expended. The point was reported by Lord Mure and thus explained in his

"*Note.*—The Lord Ordinary has taken this case to report, upon the matter reserved in his interlocutor of the 14th of July last, because a question is involved of great importance in the application of the Act 11th and 12th Vict., cap. 36, which was under the consideration of the Court in the case of Hamilton, 11th March 1857. It is whether in charging an entailed estate under sections 16th and 18th of that Act, for mansion-house or other improvements of the nature contemplated by the Act 10th George III., but constituted under section 16th of the Act 11 and 12 Vict., the petitioner is tied down by the limitations of the Montgomery Act, as to the amount of expenditure for which an estate may be charged; and, in particular, by the provisions that an heir shall not be entitled to charge for such improvements on a larger sum than two years'-or four years' free rent of the estate, as the case may be. In the present instance the petitioner seeks to charge for mansion-house improvements, on the footing that he is not subject to any such limitation. But when, upon the case coming back from the reporter in July last, the Lord Ordinary intimated that he was not prepared—having regard to what took place in the case of Hamilton—to adopt that construction of the statute, and would probably report the case for decision, the petitioner craved to be allowed to charge the estate, in the meantime, with the sum for which he would be entitled to charge, on the supposition that the limitation in the Act applied—to which course the Lord Ordinary saw no objection. An interlocutor to that effect was accordingly pronounced, reserving consideration of the larger question. The circumstances under which that question is raised are distinctly brought out in Mr Murray's report; and as the same point appears to have been argued, and anxiously considered, though not decided, in the case of Hamilton, the Lord Ordinary has not considered it necessary, in reporting the case, to enter into any further explanation of the arguments."

After hearing counsel for the petitioner, the Court appointed him to give in an argumentative minute on the point raised, and to-day found that the petitioner was entitled to charge the estate to the extent of two-thirds of his improvement expenditure, and that the free rent of the estate was not to be taken into account as an element in calculating the amount thereof.

Counsel for Petitioner—Mr Duncan. Agents—M'Allan & Chancellor, W.S.

Friday, Jan. 25.

SECOND DIVISION.

PAUL *v.* HENDERSON.

Arbitration — Decreet-Arbitral — Reduction. 1. Averments of corruption and excess of powers on the part of an arbiter which held not established. 2. Held that a party to a submission was personally barred from pleading, after the matter referred had been decided against him, that the submission had fallen from want of prorogation.

The present case is a sequel to a litigation that commenced betwixt the parties by an action raised in 1856, of count, reckoning, and payment, at the instance of the present pursuer and Mr Thomson Paul, W.S., against the present defender. On the case coming into Court the parties agreed to submit the whole matters embraced by it to Mr John Maitland, accountant of Court, who recently died. Mr Maitland accepted of the submission, a great deal of procedure took place before him, and finally a decreet-arbitral was pronounced in June 1863. The present action was brought to obtain reduction of this decree. The grounds of reduction relied upon were—(1) that the submission had fallen for want of prorogation before Mr Maitland pronounced or issued his decreet-arbitral; (2) that the findings of the arbiter are *ultra fines compromissi*, or in other words, that the arbiter had exceeded his powers; (3) that the decree is not exhaustive of the submission; (4) that the arbiter was guilty of corruption. The Lord Ordinary (Ormidale) found that the decree was not reducible on any of the grounds libelled, and assoilzied the defender.

His Lordship made the following observations in reference to one of the grounds of reduction:—

"By the submission or minute of reference the parties bound themselves to abide by whatever the arbiter might determine 'betwixt and the day of or betwixt and any other day to which he shall prorogate the submission.' Seeing that the usual words 'next to come' are here awanting, there might be room for holding that the submission continued till the decreet-arbitral was issued without any prorogation; but, independently of this, the defender contended that the submission must be held to have been prorogated and continued by the acts and conduct of the parties, and that the pursuer is barred from maintaining the contrary; and in this contention the Lord Ordinary is of opinion that the defender is right.

"The submission-proceedings show that the parties—the pursuer as well as the defender—went on maintaining their respective views before the arbiter, and in all respects conducting themselves, down to the last, on the footing of the submission being a subsisting one. In particular, the pursuer, by his agent and commissioner Mr Thomson Paul, who was himself a party to the submission, repeatedly, after the time when it is now said that it had fallen, borrowed the proceedings, and in a variety of ways insisted on and enforced his views and pleas; meetings took place before the arbiter; proof was adduced; written pleadings besides numerous other papers and productions lodged, and many orders and deliverances given out and implemented, all as fully instructed by the submission-proceedings themselves. Reference may especially be made to the requisition or interlocutor sheets, and the inventory of the proceedings containing the borrowing receipts, Nos. 354 and 355 of process. But nowhere, and at no time, did the pursuer hint at the submission having fallen. On the contrary, throughout and down to the close of the proceedings, he acted on the footing that it was a subsisting one. It cannot be doubted that had the arbiter's decree been to his liking, he would have maintained its validity with the same determination as, it being disagreeable to him, he has assailed it. That it would be most inequitable, however, to leave such a course open to any party is clear enough; and accordingly, it has been often decided, that although a submission has been omitted to be formally prorogated, if the parties choose to plead before the arbiter, to show by their acts and conduct that they have consented to a continuation of it, and of the powers of the arbiter, just as if there had been formal prorogations—that the submission must be held not to have fallen, and that the parties are barred, on the principle of acquiescence and homologation,

from availing themselves of the plea that it had. Some of the cases and authorities on this point are referred to by Mr Bell in his work on the Law of Arbitration, pp. 176–7, and also and more particularly p. 318 and following pages. The cases of Macilhose, 13th July 1738, 5 Brown's Supp., 204, and Flemings *v.* Wilson & M'Lennan, 7th July 1827, 5 Sh., 906, may be specially noticed.

"The general doctrine, that a submission may be continued or kept alive *rebus ipsis et factis* without formal or express prorogations, was indeed not disputed by the pursuer, who limited his argument rather to this—that as the pursuer while he continued to act before the arbiter after the submission had fallen for want of prorogation, was ignorant of the fact, he cannot be bound or affected by the principle of homologation. But it appears to the Lord Ordinary, that in the circumstances it cannot be taken from the pursuer that he was in any such ignorance, but, on the contrary, he must be presumed and held to have been in the knowledge of the state of the submission in regard to its prorogation or want of prorogation; and in the case of Macilhose a contention or plea similar to that here maintained by the pursuer was overruled."

The pursuer reclaimed.

PATTISON and F. W. CLARK, for him, argued—The said decreet-arbitral is null, void, and reducible, in respect that it bears to proceed on a submission which had fallen before it was pronounced. The decree-arbitral is ineffectual in respect that the matters submitted are not thereby exhausted. It is further ineffectual in respect (1) the arbiter acted in the said submission in a manner amounting to legal corruption; (2) that he refused the pursuer proof, to which he was in law entitled; (3) that he decided against the pursuer in the face of the plain meaning of the evidence; (4) that he did not issue notes of his intended findings, and issued his award without allowing the pursuer an opportunity of being heard and of stating objections to its findings and decernitures. The decreet-arbitral is also reducible, in respect that it is in some respects not exhaustive of the reference, and is in others *ultra vires* of the arbiter and *ultra fines compromissi*.

D. F. MONCREIFF and ORR PATERSON, for the defender, answered—No relevant charge of corruption, in the sense of the Articles of Regulation 1695, is set forth. The submission was maintained as a subsisting submission up to the date of the decreet-arbitral by the pursuer's actings. The pursuer is barred by homologation and *rei interventus* from objecting to the want of formal prorogations in the submission.

At advising,

Lord COWAN—Several grounds for reduction of this decreet-arbitral are stated in the record, and have been disposed of by the Lord Ordinary's interlocutor. One of the grounds stated is corruption on the part of the arbiter This, when relevantly alleged and sufficiently established, is, by the Act of Regulations, recognised expressly as a reason for setting aside his award. In the circumstances of this case it is not necessary to enter on the question what in law may be held to amount to corruption. For, taking the widest construction of the term, recognised in the more recent decisions of Miller (1855) and Ledingham (1859), there are no facts alleged in this record which amount to "such misconduct leading to injustice," or "to proceedings of such an unfair kind," on the part of the arbiter, as to justify the inference that he had failed in the discharge of his essential duty of acting fairly and justly, as distinguished from mere error in judgment. I take the same view of the statements on this point in the record as the Lord Ordinary has done, and which he has fully explained in the note to his interlocutor.

Another ground of reduction which was stated, but not dwelt on in the argument, is that of *ultra fines compromissi*, inasmuch as an award of expenses had been pronounced by the arbiter without express power having been conferred by the minute of reference as to that matter. It is a sufficient answer to this objection that the reference had regard to the claim advanced in the action which it superseded, and that one of the conclusions of the summons thus submitted relates to expenses of process. Apart from that specialty indeed, I am satisfied that there was inherent power in the arbiter to deal with the question of liability for the expenses of the procedure before him. The opinion of Lord Mackenzie to that effect in Ferrier *v.* Ross is justly adopted by Mr Bell in stating this to be the law, when the submission is silent on the point.

Laying aside these grounds of reduction, there are other two which were mainly pressed by the pursuer in the debate—viz., the alleged expiry of the arbiter's powers through non-prorogation of his jurisdiction, and the alleged non-exhaustion of the matters submitted.

The submission was entered into consequent upon an action which was instituted in November 1856 by the pursuers against the defender, David Henderson. The summons concluded for exhibition of an account by the defender of his whole intromissions as the pursuer's factor with the rents and produce of certain house property belonging to them, and for payment of whatever balance should be found due thereon by the defender. Instead of proceeding with the action, the parties agreed to submit and refer "to the amicable decision, final sentence, and decreet-arbitral to be pronounced by John Maitland, Esq., Accountant of Court, as sole arbiter chosen by them, the foregoing summons, with the whole conclusions thereof and all defences thereto competent," with power to the arbiter to consider the premises, hear parties, and take all necessary proof, "and whatever the said arbiter shall determine in the premises betwixt and the day of , or betwixt and any other day to which he shall prorogate this submission," the parties bind themselves to implement and fulfil to each other.

The minute of reference bears date 29th June 1857. The decreet-arbitral pronounced by the arbiter, after a great deal of procedure and proof led by both parties, as will be seen from the orders pronounced, and proceedings in the cause bears to be dated 27th June 1863. The contention of the pursuers is that at that date the consensual jurisdiction conferred on the arbiter had fallen, in consequence of his not having duly exercised the power of prorogation.

The terms of the minute conferring that power are somewhat peculiar, inasmuch as the words are not added betwixt and the day of "*next to come*." But this peculiarity, although dwelt on in the argument, is of no practical importance. For supposing there be no room for holding the submission to have been kept in force *rebus ipsis et factis*, it was not disputed that the lapse of year and day without prorogation by the arbiter would be fatal to the validity of his decree.

The arbiter accepted the submission on 1st Dec. 1857, and of that date appointed a meeting of the parties, when the defender was ordered to put in

defences. Various proceedings followed throughout the years 1859 and 1860, but after January 1861, nothing appears to have been done in the submission until April 1862. During this period the only prorogation that appears in the proceedings is dated 29th June 1859, when the arbiter, in virtue of the powers conferred on him, prorogated the time for determining the submission to 29th June 1860. The question is whether, there being no other minute of prorogation appearing on the face of the proceedings, the conduct of the parties in going on without objection to litigate before the arbiter was not as effectual to keep his jurisdiction in force as a written prorogation by him would have been. What the parties did is to be found in the submission process, and especially in the relative inventory of the pleadings and productions and in the orders and interlocutors in the cause.

On the 16th, and again on the 29th June 1860, to which day the arbiter had expressly prorogated his jurisdiction, the proceedings in the submission bear from the inventory to have been borrowed by the pursuer, Mr Paul. A proof had been allowed him in August, but repeatedly adjourned at his request; and prior to the last date of his borrowing up the process, he had had three diets of proof, and on 2d July 1860, the diet was adjourned in respect of his failure to appear. Then, on 11th July following, an adjourned diet was fixed for the 25th, when he was appointed to conclude his proof; and warrant to cite witnesses was granted for that date, to which the Sheriff, on application, interponed his authority. Thereafter, on the motion of Mr Paul, the diet for his proof was again continued till various dates in October, November, and December of the same year; and on 14th January 1861, a minute was lodged by Mr Paul declaring his proof closed.

As the whole numbers of process, with certain exceptions not affecting the matter under consideration, had been repeatedly in the hands of the pursuer, he had ample opportunity of ascertaining that the only prorogation in the summons and relative minute of reference was that dated 29th June 1859; and, this notwithstanding, he went on with his proof, under the orders of the arbiter, without objection, and of the date last mentioned, on the closing of the pursuer's proof, the defender Henderson was allowed probation.

No procedure took place till April 1862, when the defender stated his willingness to renounce probation. On 2d May the arbiter appointed a meeting to close the record and fix a day for debate. Minutes were then lodged by both parties renouncing further probation; and Mr Paul and the agent of Henderson agreed by minute (p. 279 of print) to hold record closed as at 11th June 1860. The arbiter thereupon held the record closed, and on the motion of the pursuer, parties were appointed to give in minutes of debate. Thereafter the whole proceedings were borrowed by the parties with a view to the preparation of their pleadings. These were lodged in October and December 1862 respectively, and the case being thus ripe for judgment, the arbiter proceeded to advise the proof and pleadings, no objection, as before stated, being taken to his powers throughout the whole period that intervened from 29th June 1860 till the decreet-arbitral was issued in June 1863.

Having regard to what thus took place in the submission, it appears to me that there is sufficient room *rebus ipsis et factis* for holding that the jurisdiction of the arbiter was prorogated of consent of the parties, and that the want of an express minute of prorogation by him is not fatal to his decreet. Arbitration is jurisdiction *inter consentientes*. Accordingly, on the case of Fleming *v.* Wilson and M'Lennan, 7th July 1827, referred to by the Lord Ordinary, in which the whole Judges were consulted, it was held by the Court that the conduct of the parties in continuing to plead and lead proof after the lapse of a year amounted to complete homologation of the proceedings, "or rather, to speak more correctly, to a prorogation of the time for pronouncing decreet-arbitral," and consequently that neither party could object to the decreet so pronounced. Certain of the Judges at the final advising of the cause are stated to have held that there could be no homologation unless it were made out that the party was aware that the submission, which was under a letter of reference, did expire by the lapse of a year. The conduct of the parties, however, was held in itself enough to support the decreet-arbitral.

I have no doubt of the sufficiency in law of such a ground for inferring the consent of parties to a prorogation of jurisdiction, which originally and essentially rests on no other basis than consent. The exercise of the power to prorogate conferred by the submission lies exclusively with the arbiter. It does not require the consent of the parties. But it is open to them, supposing the arbiter or the clerk to have omitted the form of writing out the usual minute, still to go on before him, and by their acts in so doing, give as effectual a consent as they might by lodging a mutual minute in the clerk's hands. Homologation, however, it is urged, cannot be inferred unless there was knowledge of the fact that the arbiter had not exercised his power to prorogate in due time. And such knowledge in the general case, when homologation is pleaded, is requisite to give efficacy to the plea. Whether in such cases as the present the same principles are applicable may be doubted. But supposing it to be so, the knowledge of the parties that no express written minute of prorogation existed cannot but be inferred in the circumstances. The whole proceedings were in their hands at various times, including the summons and minute of reference, on which the minute of reference was written, which prorogated the time to 29th June 1860, and on which any farther minute of the kind might be expected to have been written. No such minute was there, and judgment was taken on the footing of the arbiter's jurisdiction being as entire as if there had been prorogation duly written out. A party cannot be entitled in such circumstances, with the means of knowing the exact state of the process in his hands, to go on with the cause, and then attempt, when judgment goes out against him, to repudiate the proceedings as having been taken *coram non judice*. Even in the case of judicial procedure this principle has been acted on. A process had fallen asleep and required to be wakened, but no summons of wakening was raised. This notwithstanding, the proceedings in the cause having been renewed after the lapse of two years, an objection to their validity was subsequently taken, but was repelled. Ferrier *v.* Ross, 7th March 1833. The ground on which the Court proceeded is thus stated by Lord Balgray—"A process of wakening is a mere accessory process. A simple letter by the parties consenting to waken is enough. And their consent may be as validly adhibited *rebus ipsis et factis* as by writing." I think the principle of that decision, which was fully recognised in the subsequent case of Creighton *v.* Ranken, which went to the House of Lords, applies to such cases as the

present, and corroborates the authority of the decision, if it required support, in Fleming *v.* Wilson and M'Lellan, already mentioned. For these reasons I cannot think that the Lord Ordinary has erred in repelling this ground of reduction.

The remaining reason of reduction is that the whole matters submitted have not been determined by the decreet-arbitral; but on this question I offer no opinion at present, being aware that the Court is equally divided on the point, which will render some further procedure necessary for its final decision.

Lord BENHOLME—The opinion which has just been delivered so completely coincides with my own that I shall only make this observation. The jurisdiction of a judge stands on a different footing from the jurisdiction of an arbiter. I can imagine cases, and I think I have known at least one case, where the objection that parties had mistaken their judge, as that the cause had been decided by a wrong Lord Ordinary, would be held to be a mistake amounting to a nullity. Slighter mistakes may be cured by the parties taking no objection or by being expressly waived, but a radical objection, as that the decree was pronounced *a non suo judice*, goes deeper, and nullifies the proceedings. The jurisdiction of an arbiter is different, because it rests entirely on the consent of the parties, and having been constituted by that, it may be continued in the same way. The true basis on which his jurisdiction rests is held to be an acquiescence in and consequent prorogation of a jurisdiction in itself limited to him. Accordingly, it is difficult to see how such consent could be given without knowledge by the parties, proved or presumed. Now, I think the wholesome doctrine on this point to be, that parties must be presumed to have known when it was possible for them to know. The question, therefore, is not to put the one party to prove that, but rather for the other party to prove that it was impossible for him to have known. That is the wholesome presumption. In the situation in which the pursuer was, it was his duty to make himself acquainted with the state of matters, and he was not entitled to go on in ignorance, which was plainly voluntary on his part, as he might easily have discovered that the jurisdiction had expired.

Lord NEAVES—I am of the same opinion. It occurs to me that this is the first time that this question has been decided. I think that the conduct of parties in continuing to plead before the arbiter after the limit fixed by the submission was passed must be regarded rather as a proof that that was not intended to be the limit of the submission, but that it should continue to exist. The case of Wilson *v.* Fleming and M'Lellan was a special one; and the general question which we are now deciding did not arise purely in it. I agree in the result reached by your Lordships; but I have a difficulty in deciding under what category the case falls. If this is to be regarded as a case of homologation, it is difficult to get over the alleged ignorance of the party and the offer made by him to prove that he did not know that the submission had not been duly prorogated. If, again, we look upon it as a case of prorogation of consent, the difficulty is that the only act inferring consent occurs at a time when the submission had already expired, so that that act would be a revival and not a prorogation of the submission. I think the true ground of decision is, that the conduct of the party towards his opponent in a matter where consent is everything was of such a kind as to raise a personal bar against his now stating the objection that the submission had expired. It was his duty to ascertain what the state of matters was, and he must be presumed to have done so, and as he continued to plead before the arbiter, we will not now inquire, and cannot listen to his allegation that he knew nothing of the expiry of the submission.

LORD JUSTICE-CLERK—I concur.

The following interlocutor was pronounced:—

"*Edinburgh, 25th January* 1867.—The Lords having heard counsel on the reclaiming note for W. A. Paul, pursuer, against Lord Ormidale's interlocutor of 9th February 1866, sustaining the defences and assoilzieing the defender—Recal *in hoc statu* the interlocutor complained of: Repel the reasons of reduction embraced in the first, second, third, and fifth pleas in law for the pursuer: Further repel the reasons of reduction embraced in the sixth plea, in so far as it is founded on the allegation that the decreet-arbitral is in whole or in part *ultra vires* of the arbiter, or *ultra fines compromissi: Quoad ultra*, in respect the Court is equally divided in opinion on the remaining reason of reduction, as embraced in the fourth and sixth pleas, that the decreet-arbitral does not exhaust the reference, and is therefore ineffectual and void, Appoint the cause to be heard before the Judges of this Division, with the addition of three Judges of the First Division, upon the question whether the last mentioned reason of reduction ought to be sustained or repelled: Appoint printed copies of the papers to be laid before the Judges of the First Division, with a view to the hearing of one counsel on each side on the said reason of reduction; reserving in the meantime all questions of expenses.

"JOHN INGLIS, *I.P.D.*"

Agent for Pursuer—Thomson Paul, W.S.
Agents for Defender—J. & A. Peddie, W.S.

Saturday, Jan. 26.

FIRST DIVISION.

INGLIS AND BOW *v.* SMITH AND AIKMAN.

Arrestment—Breach—Contempt of Court—Complaint—Competency. 1. Circumstances in which held that a breach of arrestment was not punishable as a contempt of Court. 2. A prayer for decree for expenses caused by a breach of arrestment cannot be competently included in a petition and complaint to the Court for contempt.

This was a petition and complaint at the instance of Inglis & Bow, ship agents and commission merchants in Glasgow, with concurrence of the Lord Advocate, against Norval Smith, master of the ship Julia Langley, and Thomson Aikman, shipbroker in Glasgow, agent for the charterers of said vessel. The petitioners complained that the respondents had committed a breach of arrestment and a contempt of Court. The Julia Langley was partly owned by William Miller Maclean, ship and commission agent, St John's, New Brunswick, who, as the petitioners alleged, was their debtor to the extent of £694, 13s. 3d.; and on 6th December 1866 the ship was arrested in the harbour of Glasgow on the dependence of an action which the petitioners had raised against Maclean for recovery of their debt. Notwithstanding this arrestment, the ship was removed on 8th December to the Tail of the Bank, near Greenock, whither she was followed by the petitioners' messenger, and dismantled. The petitioners had in this way incurred an expense