with Mr Dickison, the architect, that he would procure materials, the prices to be deducted from the contract price, and that Aimers was to superintend the further execution of the works. On 30th November 1871, Aimers intimated by letter to Skene & Peacock that he could not finish his part of the contract, and renounced all claim to his estimate. In the meantime, Dickison had certified several accounts of the defender Aimers, and several instalments had been paid to him. On 15th November 1871, Skene & Peacock sent a cheque for £92 to Dickison, to be paid to Aimers on account of work done. On 16th November 1871, Messrs Field & Allan, creditors of Aimers in a bill accepted by him for £66, 1s. 4d., caused arrestments to be used on the dependence in the hands of Dickison for £85, and on 20th November they caused arrestments to be used in the hands of Mr Gordon. When the first arrestment was laid on, Dickison returned the cheque to Messrs Skene & Peacock, notwithstanding that he had written to Messrs Field & Allan on the 1st November, that "you may rest assured that as soon as Aimers gets an order you shall have it." On 22d December the summons in the present action was raised.

The pleas in law for the defender Gordon were —"(1) The defender not being indebted to the principal debtor, and the pursuers' arrestment not having attached any funds of his in the hands of the defender, the latter should be assoilzied, with expenses. (2) Any debt which may have been due by Mr Gordon to Mr Aimers is extinguished by the liabilities and expenses incurred and to be incurred by Mr Gordon in completing the works, and the damages sustained by him, actual or pactional, through the non-completion by Aimers of his contracts. (3) The defender Mr Gordon is entitled to retain any balance that may be now or ultimately due to Aimers to meet said liabilities, expenses, and damages, and cannot be called upon at present to count and reckon with and pay over any sum to the pursuers."

After a proof, the Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 12th June* 1872.—The Lord Ordinary having heard counsel, and made avizandum, and considered the proof, debate thereon, productions, and whole process, finds as matter of fact (1) that the defender Mr Aimers failed to complete his part of the contracts between him and the defender and arrestee Mr Gordon, which are set forth on the record, and whereby he undertook to execute certain slater and plumber work on the farm steading of Beleville, on Mr Gordon's estate of Belchester, and the slater and plumber work of certain cottages which were to be erected on the farms of Beleville; (2) that Mr Gordon has consequently been obliged to employ other parties to complete the slater and plumber work so undertaken to be performed by Mr Aimers; and (3) that the pursuers have failed to establish that any sum was, at the date of the arrestment founded on in the summons, or is now, due by Mr Gordon to Mr Aimers: Therefore, and with reference to the preceding findings, dismisses the action, and decerns: Finds the said defender and arrestee entitled to expenses, of which allows an account to be lodged, and remits the same to the Auditor to tax, and to report."

The pursuers reclaimed.

Cases cited—*Brodie*, 15 S. 1195; *Johnston*, 23 D. 646; *Kerr*, 23 D. 343.

At advising—

Lord Justice-Clerk—I think Skene and Peacock held the cheque, as Mr Gordon's agents, for payment to Aimers of work certified as having been done, and that the arrestment attached the money, and that it cannot be said that it was applied in extinction of a claim of retention, because Gordon, by his agent, had put the money out of his hand, and was not entitled to resume it. The money was not only due, but had been actually paid:

Lord Cowan—This is a case which excludes the plea of retention. The position of Dickison under the contract was clearly defined—his certificate fixed that Aimers was entitled to the payment. I think the arrestment was well laid on. Counter claims are not *hoc statu*. This is not a case of money claimed under a contract not duly fulfilled.

Lord Benholme—The questisn involved here is of importance as affecting a large class of contracts requiring a tract of time for their fulfillment. In such cases it is of the utmost moment to the tradesman to have the means of supply from time to time in order to enable him to go on with the work. The stipulation here is, that as Mr Gordon was having a certain addition made to his property he was to pay to Aimers certain instalments, to be fixed by an architect mutually chosen. I think that whenever that architect gave his certificate of work done and money to be paid, Mr Gordon was under an obligation to pay the sum over to the contractor, and if he does not do so he violates the contract. This is not at all the case of mutual contract, which is a *unum quid*, and not divisible. It is of no purpose to allege that the contractor was unable to go on with the work, when perhaps it was by Gordon's own act that he was rendered unable.

Lord Neaves—I concur generally; but am not prepared to say there is not a certain mutuality running through the whole of the contract. The mere fact that payments were to be made by instalments does not make the fund not retainable. I am not quite clear that no circumstances might occur which would not give Gordon a right of retention, such as sequestration or competition of arrestments.

The Court reversed the Lord Ordinary's interlocutor, and decerned in terms of the libel.

Counsel for Pursuers—C. Marshall and Lees. Agent—D. Hunter, S.S.C.

Counsel for Defender (Gordon)—Thoms and W. F. Hunter. Agents—Skene & Peacock, W.S.

Saturday, November 23.

FIRST DIVISION.

[Sheriff of Edinburgh.

ORR *v.* MELVILLE.

Expenses—Failure to Account.

Circumstances in which the Court refused to recal a finding of expenses in the Sheriff Court against a party who was successful on appeal, on the ground that, by his failure to account extrajudicially he had caused the other side unnecessary expense.

This was an action raised in the Sheriff-court of Edinburgh by Samuel Orr, trustee on the sequestrated estate of John Munro & Co., concluding for payment of a sum amounting to £27, 2s. 4d., due by the defender Alexander Melville to the said firm of John Munro & Co. The defender pleaded that various items were overcharged, and stated a counter claim of £18, 2s.

After a proof, the Sheriff (DAVIDSON) found for the pursuer, under deduction of two sums of £1, 2s. and £7, 10s, which was admitted by the pursuer, who was also found entitled to expenses.

The defender appealed.

At advising—

LORD PRESIDENT—This has been a very troublesome little case, and I am afraid there must be some hardship in our manner of deciding it.

The trustee only did his duty in bringing an action to recover sums apparently due to the trust estate, but then the defender is entitled to defend himself, and I think the trustee has not made out his claim.

The important element in the case is the account No 11 of process, which bears date 1871. The termination of the account proper shows a balance of £33, 15s. 6d. against the defender, and all the remaining entries, except the last two, are in pencil, but these last two are in ink, are in the bankrupt's writing, and prove that the account was rendered in its present shape by the bankrupt to the defender. To be sure the account, as now sued for, contains some items of later date, but these altogether make £7, 6s. 10d., and against that there is £7, 10s., which, it is admitted, must go to the defender's credit. That being the evidence of the account itself, the question is, what evidence there is to set against it. The trustee says he has made up an account from the bankrupt's books, bringing out a different result, but it is certain that there is no actual balance standing in those books of this amount, so that, so far, the account sued for must be more or less conjectural, so that I am afraid we must recal the Sheriff's interlocutor, and assoilzie the defender. As regards the question of expenses, I cannot say that the defender's conduct has been quite satisfactory. He has allowed the trustee to bring this action, which, in the absence of further information, he was bound to do, but it was quite easy for the defender to have given him such information, and so have saved all this expense. In these circumstances, while I think we must allow the defender his expenses in this Court, I am not disposed to recal that part of the Sheriff's interlocutor which gives expenses against him in the Court below.

The other Judges concurred.

Counsel for Defender and Appellant—Mair. Agents—M'Caul & Armstrong. S.S.C.

Counsel for Pursuer and Respondent—Brand. Agent—Robert Finlay, S.S.C.

Tuesday, November 26.

SECOND DIVISION.

[Sheriff Thoms, Caithness-shire.

LORD ADVOCATE *v.* SINCLAIR.

Property—Boundaries and Marches—Act anent Inclosing of Ground (1669, *c.* 7)*—Expenses.*

A petition under the Enclosure Acts prayed for a remit to a man of skill, without requiring the Sheriff to visit the marches. No objection in the Court below was taken to the competency, nor to the remit, and both parties concurred in dispensing with a personal inspection of the ground by the Sheriff. *Held*—(1) that the Sheriff must, under the Act 1669, c. 7, personally inspect the ground; (2) that looking to the value of the land, and the expense of the proposed fence, this was not a case to which the Act applied.

This was an appeal from the judgments of the Sheriff-Substitute (H. RUSSEL) and Sheriff-Principal. The Crown are proprietors of the lands of Scrabster, which adjoin those of Holbornhead, the property of Mr Sinclair of Forss, the appellant. On December 6, 1870 the Lord Advocate, on behalf of the Commissioners of Woods and Forests, presented a petition in the Sheriff-court of Caithness praying that warrant for service on the respondent be granted, "and thereafter to remit to Mr George Brown, tacksman of Watten, or such other person or persons as your Lordship may appoint, to report upon the proper line of march between the lands of Scrabster and Holbornhead respectively, where not already fenced, and upon an estimate of the just value of the parts to be adjudged respectively from the one heritor to the other, and to decern in favour of the party from whom shall be taken land of more value than the other, for any excess of value which may be found to be taken from such party; and thereafter to find that the most suitable fence to be erected on the whole line is a strong wire fence, or such other fence as may be reported by the said George Brown or the other person or persons to be named by your Lordship, and to ordain the same, or such other fence as your Lordship may find to be most suitable, to be erected at the mutual expense of the parties." It was set forth that this application was made under the Acts 1661 and 1669, by the latter of which (c. 7) "it is statute and ordained that whenever any person intends to enclose by a dyke or ditch upon the march betwixt his lands and the lands belonging to other heritors contiguous thereunto, it shall be leisome to him to require the next sheriffs or bailies of regalities, stewarts of stewartries, justices of peace, or other judges ordinary, to visit the marches alongst which the said dyke or ditch is to be drawn, who are hereby authorised, when the said marches are uneven or otherwise incapable of ditch or dyke, to adjudge such parts of the one or other heritor's grounds as occasion the inconveniency betwixt them, from the one heritor in favours of the other, so as may be least to the prejudice of either party, and the dyke or ditch to be made to be in all time thereafter the common march betwixt them, and the parts so adjudged, respective from the one to the other, being estimat to the just avail and compensed *pro tanto*, to decern what remains uncompensed of the price to the party to whom the same is wanting." But the prayer of the petition did not require the Sheriff to visit the marches. Further, along part of the march between Scrabster and Holbornhead there is no fence, and trespasses consequently are frequent, while portions of the boundary are crooked and uneven. Mr Sinclair entered appearance to defend, and on January 12, 1872, the Sheriff-Substitute remitted to Mr Brown to report upon the proper line of march. On February 9 he reported, finding that owing to the nature of the ground an exchange of land would be necessary, and a certain kind of fence was re-