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

of £19, 10s. 11d. ; and they prayed the Court to find that the respondents had been guilty of contempt of Court and breach of arrestment, and in respect thereof, "to fine and amerciate the said Norval Smith and Thomson Aikman, both and each or one or other of them, in the sum of £100, or such other sum as your Lordships may determine ; or to inflict such other censure or punishment as in the discretion of your Lordships shall seem just ; as also, to find the said Norval Smith and Thomson Aikman, jointly, or one or other of them, liable to pay to the petitioners the amount of expenses to which the petitioners have been put by and through the act complained of, in order to deter the said Norval Smith and Thomson Aikman, and others, from committing the like offence in time coming; and further to find the said Norval Smith and Thomson Aikman liable in the expenses of this petition and complaint, and of all the proceedings to follow hereon."

The respondents lodged answers to the petition, in which, after narrating certain negotiations and correspondence which they had had with the petitioners' agents with the view of loosing the arrestments, they stated that no breach of the arrestment had been committed ; that the ship had been taken to Greenock solely for convenient loading ; and that there was no attempt or intention to take her out of the jurisdiction of the Court until the arrestments were loosed. They also stated that they believed they had the petitioners' consent to take the vessel down the river as they did.

YOUNG and M'LENNAN were heard for the petitioners.

SOLICITOR-GENERAL and GIFFORD for the respondents.

In the course of the discussion a question arose as to whether it was competent in such an application as the present to pray for decree for the expenses to which the petitioners had been put in consequence of the breach of arrestment alleged.

The respondents argued that this was a civil debt which could not be recovered by means of a petition and complaint ; and, besides, the proceeding may turn out to have been unjustifiable, in which case the petitioners, instead of recovering this sum, will be liable in damages. The case of Bell *v.* Jamieson, 24th June 1848, 10 D. 1413, was referred to.

The Court took time to consider their judgment, which was to-day delivered by

The LORD PRESIDENT—This application is not of a usual kind. I don't recollect an application praying the Court to inflict punishment for breach of arrestment on the ground of its being a contempt of Court. Such applications founded on breach of interdict are common enough. I don't mean to say that a person is entitled to violate an arrestment—far from it. There is a statute about breach of arrestment, but it does not make it a contempt of Court. Breach of arrestment is not quite parallel with breach of interdict. A party obtains a warrant to arrest on his own application and as a matter of course. However, I am very far from saying that breach of an arrestment should not be punished, and I am very far from giving any countenance to the argument of the respondents that they were entitled to remove the ship from Glasgow notwithstanding the arrestment, provided they did not remove it beyond the jurisdiction of the Court, or more than three miles from the coast. The warrant and arrestments were regular and in the usual form ; and to say that a person is entitled to remove an arrested ship as he pleases, notwithstanding an arrestment, is altogether out of the question. That contention is quite new to me, and I think it was new to the respondents themselves ; for I don't think it was on that ground that they proceeded. If they had proceeded on that ground, they would have been in a much worse position than I think they are. But an arrestment is farther distinguishable from an interdict in this respect, that it is a matter which is every day made the subject of arrangement as to how far it is to be insisted in or relaxed ; and when we come to deal with an application for punishment for breach of it, it is material to inquire whether anything has been done by the parties with this view. I think in this case it is clear that there had been a communing betwixt the parties, and if it does appear that there was even a misunderstanding on this subject, it would be very difficult to discover any criminality. I think the import of the communings was that there was reason for the respondents believing that they had right to do what they did. Security had been offered for the debt said to be due, and there was correspondence with a view to getting the arrestment loosed. I don't think, therefore, that there was here any criminality which calls for punishment, or that we can treat these parties as criminals. On the other hand, I think there is a demand made here which is incompetent. It may be the case that the vessel having been taken to Greenock may have caused expense to the petitioners, but that is a part of the expense which, if they gain their cause, they will get. If they don't gain it, it is an expense which they are not entitled to recover. The opinion of the Court on the whole is, that we should dismiss this complaint, and find neither party entitled to expenses.

Agents for Petitioners—Morton, Whitehead, & Greig, W.S.

Agent for Respondents—John Ross, S.S.C.

PET.—HAMILTON.

Entail—Excambion—11 *and* 12 *Vict., c.* 36. Held that, in order to warrant an excambion of entailed lands under 11 and 12 Vict., c. 36, it was essential, under section 5 of that Act, that there should be produced the consents of the three next heirs of entail at the date of presenting the petition, as well as at the date of the consents being executed.

In this application by Captain Hamilton of Dalzell for leave to excamb, a preliminary point was raised as to the sufficiency of the consents, which, as it was of some general importance, and not free from difficulty, the Lord Ordinary (Mure) reported for decision. The point was thus explained in the Lord Ordinary's note :—

"It is raised under the 5th section of the statute 11th and 12th Victoria, cap. 36, which seems to require that the heirs, on whose consents an excambion may be made in such a case as the present, must be those who are the three nearest heirs, both at the date of the consents, and at the date of presenting the application. In the present case the consents were not produced with the petition, as the statute does not require this to be done ; and it was probably omitted in consequence of one of the nearest heirs, Mr George Hamilton Lawson, being then on foreign service. A considerable time having, however, elapsed between the date when the application was presented and the remit to the reporter, it appears