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v.
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will find damages. If on the second still more ; but I trust you will deal with this part of the case with that moderation and propriety which ought in all cases to regulate juries.

Verdict—For the pursuer on the first issue, damages 1s. On the second for the defender.

Cockburn and Cuninglume for the Pursuer.

Jeffrey, D. F. and Borthwick for the Defender.

(Agents, *William Douglas, w. s. William Wotherspoon, s s. c.*)

PRESENT

LORDS CHIEF COMMISSIONER AND CRINGLETIE.

1829.
July 16.

GRAHAM v. LOCH.

Damages by a tenant against an adjoining proprietor for injury done by a dam-dike.

THIS was an action by a tenant for the damage done to his farm by a dam-dike, or cauld, erected across a stream.

DEFENCE.—No damages can be given till the right to erect the dam is ascertained in a depending process. The damage was not caused by the dam.

ISSUE.

“ It being admitted that the pursuer was

“ tenant of the farm of Whiteslade, the proper-
 “ ty of Thomas Tweedie, from Whitsunday
 “ 1822 to Whitsunday 1828; and that part of
 “ the said farm is bounded by Biggar Water
 “ and Holmes Water, above their junction:—
 “ Whether, during the year 1823, the de-
 “ fender wrongfully erected a dam-dike or
 “ cauld across Biggar Water, lower down than
 “ where Biggar Water bounds the said farm,
 “ whereby, during the years 1823, 1824, 1825,
 “ 1826, 1827, and 1828, or any of them, the
 “ said waters, or either of them, did overflow
 “ a part of the said farm, to the loss, injury,
 “ and damage of the pursuer?”

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Russell opened for the pursuer, and stated the facts, and that the points to be made out were,—what the defender had done,—that it was productive of injury to the pursuer,—that it was done wrongfully without a title.

An objection was taken to a witness looking at a note which he said he made up from memory the morning of the trial.

A witness not allowed to look at a note made by him on the morning of the trial.

LORD CHIEF COMMISSIONER.—The witness can only refresh his memory by a note made at the time.

Jeffrey, D. F. for the pursuer.—I submit

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that he is entitled to look at a note made by himself, without suggestion, at a time when he would be more cool and collected than at present.

LORD CHIEF COMMISSIONER.—It is unnecessary to argue this on the opposite side. If I am wrong in ruling it as I have done, it is proper it should be altered. The note to which a witness may refer ought to be made at a time when there is no influence on his mind. But if it is made at the distance of a month or a year, it is not made with that freshness which is necessary for correct recollection, nor with the certainty that it is fair and without bias. It is a matter of indifference, in the present instance, from the nature of the fact, but the witness must either speak from recollection or from a writing made at the time.

Robertson opened for the defenders, and said, That no damage could be done by this dike. That the only damage proved was caused by the overflow of Holmes Water before it joined Biggar Water. That there was no proof that the erection was wrongful. It was on the property of the defender, and did no damage.

Jeffrey, D. F. in reply,—The two questions

are, whether the operations of the defender caused greater floods, and whether these caused damage to the pursuer? Raising the bottom, and narrowing the stream must have caused the floods to rise higher. If we have proved that the land was more and longer flooded, that is sufficient to establish some damage.

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LORD CHIEF COMMISSIONER.—It appears from the admission and the evidence, that where this dike is built, the property on both sides of the river belongs to the defender; he therefore had a right to build; but this right is limited by the operation of law, which prevents a person from using his property to the injury of his neighbour; and the question is, whether thereby damage was done to the pursuer? In running water, the stream must be allowed to remain the same in quantity and quality, and to run in the same time as it has always done, and a proprietor cannot erect a new work to the injury of his neighbour. The questions in this case are, whether this work has produced the effect on the stream, and whether this effect produced damage to the farm?

You must apply your good sense to the facts proved, as to the state of the two streams, the situation of this farm, the nature of the ope-

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ration (all which his Lordship described) and then say whether the damage was caused by this operation? If you think it was not, you will find for the defender.

The damage in the schedule is not fully proved, which shows a grasping disposition on the part of the pursuer; but some damage was done to the wheat and hay, and you must consider whether it was done by the regurgitation produced by this dam; but the defender ought not to suffer from the inaccurate proof of the damage by the pursuer.

Verdict—"For the defender."

Jeffrey, D. F. and Russell for the Pursuer.

Robertson and W. Bell for the Defender.

(Agents, *John Cullen, w. s. Dickson and Stewart, w. s.*)

PRESENT,

THE LORD CHIEF COMMISSIONER.

1829.
July 17.

INCORPORATION OF TAILORS OF ABERDEEN
v. MUNRO and GRANT.

Declarator of the exclusive privileges of an incorporation, and damages for infringing that right.

THIS was an action of declarator and damages, to have it found that the Members of an Incor-