Wednesday, February 3.

SECOND DIVISION.

ALLAN & MANN *v.* LANG.

Summary Procedure Act, sec. 28—Advocation—Proceedings of a Criminal Nature. Held that a conviction for a guild offence, punished by a fine with the alternative of imprisonment, was a proceeding of a criminal nature, and therefore excluded by the 28th section of the Summary Procedure Act from the review of the Court of Session in a process of advocation.

By the Glasgow Police Act 1866, the Dean of Guild has power to decern for any penalty due in respect of a guild offence, and grant warrant for imprisoning the party liable on failure to pay. By the same Act the Master of Works has power to require occupiers to remove or alter porches, signs, gates, fences, &c., &c., against or in front of their lands on or over any road or street, unless erected under a warrant of the Dean of Guild; and parties disobeying such requisition are guilty of a guild offence. Allan & Mann received a notice from the Master of Works to remove a fence and gate inclosing part of Victoria Street, Port-Eglinton, opposite a land on the north side thereof occupied by them. This they failed to obey, denying that the space inclosed was part of Victoria Street. The Dean of Guild, on a petition by the Procurator-Fiscal (LANG), found that the respondents had incurred a guild offence, modified the penalty to £5, granted warrant for imprisonment on failure to pay within fourteen days, and ordained the defenders to remove the obstructions complained of.

Allan & Mann advocated.

The respondent (petitioner in the Inferior Court) maintained the following pleas:—"(1) The advocation is incompetent. The proceedings are of a criminal nature, and all review thereof in this Court is excluded by the provisions of the Summary Procedure Act, 27 and 28 Vict., chap. 63, sec. 28, as well as at common law. (2) No jurisdiction, in respect the proceedings are of a criminal nature. (3) The advocation ought to be refused, in respect the judgments complained of are well founded, and that the advocators were guilty of the offence specified in the petition at the respondent's instance, having failed to remove the obstruction erected by them on the public street, all as set forth in the said petition."

FRASER and MACLEAN for advocators.

WATSON and SHAND for respondent.

The Court sustained the first plea in law of the respondent, and refused the advocation.

Agent for Advocators—John Galletly, S.S.C.

Agents for Respondent—Campbell & Smith, S.S.C.

Thursday, February 4.

FIRST DIVISION.

SCOTT *v.* M'MURDO.

Master and Servant—Dismissal—Term of Service—Coachman—Proof—Custom of the District—Reparation. Circumstances in which *held* that a servant had been justifiably dismissed for insolence, and that the master was entitled to turn him out of the cottage in which he had resided during the term of service.

A coachman is not presumed to be a yearly servant.

In the spring of 1867 Scott was engaged to become coachman to the defender, Admiral M'Murdo, from the then ensuing Whitsunday, his wages to be £45 with a free house and garden. Scott entered the defender's service at Whitsunday, and continued therein until Martinmas of the same year. He now sued the defender for damages, alleging that he had been engaged for a year, that he had been unjustifiably dismissed at the end of six months, and that, on Martinmas-day 1867, while he was absent from his dwelling-house, and his wife was outside, and the house was locked, the defender came with certain persons, broke into the house, and removed his, the pursuer's, furniture into the road, where it remained until the next day, the pursuer and his wife taking shelter for the night in a neighbour's house. The pursuer contended that, failing proof of the contract of service being stipulated for a year, that was the usual term of service for coachmen in the district.

The defender alleged that the contract of service had been for six months, that being the usual term of service in such cases; that the pursuer had, in consequence of insolent and abusive language on 28th August, been warned to leave his service at Martinmas; and that his furniture had been removed in order to make room for the incoming coachman.

After a proof, the Steward-substitute (DUNBAR) held the contract of service to have been lawfully dissolved at Martinmas, but gave £25 damages for forcible entry of the pursuer's house.

The Sheriff (HECTOR) recalled, and assoilzied the defender.

The pursuer appealed.

SCOTT and BRAND for appellant.

Solicitor-General (YOUNG) and J. MARSHALL for respondent.

At advising—

LORD DEAS, after narrating the claims of the pursuer and the answer made by the defender, said,—As to the alleged duration of the contract of service, I don't think the evidence of the other coachmen is of much importance. It is admitted that this was a special bargain. It was not a simple engagement, leaving the question of time open, so as to admit of construction by the custom of the district. But then it is said the pursuer, immediately after the engagement, told the terms of it to his friend Pringle. That evidence is of doubtful competency. It is a dangerous kind of evidence to admit, for it puts a great deal in the power of any one who wishes to make up a story. He would merely have to go away and tell somebody his version of what took place. But leaving the question of admissibility, which may be a question of circumstances, and assuming that we may look at this evidence, what is its value? I think its value is very little. It must be received with great caution, (1) because it puts so much in the power of a party to say immediately afterwards to some one else that the contract was what he wanted it to be; and (2) because the party to whom it is said may be very willing to understand the contract to be in a particular way, and to assist his friend in making it out as they wish. Here, assuming that the pursuer gave this account to his friend, I have difficulty in holding that to be much of a corroboration. Sometimes, in examining a witness, we have a feeling that he is not entirely trustworthy, and I have something of that feeling here. But except this there is no corroboration of the pursuer's evidence. On the other hand, the defender says the engage-

ment was half-yearly, to Martinmas 1867, and I think he is corroborated by the facts and circumstances of the case. I don't think it is probable that he took the pursuer for a year, knowing that he was then out of place, and being warned that he had better ask his former master about him. There is no probability that the pursuer was engaged for a year.

Then the defender got a letter from the pursuer on 25th August, saying, "I am quite disappointed in you not sending me the money, as we stand in need of it." The defender says he had agreed to pay the pursuer his wages quarterly, but I think this letter by the pursuer was quite uncalled for, seeing at this time no money was due. Then on 28th August, the defender says that on meeting the pursuer, "I remarked to him that I considered his letter of the 24th August was uncalled for. He answered, 'Have you come down here to make a fuss about a bit of money? I have served with gentlemen before, and could get money whenever I thought proper, and as much as I thought proper.' I said such should not be the case with me. He answered it was hard for a family to 'be kept out of their money.' I said my brother's coachman had a wife and child, and only got his wages in the half-year. Pursuer said, 'You are a liar, they get it every month.' I told him to desist from such language instantly. He said in reply, 'Who the hell are you; do you take me for a sailor?' He then said, 'I am ready to give up my place this moment; say the word and I will go away at once.'" I think the master was quite justified in dismissing the pursuer on the spot, or he might have told him to go at the next Martinmas, and there is nothing in that at all inconsistent with the defender understanding that the pursuer's engagement was only half-yearly, and liable to terminate at that term. It is said the master had no right to use the services of the servant up to the term; that he should have dismissed him at once. But it was a mutual advantage to let his service continue till the term. It might be awkward for a master to have his horses left suddenly without a coachman, and, on the other hand, a servant is more likely to get a new place if he leaves his old one at the term than between terms. Then the defender is corroborated by the evidence of Gracie, the gardener, as to the unjustifiable language used by the pursuer on 28th August.

The only other question is, whether the defender was entitled to turn the pursuer out of the house or cottage he then occupied. That is always a question of circumstances. This cottage was on his property; it belonged to him, and was apparently appropriated as a residence for the coachman and his family. According to the pursuer's own statement, he was told distinctly that he must leave, but he does not choose to attend to the notice. He says that on 27th November, he not being there, and his wife also not being in the cottage, the master got the door broken open, and put his furniture out upon the road. There was no turning out of the pursuer and his wife personally, and no allegation of personal violence. The other coachman and his wife had arrived, and it was necessary that they should be accommodated. It is simply a question whether, in the circumstances, the master was entitled to take possession of the house, so as to hand it over to the new coachman. I don't see anything wrong in his doing so, or at least anything so wrong as to entitle the servant to damages. He was not a tenant. If the place he occupied had been part of the mansion house, the matter would have been clear; and if he had insisted on staying, I don't know of any law that would have prevented him from being put out by a little gentle pressure. It was suggested that the pursuer might have got help so as to enable him to retain possession of the house; but if he had done so, he of course must have taken the consequences of being right or wrong. The case of *Scougal* doesn't at all resemble this.

LORD ARDMILLAN concurred. He held it to be settled that in the case of a coachman or other domestic servant, if there was no bargain, there was no presumption that the hiring was for a year. The case of farm servants and gardeners was different; in their case, and probably in the case of governesses, the presumption probably being for a yearly hiring. But in the present case that presumption did not exist, and the pursuer had failed to prove the existence of any prevailing custom which would support his contention.

LORD KINLOCH concurred.

The LORD PRESIDENT concurred.

Agent for Appellant—W. S. Stuart, S.S.C.

Agents for Respondents—Scott, Bruce, & Glover W.S.

Thursday, February 4.

ARTHUR *v.* METHVEN.

Lunatic—Poor—20 & 21 Vict., c. 71—Title to Sue—Consent—Recovery of Disbursements—Certificate—Sheriff. A parish believing itself to be the parish of settlement of a lunatic, made disbursements on his behalf, in the way of sending him to and maintaining him in a lunatic asylum. Finding that belief to be erroneous, it gave notice to the true parish of settlement, and sued for repayment of its disbursement for a year preceding the notice. *Held*, that the action was well founded, under section 76 of the Lunacy Act, qualified by the proviso at the end of section 78.

The certificate by the Sheriff, provided for in the 76th and other sections, is not an indispensable pre-requisite to an action for repayment of disbursements, but is a privilege to the party or parish disbursing.

Methven, inspector of poor of Monifieth, with consent and concurrence of Craig, inspector of poor of St Cuthbert's, brought this action against Arthur, inspector of poor of Forfar, for repayment to the first party of advances made by him on account of a pauper lunatic for one year preceding 28th March 1867, being the date of notice to the defender that the pauper had become chargeable on Monifieth.

It appeared that, in the end of February 1866, the lunatic was put into Morningside Asylum by the inspector of St Cuthbert's, in which parish she then was. It was believed that the lunatic had a settlement in Monifieth, which parish accordingly, on receiving notice from St Cuthbert's, admitted liability, paid for the lunatic, and removed her to Dundee Asylum. It became known that the lunatic's true parish of settlement was Forfar, and Forfar received notice from Monifieth in March 1867. This action was brought in September 1867. The 78th section of the Lunacy Act, 20 and 21 Vict. c. 71, was narrated, which enacts that—"If the