on a larger balance; but to counteract that manœuvre there are provisions in sections 62 and 65.

[*His Lordship quoted sections* 62 *and* 65 *as quoted in the rubric*].

The first thing to be noticed is that a greater latitude is given to the creditor in his valuation for voting purposes than in his valuation for ranking. The reason is obvious. A creditor may have to put in an affidavit for voting without having time to consider the matter carefully, and accordingly he is not to be tied down to his valuation within a margin of twenty per cent. But afterwards when he lodges his claim for ranking he has had time to consider the matter, and he is tied down to specifying his security at its true value.

Then comes the question arising on the words of sec. 65—what is the condition on which a creditor is bound to grant a conveyance? It is "on payment." It is argued by the defender that it is enough if the trustee says he will pay without actually tendering payment.

I agree with the Lord Ordinary that "payment" means actual payment. As I have pointed out, the question of securities only arises if the creditor claims, and the object of these sections is to prevent him claiming too much after taking benefit of his security. The statute does not prevent a creditor who does not claim from selling his security and repaying himself, and a creditor may do that even after lodging a claim, as was decided in the case of *Henderson's Trustee* v. *Auld & Guild*, 1872, 10 Macph. 946. What ought to stop him is nothing else but payment, otherwise a mere intimation would prevent a creditor from dealing with fluctuating securities like stocks and shares. He might think that the time for dealing with them was the present, but if the argument for the defender were right he would be debarred from selling them by the obligation to transfer, and would run the risk of seeing them fall in value although there might never be a common fund out of which he could get payment.

Accordingly I think it is quite clear that payment is the only condition upon which the trustee can demand a conveyance or assignation. I think the reference in section 65 to the "common fund" is intended to enable the trustee to make a preferential payment to the secured creditor, otherwise his hands might have been tied by other sections. I agree with the Lord Ordinary that the trustee's intimation put no nexus on the security, and that as the time had not come for a scheme of ranking the creditor was entitled to correct his valuation. I desire to reserve my opinion as to whether he could have done so if there had been a ranking; it was the opinion of Lord Kincairney in the case of *Macdougall's Trustee* v. *Lockhart*, 1903, 5 F. 905, that he could not, but the Inner House went upon another ground of judgment—that payment had been tendered.

I am of opinion that the Lord Ordinary was right, and that we should adhere to his interlocutor.

LORD KINNEAR—I agree and have nothing to add.

LORD JOHNSTON—In order that on behalf of the bankrupt estate a trustee should effectually take the benefit of the provision of the 65th section of the Bankruptcy Act 1856, it is, I think, necessary that he should do more than intimate, as the trustee did here on 13th October 1904, a resolution of the commissioners to take over security subjects.

On the other hand, as the subject is a heritable subject, it cannot be transferred without allowing time for the necessary conveyancing. I do not think that the trustee in intimating the resolution was bound there and then to tender his cheque in payment. It is enough that he do what the trustee here did on 28th December, having intimated already, or if not, intimating then the resolution to take over, at same time to intimate his readiness to pay in exchange for a conveyance and to call on the creditor to convey, it being implied that the usual arrangements for settlement in such circumstances will be made.

Until the trustee has to this extent and effect tendered payment the creditor is, I think, free not only to correct his valuation but to protect himself if he thinks proper from loss of market by sale over the heads of the trustee and the creditors.

In saying this, which is I think enough for the decision of the case, I desire to reserve my opinion as to whether the trustee and creditors are entitled to snatch an advantage out of an incautiously worded and premature affidavit and claim, at a point of time when no one was as yet really thinking of a ranking of claims, and whether the creditor is not entitled to rectify his mistake even after an astute trustee has attempted as here to take him at his word.

LORD M'LAREN was absent.

The Court adhered.

Counsel for the Pursuer and Respondent—M'Kechnie, K.C. — Malcolm. Agents—Carmichael & Miller, W.S.

Counsel for the Defender and Reclaimer—Constable, K.C.—Wilton. Agents—T. S. Paterson & Davidson, W.S.

Wednesday, December 15.

SECOND DIVISION.

[Sheriff Court at Kilmarnock.

GARSCADDEN *v.* ARDROSSAN DRY DOCK AND SHIPBUILDING COMPANY, LIMITED.

Retention—Lien—Ship—Lien for Repairs—Dispute as to Account—Expenses of Process.

A vessel was sent to a shipbuilder's yard for the execution of certain repairs. When these had been completed a dispute arose as to the amount of the shipbuilder's account, and he refused to deliver the vessel.

In an action by the owner of the vessel for delivery and for damages, *held* that he was entitled to delivery on consignation of the full amount of the account for repairs, but that he was not bound to consign a sum to meet any expenses which might be found due by him to the shipbuilder in the ensuing process.

On 30th October 1909 William James Garscadden, shipowner, raised an action in the Sheriff Court at Kilmarnock against the Ardrossan Dry Dock and Shipbuilding Company, Limited, concluding for (1) delivery of the pursuer's steamship "Staffa," which had been entrusted to the defenders for the execution of certain repairs, and which the defenders refused to deliver except on payment of their account, the amount of which was disputed; (2) failing such delivery, payment of the sum of £1500, being the value of the vessel; and (3) payment of the sum of £500 in name of damages at the rate of £10 per day for the illegal detention of the vessel from 1st October 1909. Warrant to cite the defenders having been granted, the pursuer on 10th November 1909, before defences had been lodged, moved "in respect that of the defenders' account against him of £250 he has paid to the defenders the sum of £200, and he has consigned the balance of £50 in court, to ordain the defenders forthwith to deliver to the pursuer his vessel 'Staffa.'"

On 11th November 1909 the Sheriff-Substitute (MACKENZIE) pronounced the following interlocutor—"Finds that the right of retention over the said vessel extends to the expenses to be incurred by defenders in this process: Therefore, in respect that no sum has been consigned to meet the defenders' claim for expenses, refuses the said motion *in hoc statu*."

Note.—"A point is here raised upon which it is difficult to find any direct authority. The pursuer asks for delivery of a vessel belonging to him on which certain repairs have been done by the defenders. The amount of their account for these repairs is disputed. The pursuer offers to consign the whole amount demanded by the defenders, and on doing so he asks a decree for delivery of the vessel at this stage. The defenders reply that until consignment is also made of a reasonable sum to cover the expenses to which they may be put by the present action, this motion should be refused.

"The question in dispute, therefore, resolves itself into this—whether the right of retention over the vessel, which is admittedly possessed by the defenders, extends to their expenses in this action.

"Professor Bell in his Principles, sec. 1410, defines retention as 'a right to retain a subject legitimately in one's possession until a debt shall be paid, or an engagement performed the *jus exigendi* of which is in the possessor.' It is to be observed that there is here no mention of consignment or security, payment alone being the condition on which the subject is set free. The defenders, however, for the purpose of minimising commercial inconvenience, are willing to waive this point. But they maintain that a sum to meet their prospective expenses must be consigned along with the amount of their account.

"The only cases to which the pursuer has directed me on this point have to do with a law agent's lien over his client's papers, and one of these—*Gray* v. *Wardrop's Trustees*, 1851, 13 D. 963, 23 Jurist 450, affirmed by the House of Lords, 18 D. 52, 27 Jurist 621, would seem at first sight to be directly in his favour. The first part of the rubric runs—'Law agent's right to retain his client's title-deeds does not extend to the expense of judicial proceedings instituted by him after the termination of his agency for the purpose of recovering payment of his accounts.'

"I am not satisfied, however, that the analogy of a law agent's lien is a true one in all respects, and I gather from the opinions delivered (1) that the case does not show the same relation between parties as exists here, and (2) that if the question had been a direct one between the law agent and his client, the result would have been different. This is shown most clearly in the opinion of Lord Cunninghame, who says it is 'indisputably settled in law and practice that the right of retaining a lien or pledge generally covers the expenses of maintaining or defending it when disputed.' His Lordship then goes on to cite the instance of sequestrations for rent where the funds realised 'are invariably held to cover the necessary expenses incurred by any challenge of the lien if repelled.' The present case appears to me to belong to the general rule above stated, and not to the exceptional state of circumstances where the question does not arise directly between the parties as explained by the Lord Chancellor in the House of Lords report.

"The other case quoted—*Craig* v. *Howden*, 18 D. 836, 28 Jurist 392—relates to the question of whether consignation is equivalent to payment, but that does not directly arise here.

"On the general principle, and on the definition given by Professor Bell, along with the first case quoted above, I think it must be held that the defenders' right of retention here extends to the payment of their account for repairs, whatever the amount of it may be found to be, along with such expenses as they may have been put to in recovering it. Otherwise they would appear to me to be in danger of losing their security, and perhaps a considerable part of their remuneration at the same time. The purpose of their retention would in that case be defeated.

"Until, therefore, the pursuer consigns a reasonable sum to cover expenses, I do not think his motion can be granted."

The pursuer having obtained leave of the court, appealed to the Court of Session, and argued—The defenders had no doubt a lien over the vessel for the amount of their account, but that lien did not

cover anything more than the account —Ersk. Inst., iii, 1, 34; Bell's Commen. (7th ed.), vol. ii, pp. 92. 93. In any event, the lien could not extend to a debt of which there was no *jus exigendi* in the possessor —Bell's Prin., section 1410. The defenders' lien therefore could not cover expenses in the present action which were not due now and might never be found due. A lien covered only the sum due for work done on the subject of the lien, and not any other charges—*Somes* v. *British Empire Shipping Company*, 1860, 8 Cl. (H.L.C.) 338; *Stephen* v. *Swayne*, December 13, 1861, 24 D. 158. In *Gray* v. *Wardrop's Trustees*, 1855, 2 Macq. 435, 13 D. 963, it was no doubt suggested by Lord Cranworth, L.C., that a law agent's lien covered the expenses of his action for payment of his account, but it was clear that the expenses contemplated there were the expenses already incurred. Arrestments had been held not to cover the expenses of the action—*M'Phedron and Currie* v. *M'Callum*, October 31, 1888, 16 R. 45, 26 S.L.R. 27; *Stewart* v. *Macbeth & Gray*, December 19, 1882, 10 R. 382, 20 S.L.R. 266. The pursuer was therefore entitled to delivery of his vessel on consignation of or caution for the amount of the defenders' account.

Argued for the defenders—A party holding a lien was bound to surrender it only on his own terms, unless these could be shown to be unreasonable, and the Court, which had power to regulate the exercise of the right, would not interfere unless the circumstances demanded it—*Ferguson and Stewart* v. *Grant*, February 8, 1856, 18 D. 536. The defenders' terms here were not unreasonable. They did not ask payment of their account, but only consignation of the amount and caution for expenses. The defenders would be entitled to the expense of constituting their claim, and if so they were entitled to be secured until paid, and their lien must therefore cover expenses.

[It was stated at the Bar that the amount of the account was not £250, but £275, and counsel for the pursuer agreed to consign the further sum of £25.]

Lord Ardwall — The only material before us in these pleadings is the initial writ, the motion for the pursuer, and the interlocutor of the Sheriff-Substitute.

It appears that there is a steamship "Staffa" belonging to the pursuer which had been sent to the defenders' yard at Ardrossan for repairs and for overhaul, and that when the repairs were completed a dispute arose with regard to the account to be paid for these repairs. In that state of matters the defenders refused to deliver the ship, and the action with which we are now concerned was brought, concluding for, first, delivery of the ship, and failing delivery, for a sum of £1500; and secondly, for £500 for illegal detention or demurrage from 1st October 1909 till delivered, at the rate of £10 a-day. Though defences have not been lodged, we are informed that these will be to the effect that the pursuers refuse or delay to pay the defenders' account, and that the defenders are entitled to detain the ship till the account is paid and caution or other security is given to them for the future expenses of the process.

In these circumstances it is quite evident that it is desirable in the interests of both parties that the ship should be released, because whoever has to pay for the detention it is plainly undesirable that this ship should be detained longer in the dock than is necessary; and accordingly, although there is a lien claimed over the ship in respect of the amount of these repairs (which is in dispute), it is certainly desirable that the Court should interfere in the matter and arrange the terms on which this ship may be allowed to go.

A point of general interest has been raised in this case, namely, whether the lien over a ship undergoing repairs covers the expenses of any action regarding the lien or the account payment of which it is thereby sought to enforce. I do not know that it is necessary to decide that at present as an abstract question, because I think we are justified in a case of this kind in exercising an equitable control over the defender's right of lien, and as an authority for this I may refer to Lord Colonsay's opinion in the case of *Ferguson & Stewart* v. *Grant*, 18 D. 538, where although the Court would not interfere in the matter, yet Lord Colonsay says this—"Another question arose, whether a right to retain the papers is not subject to the equitable control of the Court—whether the Court can prevent the abuse of that right of hypothec. I think the Court has the power to do that, and has frequently exercised that power. That raises the further question, whether the circumstances of this case call for the interference of the Court"—and he held that they did not. But in the present case, for the reasons I have stated, I think there are circumstances which call for the interference of the Court.

But with regard to the question of expenses I should be sorry if anything we say here should affirm the proposition, that a right of lien gives the person who holds it—in a question as to whether the subject of the lien can be released or not—a right to add to the sum for which the subject is being lawfully retained a sum representing possible future expenses which may arise out of a dispute between the parties regarding either the lien or the account for which it is held. I think there is authority against that contention in the passage in Professor Bell's Principles which is quoted by the Sheriff-Substitute, where he defines retention as a right to retain a subject legitimately in one's possession until a debt shall be paid or an engagement performed, the *jus exigendi* of which is in the possessor. Now it cannot be said there is any *jus exigendi* for a future account of expenses whatever may be said as to past expenses, which do not exist in this case.

I accordingly am not prepared to affirm that possible future expenses are a liability for which a party holding a lien is entitled to have security provided as a condition

of the right of retention being relaxed by the Court.

In the present case the pursuer moved that the ship should be delivered to him on payment of part and on consignation of the balance of the defenders' account without any security being given for possible future expenses of process. I am of opinion that that motion should be granted. But unfortunately there is a little difficulty here. In the motion No. 6 of process it is stated that the pursuer has paid the sum of £200 and has consigned the balance of £50 in Court. But apparently that is not the full amount of the defenders' account, because we are now informed that the amount is about £275, which if £200 has been paid and £50 consigned would leave £25 to be consigned, and in the judgment which I propose your Lordships should pronounce I think we must make provision for £25 being consigned. As we differ from the learned Sheriff's finding that the defenders' right of retention over the vessel extends to the expenses to be incurred by them in this process, I propose that we should recall his interlocutor, and that upon consignation of the additional sum of £25 we should order delivery to the pursuer of the vessel in dispute.

LORD DUNDAS—I am of the same opinion and I have very little to add. The learned Sheriff-Substitute has found "that the right of retention over the said vessel extends to the expenses to be incurred by the defenders in this process; therefore, in respect that no sum has been consigned to meet the defender's claim for expenses," he refused the pursuer's motion *hoc statu;* and he states in his note that "until the pursuer consigns a reasonable sum to cover expenses" he does not think his motion can be granted. One observes upon that that the learned Sheriff-Substitute has not indicated what in his opinion would be "a reasonable sum." I confess I think there is difficulty there, for I do not see how anyone can make even a fairly approximate estimate of what the expenses of this process may be; it all depends upon the pertinacity of the parties, and the length to which matters may be pressed by them. But leaving that aside, I agree with what Lord Ardwall has said, and I think the Sheriff-Substitute is wrong, for the defenders cannot be said to have a *jus exigendi* (as for a debt) for any expenses due to them. There are no expenses due to them, and whether or not there may ever be expenses due to them is matter of pure conjecture. It seems to me that the defenders' present position is that they have a lien entitling them to hold the pursuer's ship in security for payment of the amount of their account whatever that may be. If the Court substitute consignation for that form of security, I do not see why the Court should be called upon to enlarge the scope of the security, and to extend it so as to include expenses wholly future and contingent.

LORD JUSTICE-CLERK—I am of the same opinion. The general principle as regards expenses is that there is no ground for a litigant asking for security for expenses merely because it can be said that the party opposed to him is impecunious. Such a demand for security for expenses has been refused over and over again. The Court will not inquire whether a person will ultimately be able to pay expenses or not. The contention of the defenders in this action in effect is just the same thing. It is enlarging a security which covers the principal sum claimed so as to make it include a supposed sum for future expenses that may be incurred, so that the party may be secured, if the opponent is not successful, for his expenses. But on principle he is not entitled to any such security at all, and therefore I agree with your Lordships.

I also concur with Lord Ardwall that this secured subject should not be freed without some addition to the amount which is to be consigned, and I agree with the course which has been suggested.

The Court pronounced this interlocutor—

"Sustain the appeal and recal the . . . interlocutor appealed against: Find that the pursuer, in respect of the sum of £200 already paid by him to the defenders, and the further sum of £50 consigned in the Sheriff Court, and the balance of £25 to be consigned, is entitled to delivery of the steamship 'Staffa,' together with her whole gear, machinery, &c., all as prayed for, and that within three days from the date of this interlocutor, consignation of said £25 having been duly made," &c.

Counsel for Pursuer (Appellant)—Aitken, K.C.—A. R. Brown. Agents—Whigham & MacLeod, S.S.C.

Counsel for Defenders (Respondents)—D. Anderson—J. R. Dickson. Agents—Steedman, Ramage, & Company, W.S.

Tuesday, December 7.

FIRST DIVISION.

[Lord Salvesen, Ordinary.

KLEIN AND OTHERS (OWNERS OF THE "TATJANA") *v.* LINDSAY AND OTHERS (CARGO-OWNERS).

Ship—Unseaworthiness—General Average—Onus—Pumping Power—Cast-Iron Coamings—Outlays in Port of Refuge—York-Antwerp Rules 1890, 10 *and* 11.

A steamship which had been built in 1872, and which had been laid up for about eighteen months, after a careful survey was purchased in 1905. After a survey of the engines and some testing in harbour she sailed on 8th April from Libau for Leith with a general cargo, but between one and a-half and three hours out she broke down owing to a fracture of a valve casing of the feed-pumps. The engineer, under an erron-