On reviewing the authorities, I must say that I do not feel able to concur in the old decision of *Hamilton* v. *The Countess of Oxenford*, in so far as that decision may be held to imply, as was contended, that the heir in possession might cut all the fine old ornamental timber up to the door of the mansion-house. The more recent authorities seem to me to imply a qualification of that old decision. The opinions of the Judges in the cases of *Bontine* v. *Carrick*, and *Bontine* v. *Graham's Trustees*, in 1827, certainly imply that in a case where the cutting of wood near a mansion-house seriously affects the beauty and comfort of the residence, the Court would interfere by interdict if called on by the next heir of entail.

It is, however, only in a strong case that such interdict would be granted. Speaking generally, the right to cut wood is in the heir of entail in possession; and the wood is considered as the fruits of the estate, not as part of the fee of the estate. An exceptional case must be instructed by the party craving interdict.

In the case before us Mr Mark Boyd has already cut, with the sanction of the gentleman to whom a remit was made by the Court, a very considerable amount of wood. It cannot be said that he has been hitherto put under any severe restriction. Nor am I now prepared to say that he is bound to spare the whole or nearly the whole of the trees in this particular wood, called "the Old Wood." I only mean to say that the entire cutting of the whole of that wood, looking to its position and its character and quality, and relation to the mansion-house, would be, according to the evidence before us, a serious injury to the residence of Martonhall. If so, then it is an exceptional case; and to that extent and effect, and no further, and leaving for adjustment the selection of trees to be cut, or of trees to be spared, I am prepared to concur in continuing a limited interdict such as it is now proposed to grant.

This wood is, in point of situation and relation to the mansion, placed midway between wood in regard to which interdict would be granted and wood in regard to which interdict would be refused. In such circumstances, I think the Court entitled to pronounce a *media sententia.*

In my view the interdict should be continued to the extent of one-third of the trees in the "Old Wood," leaving the heir in possession to cut two-thirds of that wood. And I am of opinion that Mr Maitland, to whom a remit was formerly made, should select, for the purpose of carrying out this judgment, the trees in the "Old Wood," amounting to one-third thereof, which ought, in his opinion, to be preserved for the benefit of the residence of Martonhall, and should report thereon, and as to the mode and time of cutting, to the Lord Ordinary.

LORD KINLOCH—I do not entertain any doubt as to the legal principle applicable to this case. An heir of entail is entitled to cut the wood on the estate provided (1) the wood be ripe for cutting, and (2) he does not, in cutting it, interfere with the comfort or amenity of the mansion-house. The difficulty lies in the practical application of the principle. A case may occur in which the wood proposed to be cut lies between the two extremes: being neither proper to be wholly left nor to be wholly cut down. In the present case, the "Old Wood" in question seems to me to stand in this predicament. On the one hand, it is not so near the mansion-house, nor so essential to it as a whole, as to make it necessary that it should all be left. On the other hand, it is very plain that, if the whole of this wood, which I think beyond all doubt was originally planted for shelter and ornament, were cut down, it would affect the shelter to some extent, and to a very considerable extent the amenity and beauty of the residence. The sound practical course seems to be not to limit the heir to merely thinning the wood for the sake of its own better growth, but to allow him to cut it to such an extent as will still leave a certain number of trees for the protection and ornament of the mansion-house. I think the course which has been suggested a very suitable course for attaining this object.

LORD DEAS concurred.

LORD PRESIDENT had doubts about the principle of law, but, under the circumstances, saw no reason for differing.

Agents for Complainer—Cotton & Finlay, W.S.
Agents for Respondents—Goldie & Dove, W.S.

Wednesday, March 2.

SECOND DIVISION.

AITCHISON *v.* THORBURN.

Reparation—Assault—Damages. In an action concluding for damages on account of injuries sustained through a personal assault, judgment for the defender.

George Aitchison, a mason in the county of Roxburgh, sued the defender, who is a farmer residing at Headshaw, in the same county, for damages on account of an alleged personal assault. It appears that the pursuer had been trespassing on the defender's farm, shooting crows, and that the defender had endeavoured to take the pursuer's gun from him, that a struggle ensued, that the pursuer fell to the ground, was struck, &c. The defence was, that from what passed the defender had reason to believe that the pursuer was going to shoot him, and that in doing what he did the defender was only disarming an enemy. The Sheriff-Substitute (RUSSELL) decerned for the pursuer, and assessed the damages at £15. The Sheriff (PATTISON) on appeal altered. After several findings, disposing of the facts of the case, his Lordship—"Finds, as matter of law, that in the circumstances the defender did not do any wrong to the pursuer in taking hold of the pursuer's gun and endeavouring to disarm him; and that the pursuer has no claim against the defender for damages on that account: Finds that, in regard to what followed, there is no evidence to show that the defender assaulted the pursuer, or did more than was necessary for his own defence: Finds, separately, that the pursuer having afterwards assaulted the defender by throwing stones at him, and striking him therewith on the head when he was going away, and having otherwise injured the defender, is barred from claiming any damages from the defender: Therefore sustains the defences, and assoilzies the defender from the conclusions of the action: Finds no expenses due to or by either party, and decerns."

The Sheriff adds a long Note to his judgment, in the conclusion of which he observes—"It ap-

pears from the evidence that the pursuer struggled with the defender for the gun (which indeed the pursuer is obliged to admit in his cross-examination); that in the course of the struggle the gun fell to the ground; that the pursuer and defender then seized hold of one another, or, as one of the witnesses says, 'got into grips,' and both fell; that when on the ground they struck one another on the face; that the pursuer kicked the defender on the leg; that when they got up, and when the defender was going away to his own house, the pursuer threw several stones of road metal at the defender, and hit the defender with some of them on the back of the head, and that he then took up the gun, and called upon the defender, with an oath, to 'come on.' There is no proof except the pursuer's own evidence, which cannot be relied on, that the defender kicked the pursuer. There is no proof which of the two first seized the other after the gun fell, or which of them, when they were down, first struck the other on the face. The defender admits that he struck, but says that the pursuer struck him first. There is nothing to contradict this except the pursuer's statement, who says that he did not strike the defender at all; to which the Sheriff does not attach any weight.

"If the defender was justified in taking hold of the gun, is there anything to show he was the assailant in what followed? The Sheriff thinks there is not. Probabilities would lead to the inference that the pursuer was then the assailant. But the proof is defective; and all that can be said is, that it is impossible to say which of the two began the tussle, or which of them was most injured. Certainly the throwing of the stones or road metal at the defender, after both parties had risen and the tussle had come to an end, and the defender was going away, was not necessary as a defence, or justifiable—was in fact a new assault—and might have led to much more serious injury than any the pursuer had received.

"Upon the whole, therefore, the Sheriff thinks that the pursuer's claim for damages is not well founded; and that, even if he might have had a claim otherwise, he cannot now, after having taken satisfaction out of the defender, claim anything.

"The Sheriff thinks it is not a case for expenses on either side."

The pursuer appealed.

M'Kie for him.

Strachan in answer.

The Court adhered to the Sheriff's judgment.

Agent for Appellant—Alex. Cassels, W.S.

Agent for Respondent—A. Beveridge, S.S.C.

Wednesday, March 2.

CALDER *v.* ADAM.

Right of Way—Possessory Judgment—Interdict. Held as the import of a proof, on an application at the instance of a tenant for interdict against certain parties using a cross-road on his farm, which the petitioner alleged was a private road, that there had been use by the public of the road in question as of a public road, and petition therefore dismissed.

John Calder, tenant and in possession of the farm of Muirtown, in the parish of Drainie, presented an application against William Adam, farmer, Kinnedar, in the same parish. The petition set forth that the petitioner "is tenant and in possession of the farm and lands of Muirtown, in the parish of Drainie, and county of Elgin; and the respondent is tenant of the farm of Kinnedar, in said parish and county.

"That a considerable portion of said farm of Muirtown lies between Elgin and Lossiemouth public road, generally known as the old turnpike road, and another public road, which branches off from said old turnpike road at a short distance to the north of Loch Spynie, and which road passes through said farm of Kinnedar, and is called the Muirtown road.

"That from a part of the said Muirtown road, to the north of the steading of the petitioner's farm, there is a private road which runs through one of the fields of the said farm of Muirtown, in the directon of and on to the said public road from Elgin to Lossiemouth.

"That the said private road is a part of said farm of Muirtown.

"That the said private road was constructed solely for the use of the tenant of the said farm of Muirtown, and for the more convenient working of said farm, and it was never intended that it should be used by the public or any of the tenants of the farms adjoining the farm of the petitioner.

"That the said road in question is a private road, and intended only for the use and convenience and proper working of the petitioner's farm, and no person other than the petitioner, and those having his authority or permission, has any right to use it for any purpose whatever."

After setting forth the circumstances of the alleged unwarrantable use of the road by the respondent, the petition concludes with the following prayer, "to interdict, prohibit, and discharge the respondent, and all others, his servants, or those employed by him, or acting by his authority, and for whom he is responsible, from entering upon, and passing along, or using in any manner of way, or for any purpose whatever, the said private road in all time coming, or at least so long as the petitioner is in possession of the said farm and lands of Muirtown, reserving the petitioner's right of action against the respondent for all loss and damage which he has sustained, or may yet sustain, in and by the respondent's said illegal and unwarrantable actings."

The respondent makes the following statements in defence:—"(4) Since the respondent became tenant of the said farms of Kinneddar and Janefield—a period of upwards of seven years—he has frequently, by himself and his servants, when he had occasion to do so, used the road in question without any interruption or attempted interruption of his right thereto by any party, until recently the petitioner unwarrantably attempted to do so. (5) On the lands of said farm of Muirton there are situated two wells, from which the public, or at least the tenants of the neighbouring farms, have the right of drawing water; and the road in question has been used by said tenants for this purpose from time immemorial, or at least for seven years prior to the petitioner's unwarrantable attempt to shut it up. (6.) The said road has been used by the public and the tenants of the farms in the parish of Drainie without any interruption or attempted interruption from time immemorial, or at all events for a period of upwards of seven years prior to the attempted interruption mentioned in Articles 13 and 14 of the petitioner's Revised Condescendence."