved that the guarantor knew that the marriage-contract conveyed the furniture to the trustees, but it did not appear that he knew that the pictures, or at least the pictures assigned to him, had been conveyed to the trustees.

Held that the pictures sued for had been acquired for value and in good faith, and the defender *assoilzied.*

By antenuptial contract of marriage of date 3rd December 1883, between Richard George Hewat and Harriet Aitken Middleton, Hewat disponed to trustees named therein a house in Portobello, a policy of insurance for £400, and (3) "All and sundry the whole household furniture, silver plate, bed and table linen, books, pictures, and other effects of every description in his house at Bellfield, Portobello," for the liferent use of the spouses, and payment of the estate conveyed to the children of the marriage on the death of the last survivor. In 1890 Hewat's circumstances became embarrassed, and a composition of 7s. 6d. in the £ was accepted by his creditors. This composition was payable in three instalments, and William Carruthers Smith became cautioner for payment of the last instalment on condition of receiving security. Security was given in the form of a sum in cash, a quantity of tea, and 48 pictures. Among the pictures were six which it was admitted were in Hewat's house at the time the contract of marriage was executed, and which remained in his house after his marriage. In order to recoup himself for the loss sustained in paying the last instalment of Hewat's debts Smith sold the pictures by public roup, including five of the said six pictures. Thereafter James Middleton, M.D., the sole surviving trustee under the marriage-contract trust, raised an action in the Edinburgh Sheriff Court to have Smith ordained to deliver up the six pictures referred to, or to pay £250 as their price. He averred—"These pictures were in Bellfield House at and prior to the execution of the said contract of marriage, and had been conveyed to the said trustees by and in virtue of the said contract of marriage. The conveyance of the pictures to the guarantor was done without communicating the fact to the pursuer, the only trustee in this country except the defender's said son. In carrying out this illegal arrangement the said pictures were removed and placed in the defender's hands. The defender knew of the existence and terms of the said marriage-contract."

The defender averred—"He got as security a sum in cash, a certain lot of teas, and a number of paintings, including those sued for. Explained that the defender was not aware that the pictures were affected by the said marriage-contract. Explained further that Mr Hewat was very anxious that the defender should undertake the obligation for the last instalment of his composition, and the said pictures were removed from Bellfield House to Dowell's by the said Richard George Hewat, and the defender got possession of the pictures in Dowell's Rooms in George Street, Edinburgh, in March 1890, conform to agreement between the defender and Mr Hewat, dated 21st and 26th days of March 1890. The defender was not aware of the terms of the said marriage-contract, and he had no communication with his son (at that time one of the trustees) on the subject."

The pursuer pleaded—"(1) The pictures in question being the property of the trust,