LORD KINNEAR — I agree with Lord Trayner. I think that if the Scottish Highlander Company is in the occupation of the premises, it occupies them through Mr Mackenzie, and in no other way, according to the statement which the Sheriff brings before us. I am therefore of opinion that Mr Mackenzie is occupant of the premises, and I have no doubt he is sole tenant.

The only additional observation I desire to make is, that I do not understand that either of your Lordships entertains any doubt as to the doctrine, which is quite well settled, that although the valuation roll is conclusive upon the question of value, it is not conclusive upon the question of occupancy; and if any relevant ground is stated for inquiry, there is no reason why proof should not be allowed as to the question of occupancy. The only difficulty which appeared in the argument upon that subject arose from Mr Orr's citation of the case of *Rea*, but that case does not really conflict in any way with what has always been understood to be the law on the subject. All that was decided there was that the particular proof asked in that case was inadmissible. The reason was clear. The tenant and occupant of a farm had been enrolled as a voter for the county of Perth. Then another person came forward, alleging occupation for the requisite period, and produced an assignation to the lease of the farm dated 22nd February 1870. The Sheriff refused to allow the proof of occupancy because he held that the claimant's right to be registered in virtue of the assignation must be regulated by the date of the assignation itself.

The Court sustained the appeal and reversed the judgment of the Sheriff.

Counsel for the Appellant—Orr. Agent—William Officer, S.S.C.

Counsel for the Respondent—Dickson—A. Davidson. Agents—J. & F. Anderson, W.S.

COURT OF SESSION.

Tuesday, December 9.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

MORGAN, GELLIBRAND, & COMPANY *v.* DUNDEE GEM LINE STEAM-SHIPPING COMPANY AND OTHERS.

Process—Amendment of Record—Expenses. Amendments of record, especially if they involve a change of the ground of action, will as a rule only be allowed in the Inner House on payment of expenses from the date of closing the record.

This was an action by Morgan, Gellibrand, & Company against the Dundee Gem Line Steam Shipping Company Limited, and David Martin & Company, for payment of the loss alleged to have been incurred by the pursuers through delay in the delivery of two cargoes of flax to them.

The pursuers averred that they were the onerous indorsees of bills of lading of the two cargoes of flax which had been shipped at Riga for Dundee on board of vessels belonging to the defenders the Gem Line Company. They averred against Martin & Company that they were creditors of the Riga merchants who had shipped the cargoes, and that they had by false representations induced these merchants to send the cargo to Dundee in order that they might secure and realise it, and so obtain payment of the debts due to them, and that they had, by arresting the cargo on its arrival *ad fundandam jurisdictionem*, and afterwards on the dependence of an action against the Riga merchants, obstructed its delivery to the pursuers.

It was not averred that the Gem Line Company were cognisant of the false representations alleged to have been made by the other defenders.

The Lord Ordinary (KINCAIRNEY) on 15th July 1890 allowed the pursuers a proof of their averments as against Martin & Company, but assoilzied the Gem Line Company.

The pursuers reclaimed.

At the hearing they asked to be allowed to amend their record by adding to and making more specific their averments against the Gem Line Company, which the Lord Ordinary had not thought sufficiently specific. In the amendment proposed the pursuers averred that the Gem Line Company were parties to the fraud which the other defenders were alleged to have committed.

At advising—

LORD PRESIDENT—I do not think there can be any doubt that the condition of allowing the amendment must be that the reclaimers shall pay the expenses since the date of the close of the record. This is one of a considerable class of cases in which we are called upon to allow such amendments in the case of records which have been closed without proper consideration. It appears to me that sufficient attention is not paid to the state of the record even in this Court. We have had occasion very lately to see what scant attention is paid in the inferior courts at that stage of the process, and I think that if we are to apply the rule to which we have given effect in the cases to which I have referred—*Campbell* v. *Prestongrange Coal Company*, December 2, 1890, and *Macdonald* v. *Clyde Shipping Company*, December 6, 1890, both in the First Division, in the case of records made up in the inferior courts—*multo majis* are we bound to apply it to records made up in this Court?

There is another consideration in the present case which leads to the same result. The action has now been converted into an action based upon the ground of

fraud, which it was not before the amendment was made. This amounts of course to a very serious charge, and I do not think that amendments of so serious a character ought to be allowed except upon the condition of payment of expenses from the date of the closing of the record.

LORD ADAM concurred.

LORD M'LAREN—I am glad that your Lordship has called attention to the necessity for greater care on the part of counsel and agents at that stage of a process which consists in the closing of the record. I am aware that very little time is allowed by the statute for consideration of the pleadings prior to the closing of the record, but an application may always be made to the Lord Ordinary, and a reasonable postponement will always be granted. I rather think there may be too great a desire to minimise expense at the earlier stages of a process, and that this perhaps may account for what takes place.

LORD KINNEAR concurred.

The Court, on condition of the pursuers paying the defenders' expenses since the closing of the record, allowed the amendment to be made, and appointed the amended record to be printed and boxed *quam primum:* Allowed an account of the expenses as found due to be given in, and remitted the same to the Auditor to tax and report.

Counsel for the Pursuers—D.-F. Balfour —Guthrie. Agents—Henderson & Clark, W.S.

Counsel for the Defenders — Graham Murray—C. S. Dickson. Agent—J. Smith Clark, S.S.C.

Wednesday, December 10.

SECOND DIVISION.

GILLIGAN *v.* GILLIGAN.

Succession — Heritable and Moveable — Heritable Security—Jus Relictæ.

A truster directed her trustees "to hold, apply, pay, and convey" the residue of her estate equally among her three children, and also authorised her trustees to sell the whole or any part of the trust-estate, to invest the trust funds in the purchase or on the security of heritable property, and to realise and change her investments. The truster died survived by her three children, and the trustees divided her whole estate among the children, with the exception of £1500, the unuplifted portion of a sum of £2000 contained in a heritable bond and disposition in security, which the truster held at the time of her death. Thereafter one of the children of the truster having died intestate, a question arose as to the respective rights of his widow and only child in £500, his share of the sum contained in the heritable security.

Held that the deceased's right to a share of the sum contained in the heritable security was moveable, and that therefore his widow was entitled to *jus relictæ* out of the £500.

By section 117 of the Titles to Land Consolidation (Scotland) Act 1868 (31 and 32 Vict. c. 101) it is enacted—"From and after the commencement of this Act no heritable security granted or obtained, either before or after that date, shall, in whatever terms the same may be conceived, except in the cases hereinafter provided, be heritable as regards the succession of the creditor in such security, and the same, except as hereinafter provided, shall be moveable as regards the succession of such creditor, and shall belong, after the death of such creditor, to his executors or representatives *in mobilibus* in the same manner and to the same extent and effect as such security would, under the law and practice now in force, have belonged to the heirs of such creditor; . . . provided that all heritable securities shall continue, and shall be heritable *quoad fiscum*, and as regards all rights of courtesy and terce competent to the husband or wife of any such creditor, and that no heritable security, whether granted before or after marriage, shall to any extent pertain . . . to the wife *jure relictæ* where the same is or shall be conceived in favour of the husband, unless the . . . relict has or shall have right and interest therein otherwise."

Mrs Ellen M'Grath or Gilligan died on 3rd April 1884 survived by three children—William Robert Gilligan, Archibald Robert Gilligan, and Susan Gilligan or M'Culloch. She left a trust-disposition and settlement, by which she conveyed her whole means and estate to trustees, and directed them, in the fifth place, "to hold, apply, pay, and convey the whole residue and remainder of my said means and estate to and for behoof of and equally among my said children."

She also thereby authorised her trustees "to sell, feu, and dispose of the whole or any part of the trust-estate, both heritable and moveable, and that either by public roup or private bargain," and . . . "to invest the trust funds in the purchase or on the security of lands, houses, feuduties or ground annuals, or other heritable property, and to call up, realise, and change the said investment from time to time."

The truster at the time of her death held, *inter alia*, a bond and disposition in security for £2000 by Patrick Boyle and Robert Curran, in favour of herself and her executors or assignees whomsoever, over property in Kirk Street and Risk Street, Calton, dated the 16th and recorded 21st March 1877.

The trustees entered on the management of the trust-estate. They did not realise the £2000 bond, but they received payment of £500 to account, thus reducing it to £1500. With the exception of this £1500