their view that the new proprietor might wish to enjoy the right of angling as well as the old. But, farther, it might have been meant to let the fishings, and a tenant might not have been got who would be induced to concede the right as now claimed. On the whole, therefore, I see no room for holding that I have any stable ground for extending this privilege as has been contended for.

Lord CURRIEHILL—I concur.

Lord DEAS—I think I never saw a case in which I found it more difficult to form a satisfactory opinion. That arises entirely from this, that while the question is to a great extent one of intention, the parties have not so expressed themselves as to let us know what they meant. If they had intended to prevent us understanding what they meant, I think they could not have expressed themselves better. I confess, however, that my impression is that, whatever may have been the intention of the parties, it was not to limit the right to Mr Duff personally, and to his successors personally. To that extent I have an opinion, although not a satisfactory one, but the difficulty remains, though I am right as to what they did not intend, as to what they did intend; and I am glad to be in a position which makes it not necessary for me to have an opinion in regard to that, because it would be of no practical use. My difficulty lies here. I think there are two questions involved; one is as to the nature of the right reserved, and the other is as to its extent. As to the nature of the right we must look to Mr Duff's position at the time. He was the feudal proprietor of Orton, through which the river Spey runs, and of the salmon and other fishings in that part of the river. He sells the fishings and he reserves a certain right. Now, be the extent of that right what it may, I think the nature of the right reserved was a heritable right attached to the estate. It was not a personal privilege to Mr Duff, his heirs, or singular successors. It was a right reserved for all time to the estate itself. If it was not that it was nothing at all. Our law would not otherwise recognise it. The words are, "Reserving the privilege of fishing with the rod." Suppose we stop there, it is perfectly clear that that would have been a right of angling which may be an exclusive and unlimited right, and is a heritable right which may be enjoyed separately. Then there is a limit put upon the right which otherwise would not, I think, be limited. It is this which makes the whole difficulty in my mind. The words are, "for our amusement only." Now suppose the word "our" had been omitted, I don't think it would be possible to say that the right was to be limited to Mr Duff and his successors. The only limitation would be in the purpose—namely, for amusement, not for profit or gain. That brings us to the very narrow question, whether the introduction of the word "our" limits the right to the individual proprietor. I find it very difficult to suppose that that was Mr Duff's meaning. If it was he must have been a more selfish man than I can imagine him to have been. I can't imagine a man reserving to himself alone the right of angling for a mile and a half in that splendid river, and also reserving the right to keep a boat on the river. It is a kind of desire for personal and solitary pleasure which I can't believe to have been according to his nature. The reservation of the right to have a boat was admittedly with a view to the fishing, for the river remained his property, and he could put as many boats on it as he pleased. He did not for any other purpose than fishing require to reserve his right to have a boat on it. He was to have only one boat, so that no more were to angle from it than the boat would hold. I find it difficult to suppose that it was intended that the purchasers could send as many people to the banks of the river, and in as many boats, as they pleased, and so make Mr Duff's privilege so useless that it could not be exercised. I rather think that a right of angling was reserved to the estate, subject only to this limitation, that it was to be exercised for amusement only. Either view is attended with difficulty. I admit that the view I am suggesting is attended with difficulty as well as the other. But suppose Mr Duff died leaving six daughters, each would be entitled to angle; or suppose he were to die leaving his estate to seven sons, they could all angle; and if he divided his estate into portions for the erection of villas, it follows that the privilege would be divided also. All that leads to great embarrassment and difficulty, and I am inclined to think that the view I have suggested would lead to less. Then if you read the disposition in connection with the lease and hold the reference to the latter not merely as descriptive of the subject, but as explanatory of the right reserved, I confess that I think the introduction of it in the disposition is against your Lordship's view. It is impossible to suppose that the seller meant to give up the right which he had under the lease to angle by himself and his friends. I don't see any view in which the lease aids your Lordship's construction. It just increases the embarrassment. The result of all this is that while I have an impression as to what the right was, I have great difficulty in saying practically what its limitations were. I would have liked if we had had an opportunity of consulting with some of our brethren before deciding this case; but as all your Lordships have formed decided judicial opinions, my difficulties are no reason why they should not be given effect to.

Lord ARDMILLAN concurred with the Lord President, but said that he did so after great hesitation and with considerable difficulty. He thought, with Lord Deas, that it was eminently improbable that Mr Duff should have intended to reserve nothing but the solitary right of fishing with his own hand. But reading the deed without any allegation of any practice, during nearly forty years since its execution, inconsistent with that contended for by the pursuer, he could not give effect to the defender's pleas.

Adhere, with expenses.

Agents for Pursuer—Gibson-Craig, Dalziel, & Brodies, W.S.

Agents for Defender—Tods, Murray, & Jamieson, W.S.

PETITION—MOSMAN.

Entail—Improvement Expenditure—10 *Geo. III.*, *c.* 51—11 *and* 12 *Vict.*, *c.* 36. Held that an heir of entail in possession is entitled, under 11 and 12 Vict., c. 36, to charge the entailed estate with improvement expenditure to the extent of two-thirds thereof, whatever may be the "free rent" of the estate.

This was a petition for authority to charge an entailed estate with improvement expenditure. The amount of the expenditure was £2685, and the question raised was whether the petitioner was entitled to charge the estate with two-thirds of that sum, or whether he was limited by the terms of the Montgomery and Rutherfurd Acts to two-thirds of the free rent of the estate, which, in this case, amounted to less than two-thirds of the sum

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,