any person refuses to pay any assessment, it is enacted that "the collector may make an attestation in writing setting forth that the said person has failed to pay such assessment, or any portion thereof, notwithstanding the same has been demanded from him by the said collector by a printed notice delivered to or left for him on the premises in respect of which such assessment is made; and such attestation being made, it shall be lawful for the collector to make application to the Sheriff, or to any one of the magistrates of police or other magistrates of the burgh, who upon such application, and production therewith of such attestation, shall grant summary warrant;" and so forth. Now, no doubt the printed notice there referred to is mentioned only in reference to the application for a summary warrant; but I think it is assumed in that enactment that a notice has been served before any steps are taken for recovering the assessment. It is said, however, that the after part of the clause, which provides that "nothing herein contained shall prejudice the right of the collector at any time after the said assessment shall be payable to prosecute . . . . by any other legal form of proceedings," makes no provision for service of such a notice. But it would be an extraordinary contention to hold that it is required in one instance and not in the other. I think it is all the other way. Every action for recovery of a debt is necessarily preceded by a demand. No man raises an action for payment of an account which he has not rendered. This is so in every case of the kind, and the summons bears, as part of the final averment, that the pursuer has frequently desired and required payment of his debt in vain. And this action having been brought into Court without such previous demand is the cause of this litigation, for I think we are bound to assume that the pursuers' demand for £34, 6s. 8d. would have been met extra-judicially, as it has been met judicially, by an offer of £25, and that the collector would have accepted that offer, as he has now done. I am therefore of opinion that the whole expense of raising this action has been caused by the failure of the collector to demand payment of this sum of £34, 6s. 8d. before bringing his summons into Court.

Lord Mure concurred.

Lord Shand—The record in this action was closed on 19th October 1880, and on the 21st a minute accepting defender's tender was put in by the pursuers. At that time, therefore, the parties certainly had no further litigation in view, and the whole subsequent dispute has been about expenses. In addition to the passages from the record referred to by your Lordship, I find the defender pleads—"The defender being willing to pay the assessments truly due by her, on demand being made for them, and on an account rendered showing details, the present action was premature and unnecessary, and ought to be dismissed with expenses. The defender ought to be found entitled to expenses, in respect that (1) the sum tendered is more than is really due, and (2) that no litigation would have been required had the pursuers rendered an account and afforded reasonable information regarding their claim." Now, agreeing with your Lordship, I cannot doubt that the question of expenses having been thus raised, and the action instituted without an extra-judicial demand for payment, the pursuers ought to have met the defender's allegation of want of notice in some way, and that it is not met by their general statement that "the defender has been repeatedly desired and required to make payment." And though this ought to have been done upon record, yet I think the pursuers were not precluded from stating anything of the sort at the discussion. But what has happened here? The defender says she had no notice, and that if she had she would have paid what was right. The pursuers' answer was to have produced their notice, and we asked about the matter, but no such notice has been laid before the Court. The argument for the pursuers on this matter of expenses was rested first on their substantial success. But I think that has no bearing on the matter. If a creditor sues me, and I say, "There is your money, but you gave me no notice," is that substantial success on his part? He would have got his money without raising a summons. The pursuers' next point was that certain letters which were produced were equivalent to notice. But I think they had nothing to do with this claim, and in no way amounted to notice. I am clearly of opinion that when a debt of money is demanded, and the defender is not first told how much is asked of him, and when it is to be paid, but a summons is raised at once, and the pursuers then ask expenses, the defender is entitled to expenses, and not the pursuer.

The Court recalled the Lord Ordinary's interlocutor in so far as it found the defender liable in expenses, and in place thereof found the pursuers liable in expenses. *Quoad ultra* adhered, with additional expenses to the defender.

Counsel for Pursuers (Respondents)—Trayner—Harper. Agents—J. Campbell Irons & Co., S.S.C.

Counsel for Defender (Reclaimer)—J. C. Smith. Agent—Daniel Turner, S.L.

Friday, February 18.

SECOND DIVISION.

[Sheriff of Perthshire.

LOWSON *v.* ROSS.

Landlord and Tenant—Removing—Accessory held on Lease with Different Ish from Principal.

A tenant held from the same landlord on separate leases a country house, the lease of which expired at Whitsunday 1881, and an adjoining cottage, used as a coachman's house and laundry, the lease of which expired at Martinmas 1880. In an action to remove the tenant from the cottage, *held*, on the terms of a correspondence between the parties, that an offer accepted by the tenant, and bearing to refer to the dwelling-house only, to "extend the existing lease for one year—say to Whitsunday 1882—the tenure to be in every respect the same as previously," referred to the whole subjects as then possessed, and not to the dwelling-

house only, and the defender assoilzied accordingly.

Lord Young *diss.* on the terms of the correspondence, and holding that an offer limited by its terms to a subject held under one lease, could not be read as applying by implication to another subject held on a different lease with a different ish.

This was an action of removing at the instance of William Lowson of Balthayock, in the county of Perth, against Mrs Ross, tenant of certain subjects belonging to the pursuer. The subjects were (1) Westwood Cottage, with the small flower-garden thereto belonging, which the defender held on a twenty-one years' lease expiring at Whitsunday 1881. (2) An orchard held originally on a seven years' lease which expired at Whitsunday 1865, but had since been renewed by tacit relocation. This orchard adjoined Westwood, and was used as a kitchen-garden, and contained a house in which the gardener resided. (3) A cottage of the annual value of £4, 10s., known as Hay's Cottage, and situated near, but not actually adjoining, Westwood. Along with this cottage Mrs Ross held, in virtue of an agreement with Mr Lowson, a right of pasture in a plantation near to Hay's Cottage. Hay's Cottage was held under a written lease expiring at Martinmas 1880. It had been used by Mrs Ross as her coachman's house, there being no accommodation at the stables at Westwood for a coachman, and a part of it had also been used as a laundry and washing-house. The whole subjects had been occupied together as a country residence by Mrs Ross. On 2d January 1880 Mrs Ross wrote to Mr Lowson on the subject of her tenancy as follows— . . . "I learn from Westwood that a great many trees have been blown down, and also the fence which we put up round the stable-yard, and that round the garden. This makes me somewhat hasten writing to you on the subject of Westwood, tho' in any case I should have done so soon, as the present lease expires at Whitsunday 1881, and it may be convenient for both parties to know whether it is to be renewed or not. I should certainly wish and hope to do so, if we can arrange terms, but in any new lease it would be indispensable to have other stables, and to have the cottage thatch renewed. Any smaller matters I need not enter on until I hear what are your views about the place. I do not conceal from you how attached we all are to the little spot, and what special associations it has for us, but I believe your knowledge of this will make you none the less inclined to deal favourably by us." It was not disputed by either party to this case that the "cottage thatch" referred to in this letter meant the thatch of Westwood. On 6th January Mr Lowson made this answer— . . . "I was aware the lease of the cottage expired in May 1881. I would gladly have negociated at once for a renewal of your lease, for with no family could we have had more pleasant intercourse than with your good selves. But I may mention in confidence, a near relative meanwhile proposes, if all's well, to take the cottage, and I could not let it past him. Certain circumstances may by next year interfere with his present views. Should anything do so, and you have not in the interim fixed with any other country place, we would, I have little doubt, be able to arrange a short lease to our mutual satisfaction." . . . Mrs Ross replied to this letter on 13th January, saying—"When I last wrote to you I never for a moment imagined there was anything but a question of terms between us, so much was I under the impression there was to be no disturbance in our tenancy of Westwood." She then went on to refer to her great aversion to leave the place. Mr Lowson on 17th January made this reply—"When I last wrote you, altho' I felt if you had to leave Westwood it might be a disappointment, I confess I was unprepared for the strong expression of feeling manifested in your last kind note. In your previous communication there were certain things which you stipulated for as 'indispensable' before any new lease could be entered into. These were perfectly reasonable as betwixt landlord and tenant. At the same time, it did not enter into my mind then that you were dealing with the renewal other than very much as a matter of business. It is right to explain all this, for I would be very sorry if you imagined other than very strong reasons, altogether apart from an ordinary tenancy, induced me to write confidentially to you in the way I did. I fear I can say nothing more definite than in my last as to the future of Westwood, and I would only mislead if I induced you to believe that anything conclusive for months could be communicated." On 10th June he wrote this letter — "Referring to our correspondence in the end of last year regarding the renewal of a lease of Westwood Cottage and grounds, I am now in a position to offer to extend the existing lease for one year—say to Whitsunday 1882—the tenure to be in every respect the same as previously. I regret I cannot propose at the present time any further extension of the existing arrangement, for reasons I need not trouble you with, but you may rest assured, as explained in former letters, I shall not lightly sever our present relations, which have been to me always of such a pleasant character." On 12th June Mrs Ross wrote saying—"I gladly accept your offer that my present lease should be prolonged for a year from Whitsunday next." In this letter she expressed a desire to purchase Westwood if at any time Mr Lowson should be disposed to sell it. Mr Lowson replied saying—"I am glad you are fixed at Westwood to 1882." On 23d August he wrote again announcing the approaching marriage of his son, and stating his intention to hand over Westwood for his son's residence. In this letter he said—"Knowing well that you would be anxious to hear in early summer whether the present tenancy could be prolonged. . . . I wrote perhaps a little early agreeing to another year's occupation on the same terms as before." He then asked to be allowed to cancel the letter of 10th June above quoted, and offered to abate the rent for the term then current in consideration of his son's getting possession in November 1880 for the purpose of making certain repairs. On the same day Mrs Ross replied stating her willingness to oblige Mr Lowson in the matter, but that she saw little prospect of being able to release him from the engagement of 10th June. On 3d September Mr Lowson wrote —"I intend resuming possession of the orchard and Orchard Cottage at Martinmas first, and beg to give you notice to that effect. I have also to remind you that the lease of Hay's Cottage and garden in favour of your late husband expires at

Martinmas 1880, and as my present intention is to unroof and improve this cottage in early spring, I do not propose to extend your tenancy beyond Martinmas. Please consider the above as formal notice, and in acknowledging this letter, be good enough, as a matter of business, to state that you undertake that your servants will peaceably remove from the cottages referred to on the 11th November. This to prevent any chance of unpleasant difference with them." Mrs Ross, and subsequently her solicitors on her behalf, replied stating that her construction of the letter of the 10th June was that the tenancy of the whole subjects, including both the orchard and Hay's Cottage as well as Westwood, had been extended to Whitsunday 1882. She offered, however, to give up Hay's Cottage, though at great inconvenience, on condition that Mr Lowson should purchase certain fixtures contained in it at a valuation.

Mr Lowson then brought this action in the Sheriff Court of Perthshire to have Mrs Ross removed from Hay's Cottage and from the privilege of pasture in the plantation.

The Sheriff-Substitute (Barclay) found that (1) the defender's lease of Hay's Cottage expired at Martinmas 1880; (2) "That nothing has followed between the parties whereby a prolongation of the said lease has been definitely and legally fixed and determined to entitle the defender to possess for a year or any longer period than that stipulated in the lease." He therefore granted decree of removing. In his note he said, with regard to the correspondence above quoted, —"There appears some difficulty in reading the correspondence between the parties. It would rather appear that the pursuer had only in view the lease of the house or cottage of Westwood, whilst the defender understood that the correspondence applied to the whole three separate possessions. It was unfortunate, however, that the pursuer had not more distinctly excepted Hay's Cottage. But be that as it may, it is impossible to hold that there existed a legal prolongation of the combined leases for another year after the longest term of endurance."

The Sheriff (Macdonald) on appeal recalled this interlocutor, and found that "by the letters of 10th and 12th June an agreement was entered into between the parties whereby the defender should become the tenant of the pursuer in the subjects foresaid" (Westwood, the orchard, and Hay's Cottage) "till Whitsunday 1882." In his note, after narrating the facts, he said—"In these circumstances a correspondence was opened in the commencement of 1880, by the defender, with a view to ascertain whether she could hope to be allowed to continue at Westwood. The correspondence indicates the most perfect feeling of mutual confidence between the parties, and that they were negotiating on the most friendly footing. The pursuer at first indicated that he might not be able to oblige the defender, as a near relative proposed to take 'the cottage.' But after some further correspondence the pursuer wrote on 10th June offering to 'extend the existing lease for one year, say to Whitsunday 1882, the tenure to be in every respect the same as formerly;' and on 12th June the defender wrote accepting.

"It was admitted at the debate that the pursuer, in speaking of his possibly requiring the defender to give up 'the cottage,' meant her to understand her whole holding, including the orchard and the subject now in dispute; but it was contended that although he did so understand, and was intended so to understand, still the exact words of the letter of 10th June implied an offer only as regarded the cottage, and not as regarded the orchard or Hay's Cottage, and that therefore, although an agreement for a lease of the cottage was constituted, the pursuer is entitled to remove the defender from the orchard and Hay's Cottage before the time specified in the letters constituting the agreement. The pursuer's procurator at the debate declined to say for his client that such was the construction he intended the defender to put upon his offer, or that he could expect her to put that construction upon it in the light of their previous correspondence and his own knowledge of the use to which the orchard and Hay's Cottage was put. He based his case entirely upon a strict and literal reading of the letter of 10th June, and maintained that no other documents could be looked at in ascertaining what the parties intended to include in their agreement. The Sheriff is unable to give effect to this contention. The pursuer's own letter refers to the previous correspondence, and the words 'the tenure in every respect to be the same as formerly' makes reference to other sources of information indispensable.

"Taking the letters of 10th and 12th June along with the other documents in the process, the Sheriff has no doubt whatever that the pursuer understood perfectly that the defender wished her whole occupancy to be prolonged, that the correspondence proceeded on that footing on both sides, and that the proposal to turn the defender out of a part now is the result of an afterthought.

"The pursuer seems to have been desirous that the defender should give up her rights under the agreement contained in the letters of 10th and 12th June; but upon the defender explaining that although she would use every effort to get another residence, she could not absolutely undertake to oblige him, he at once changed his tone, and wrote her a letter in which all the old cordiality was awanting, and gave her notice to quit both the orchard and Hay's Cottage. Thereupon the defender consulted her agents, who wrote a most temperate and conciliatory letter, pointing out that the bargain, in the view of both parties at the time, applied to the whole subjects, but offering notwithstanding to give up Hay's Cottage if the pursuer would take over the articles in it at a valuation, as she could not have a sale of these few articles. The pursuer seems, however, to have resolved to exact whatever the letter of his agreement would allow of, and raised this action. The Sheriff is of opinion that had the question between the parties been, what conditions were to be inserted in a formal lease to carry out the agreement of 10th and 12th June, that the defender would have been in a position to insist that the agreement applied to her entire holding, and that therefore the pursuer is not entitled to remove her from part of it."

The pursuer appealed to the Second Division of the Court of Session, and argued—The letter of 10th June could as matter of law refer only to Westwood, the prorogation of the lease of which

for one year would extend it to "Whitsunday 1882," and not to Hay's Cottage, which had a different ish. The effect of the defender's construction was to extend the lease of Hay's Cottage, which expired at Martinmas 1880, not for one year, but for eighteen months. Further, it was the pursuer's intention only to extend the lease of Westwood, and a fair reading of the correspondence showed that.

The respondent answered—The meaning of the letters plainly was that the parties agreed that the whole subjects, as they had been long occupied, were to be let to the defender till Whitsunday 1882. Westwood, as the pursuer well knew, was not capable of comfortable occupation without the use of Hay's Cottage, and the intention was to continue the previous possession.

At advising—

Lord Justice-Clerk—This is not a dispute on a matter of very great value, and it is rather to be lamented that the parties should now be taking our judgment on what might have been reasonably settled without it.

It appears that the defender has been in occupation of the three subjects which have been referred to for a number of years—of Westwood since 1854, of the other two subjects since 1858. The leases on which they were held (for they were held on separate leases) have separate periods of termination. The main subject of occupation was the cottage of Westwood with the flower garden attached to it, and then there was the garden lying to the east, and thirdly there was Hay's Cottage, occupied by the defender's coachman, the whole three making one subject of occupation, and the two smaller subjects appearing essential to the comfort and convenience of those inhabiting Westwood.

That being so, the leases were on the eve of expiry, and while the lease of Hay's Cottage expired at Martinmas 1880, the lease of the main subject went on till Whitsunday 1881. The parties being aware that the leases were on the eve of expiry, the tenant writes the letter of 2d January 1880, in which she says—"This makes me somewhat hasten writing to you on the subject of Westwood, tho' in any case I should have done so soon, as the present lease expires at Whitsunday 1881, and it may be convenient for both parties to know whether it is to be renewed or not. I should certainly wish and hope to do so, if we can arrange terms, but in any new lease it would be indispensable to have other stables, and to have the cottage thatch renewed. Any smaller matters I need not enter on until I hear what are your views about the place. I do not conceal from you how attached we are all to the little spot, and what special associations it has for us, but I believe your knowledge of this will make you none the less inclined to deal favourably by us." I think it not conceivable, looking to the terms of that letter, that the writer of it meant anything else than a negotiation with regard to the whole combined subject. Mr Lowson, the landlord, answers thus on 6th January—"I was aware the lease of the cottage expired in May 1881. I would gladly have negotiated at once for a renewal of your lease, for with no family could we have had more pleasant intercourse than with your good selves. But I may mention in confidence a near relative meanwhile proposes, if all's well, to take the cottage, and I could not let it past him. Certain circumstances may by next year interfere with his present views. Should anything do so, and you have not in the interim fixed with any other country place, we would, I have little doubt, be able to arrange a short lease to our mutual satisfaction." I attach importance to that letter, because it indicates that the tenant would not be disturbed in her present occupation but for the intention of a near relation of the landlord to take the cottage. If Mr Lowson had meant that the "short lease" of which he spoke should be a short lease without Hay's Cottage, I think he would have made it clear that he did not intend Hay's Cottage to be included.

Then comes the letter of 13th January, in which the tenant writes—"When I last wrote you, I never for a moment imagined that there was anything but a question of terms between us, so much was I under the impression there was to be no disturbance in our tenancy of Westwood." There could be no greater "disturbance" than the taking away of the means of comfort and convenience enjoyed by the tenant. In answer Mr Lowson writes—"I fear I can say nothing more definite than in my last with regard to the future of Westwood;" and then on 10th June he writes—"Referring to our correspondence in the end of last year regarding the renewal of a lease of Westwood Cottage and grounds, I am now in a position to offer to extend the existing lease for one year—say to Whitsunday 1882—the tenure to be in every respect the same as previously. I regret I cannot propose at the present time any further extension of the existing arrangement, for reasons I need not trouble you with, but you may rest assured, as explained in former letters, I shall not lightly sever our present relations, which have been to me always of such a pleasant character." Both landlord and tenant I think, in letters I have quoted, referred to the whole possession, and the mere fact that the small piece of ground on which Hay's Cottage is situated was held on a different tenancy cannot affect that fact.

I do not wish to be dogmatic on a matter admitting of two views being taken, but in my opinion there is no reasonable ground on which to hold that either party was bargaining with respect to the cottage and not with respect to its accessories. I think, therefore, that we should affirm the judgment of the Sheriff.

Lord Young—This is an action of removing relating to a cottage rented at £4, 10s. per annum, and which the owner says is in so ruinous a state that he is desirous to pull it down. It is held under a written lease which terminated at Martinmas 1880. That lease refers to it alone. The ground of the removing is that the lease is not renewed, and that the tenant is bound to remove at the ish therein specified. The answer made is that the lease has been extended from that ish Martinmas 1880, when according to the deed it terminates, for a year and a-half beyond, viz., till Whitsunday 1882. It is that dispute we have to decide. It depends on the construction to be put upon two letters dated 10th and 12th June 1880, although it is competent, if they are ambiguous in their terms, to refer to the whole correspondence. It is by these letters that the defender's right is continued beyond Martinmas

1880, if continued at all. Now, to understand these letters we must note the fact that the defender held jointly three different subjects—not inseparable, for they were once held separately—which she came to possess at different times. They were held by different leases, expiring at different times. The first is Westwood, which she holds by a nineteen years' lease expiring at Whitsunday 1881. The second is the orchard, held originally on a seven years' lease, which since its expiry has been renewed by tacit relocation. In familiar though not accurate language, she held the orchard as tenant at will, and she might give it up, or the landlord might resume it, at any Whitsunday. For many years, therefore, the orchard might by either party have been separated from the possession of Westwood Cottage and garden. The third subject was held under a third lease—a lease enduring nineteen years, and with a different ish. It expired at Martinmas 1880.

These leases were originally granted to the defender's husband. She opened a correspondence with the landlord, in which she expressed a desire to continue in possession of Westwood. There is nothing in that correspondence to show that she also desired to continue to have Hay's Cottage and grounds. It might rather, indeed, have been inferred that she wished to be rid of it, for it was used as an inconvenient makeshift rendered necessary by the absence of accommodation for the coachman at the stables, and it is not convenient that the coachman should reside several hundred yards from the stables. And so it is not surprising that the defender says in this correspondence that the stable accommodation is insufficient. One inconvenience to which she refers must be the fact of the coachman living in Hay's Cottage. I should have thought it likely, if her views on that matter had been met, that she would have said she had no more use for Hay's Cottage, but with that exception (which is the reverse of indicating any desire to retain Hay's Cottage) I do not gather anything on the subject from the correspondence. In the first letter we have here—that of 2d January 1880—she asks a renewal of tenure of Westwood—"This makes me somewhat hasten writing to you on the subject of Westwood, tho' in any case I should have done so soon, as the present lease expires at Whitsunday 1881." What lease expired at Whitsunday 1881. That of the orchard? No. It was held from year to year by tacit relocation. That of Hay's Cottage? No. It expired at Martinmas 1880. It is the principal subject she confines herself to in the words she uses. I cannot read her words as having reference either to the orchard or Hay's Cottage. I asked the defender's counsel how language which exactly fits Westwood and nothing else came to be used if the defender meant to refer to the other subjects, and he said she must have forgot the exact period of termination of the lease of Hay's Cottage. I cannot assume that. "It may be convenient," she says, "for both parties to know whether it is to be renewed or not." It is the lease which ends at Whitsunday 1881 she says it would be convenient to know about. Then comes the passage in which she says that in any new lease there must be other stables. From beginning to end of the letter there is not a syllable to indicate that Hay's Cottage was in any way referred to, or any lease which expired at Martinmas 1880. The same may be said of the other letters. All refer to the lease of Westwood Cottage, which expired at Whitsunday 1881. Then comes the decisive letter of the pursuer on 10th June 1880, in which he says—"Referring to our correspondence in the end of last year regarding the renewal of a lease of Westwood Cottage and grounds, I am now in a position to offer to extend the existing lease for one year—say to Whitsunday 1882—the tenure to be in every respect the same as formerly." The proposal of the defender is to read into those words an offer to grant a lease of the orchard from Whitsunday 1881 to Whitsunday 1882, and a lease of Hay's Cottage for one and a-half years from Martinmas 1880 to Whitsunday 1882. Write in these words and you have what the defender says the letters mean. We have no warrant to do that.

I am therefore of opinion that the letter of 10th June refers to the lease it exactly describes, and to the subject therein contained, and that it cannot be understood to refer to a subject not in question in it at all. And I am confirmed in this opinion by the answer of 12th June, for in it also the language applies to Westwood, and has not the remotest application to Hay's Cottage. I agree therefore with the result at which the Sheriff-Substitute arrived.

Lord Craighill concurred with the Lord Justice-Clerk.

The Court affirmed the judgment of the Sheriff.

Counsel for Appellant—Guthrie Smith—J. P. B. Robertson. Agents—Wotherspoon & Mack, S.S.C.

Counsel for Respondent—Kinnear—Murray. Agents—Maconochie & Hare, W.S.

Friday, February 18.

FIRST DIVISION.

[Lord Lee, Ordinary.

BLACK AND ANOTHER *v.* MASON.

Prescription—Minority—Verus dominus.

An estate was conveyed to a father in liferent and the heirs of his body in fee. He died before either of his two daughters, who succeeded him in that character, attained majority. In an action at their instance to have it declared that a road which passed through the estate had not been a public road for the forty years necessary to found prescription—*held* that in reckoning the prescriptive period the minority of the pursuers could not be deducted except in so far as it was subsequent to their father's death, their position prior to that event not having been that of *verus dominus*.

Miss Jessie Black, Heatheryknowe House, in the parish of Old Monkland and county of Lanark, and her sister Mrs Agnes Black or Scott, heritable proprietors of the lands of Heatheryknowe and others, raised an action of declarator against Alexander Mason, farmer at Commonhead, to have it found and declared that there existed no public road for foot-passengers, carts, carriages,