bably expected to see the defender, and there are important verbal engagements entered into every day.

SMITH v. JAMIESONS.

Verdict "for the pursuer, damages "L.158. 12s. 2d., due from 25th September "1817."

Cockburn and *D. Macfarlane*, for the Pursuer.
Jeffrey and *Ja. Miller, Jun.* for the Defenders.

(Agents, *David Murray*, W. S. and *A. Robertson*, W. S.)

PRESENT,
LORD PITMILLY.

DUKE OF ARGYLE v. CAMPBELL.

1819. March 12.

A finding as to the practice of taking wreck, &c. from the sea shore.

COUNTER actions relative to the right of the Duke of Argyle to take sea-wreck and shell-sand from the shore opposite to the lands of the defender.

ISSUES.

"1st, Whether the Duke of Argyle, by "himself or his tenants, has been in the im- "memorial use of taking sea-ware, or wreck,

initialibus, the witness stated, that he never had taken sand from the place in question.

Jeffrey, for the defender.—The claim is for the whole barony; and if the Duke is found to have the right, this witness, and all the other tenants, may take it.

LORD PITMILLY.—I shall admit the witness, as I do not think the interest has been made out.

A tenant who has taken wreck, inadmissible as a witness.

The same objection was taken to another witness. In his examination *in initialibus*, he stated, that when in bad health, he gave up his farm to his son, but admitted that he still considered himself tenant. He was then asked, if he ever had taken sand from the place in question; and he answered that he had taken wreck and sand.

LORD PITMILLY.—It appears to me that this is not an admissible witness; and the evidence given by him, as to taking sand, &c. so far as it goes to establish the pursuer's case, cannot be taken into consideration by the Jury.

The smallest interest excludes a witness.

When the defender afterwards called one of his tenants, the same objection was taken.

Jeffrey.—Our tenants are necessary wit-

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nesses, as they all possess on old leases; and as their right to take sand, &c. is admitted, they have not the same degree of interest, as those on the other side.

Clerk.—There is no ground for any distinction. If the objection was good in the former case, the amount of the interest is nothing. They are not necessary witnesses, as every servant must know the facts.

Lord Pitmilly.—The objection of interest is almost the only one that is an absolute exclusion of a witness. The smallest interest excludes as effectually as the greatest, because the Court cannot distinguish what degree of interest will influence the mind of any particular individual.

I see no room for distinguishing the cases. The tenants on both sides, who take sand, are interested, and I must repeat the same judgment.

A witness examined, whose name was not in the first list served on the opposite party.

An objection was taken to a witness, that his name was not in the list.

Jeffrey.—It is in the discretion of the Court to allow the witness to be examined. Notice was given two days ago, and his name was not left out of the original list, from any negligence or improper motive.

Clerk.—They have not examined a single witness, and are not now entitled to this, as they ought to have asked it at the beginning of the trial.

LORD PITMILLY.—This is entirely in the discretion of the Court; and I shall receive this witness, as I would have received the witness on the other side, if an equally strong case had been made out.

When there is no surprise, and no attempt at any thing improper, I think it my duty to the Jury, and in forwarding the ends of justice, to admit the witness, and that I am not merely entitled, but bound to receive him.

An objection to a written document ought to be stated at the time it is tendered in evidence.

The witness at one time had had the management of the defender's property, and was desired to look at some leases granted during that period.

Clerk.—This is incompetent: the leases are not evidence.

Jeffrey.—The objection is too late.

LORD PITMILLY.—In my opinion, the objection ought to have been stated when the leases were produced.

Before his reply, Mr Clerk wished part of the leases read.

D. OF ARGYLE v. CAMPBELL.

LORD PITMILLY.—They were produced by the defender, and I think you are entitled to read them.

Moncreiff opened the case, and contended, that the Duke of Argyle being infeft in the barony of Kintyre, he has the right to the whole coast; or, if that is not sufficient, he has the right in virtue of his commission as Admiral. The defender has no title, as he got no right to the wreck, &c. within high-water mark.

To support his plea, the defender must aver an exclusive possession; but all we maintain is, that there has been a joint possession.

Jeffrey.—This is a simple question of fact, and the detail of law was artfully given to perplex, if not mislead. We deny the accuracy of the statement, and deny that our land has been part of the barony for a century past, at which time the whole right which the Argyle family had to the lands was conveyed to us.

The question is, whether the Duke has had *immemorial* possession, and such possession as will deprive the defender of a right that would otherwise belong to him.

LORD PITMILLY.—Never since the institution of this Court have I seen a case of purer fact than the present. In the Court of Session there is a dispute as to the titles of the parties, which may be affected by the state of possession; and the question as to possession is sent here to have the fact ascertained. It will then return to the Court of Session; and having the titles, together with the verdict on the facts, before them, they will take a complex view of the whole case. The only questions here are, whether the Duke has had a common possession? and if he had, whether it was by permission from the defender? Of the possession by the defender there is no question.

The question under the first Issue is, whether the Duke has possessed for 40 years or upwards. The evidence is not discordant; and you have to say whether the whole does not tend to the conclusion, that in terms of the Issue, the Duke had, &c.

If you are satisfied that he had possession, then you must say whether it was by leave from the defender. This is a proposition which the defender must prove; the Duke is not bound to prove a negative. There is no direct evidence on this point; and the former factor

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of the defender proves, that he at least never gave permission. The only evidence consists of the attempt to prove interruptions. But the interruptions appear to have been on account of the hour at which the Duke's tenants came; and the regulations made by the tenants as to the manner of taking the seaware, &c. rather confirm than weaken the usage of taking it.

"Verdict for the pursuer on both Issues."

Clerk, Moncreiff, and *Fletcher,* for the Pursuer.
Jeffrey and *Cockburn* for the Defender.

(Agents, *J.* and *M. Ferrier,* and *Lockhart* and *Kennedy.*)

PRESENT,
LORD GILLIES.

1819. March 13.

Scougal *v.* Lady Mary L. Crawford.

Damages against a proprietor, for taking the roof off the house of a servant.

An action of damages for taking part of the roof off a house possessed by the pursuer.

Defence.—The house belongs to the de-