the blame rather lay with the appellant. At all events, he who seeks damages, ought to come into the Court with clean hands. The appellant and his employer were intending to resort to a scheme, by which the persons entitled to succeed under the entail, were to be defrauded of their rights. The appellant says he had the consent of the next heir, but there were many whose consent he had not. Besides, as the appellant can only plead in room, and in right of John Ranaldson, and could have no better right than he had, which was one under the entail,—as he could not have specified any damages, so neither can the appellant. Besides, penal actions cannot be maintained against the respondents, Sir William Erskine and Mr. Forbes' representatives, on account of alleged fault of those whom they represent. For the culpable act of an ancestor, the heir is not liable, and therefore, on this ground alone, the action must fall.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and that the interlocutors therein complained of be, and the same are hereby affirmed.

For Appellant, *John Clerk, David Douglas.*
For Respondents, *C. Hope, Wm. Adam.*

JAMES RUTHERFORD of Ashintully - - *Appellant;*
JAMES STORMONTH, Esq. - - *Respondent.*

House of Lords, 25th July 1803.

SERVITUDE OF COMMON PROPERTY, OR OF COMMON—PRESCRIPTIVE POSSESSION. — The appellant and the respondent's estates marched with each other. The former claimed a right of servitude of common, for pasturing his cattle, and casting fuel, feal, and divot, upon ground claimed exclusively by the respondent, who brought a declarator to have such right set aside. It appeared that the appellant founded on a decree arbitral, so far back as 1577; but, since that date, the marches had been changed by agreement of parties, and a new stone dike built to mark the division. The appellant, however, sometimes pastured his cattle on a patch of the lands. Held that he had no right of common, and that the respondent had exclusive right to all the lands on his side of the march, and that the parties had no

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right of common property, or servitude of any kind, the one against the other.

The appellant purchased the lands of Ashintully, situated in the highlands of Perthshire, in 1780; and nearly about the same time, the respondent acquired right to the Lands of Whitehill, or Mortcloich, which are adjoining to the appellant's lands.

The appellant having laid claim to a right of common property in a piece of ground of about 120 acres, called the Corry of Mortcloich, which, for more than two centuries, had been considered as part of the respondent's lands of Whitehill or Mortcloich, he was obliged to bring the present action of declarator, to have it found that this piece of ground belonged exclusively to him, and was subject to no servitude or right of common property on the part of the appellant, nor any right to pasture sheep, or cast peats upon the said property, which belonged to the respondent.

It appeared that disputes had arisen between the previous proprietors of both lands, as to the right of property between them and their respective marches, which were submitted to arbitration, and the following decree arbitral pronounced in 1757. This decree fixed and laid down the march line, and stones between the two lands, and declared that all on the east side of the marches should pertain in property to the predecessors of the appellant, and that all on the west side thereof should pertain likewise in property to the respondent's predecessor. After which there follows an exception in these words: "Except that piece of ground "and moss from the said Corryvoigle at the east of the said "meiths (boundaries) to a well and a strype (run of water) "that runs therefrom into the burn of Autinagarrall, at the "west, and up the said well to two great grey stones, and "in the upper end of the same are crescents also engraven, "to be used as commonty by the said parties and their "tenants respectively, in all time coming, by casting of "fuel, feal and divot, and to the Gudes cattle of Mortcloich "to pasture thereon without impediment." And after the testing clause there is the following: "Providing that the "piece land called Croftnastrae, otherwise the Stripe Croft, "on the west side of the burn, be commonty to both the "said parties, and their tenants, in time coming."

It was on this decree, and the alleged possession following thereon, that the appellant claimed his right. It was

farther maintained by him, that the rivulet or burn of Autinagarrall, now called the Burn of Ashintully, divided the two estates of Ashintully and Mortcloich, from the foot of Corryvoigle all the way southward, but ran in a very winding direction. At Corryvoigle the boundary left the rivulet to the west, and ascended the hills in a direction to the north-east, by the line marked by the stones numbered 1 to 14, all which stones remained to this day, bearing the engraved crescent mentioned in the decreet arbitral 1577. And the parties were agreed that this was the boundary of the two lands up to the year 1771, when, for the sake of enclosing the lands of Ashintully by stone walls, a line was drawn from the Corry ford southward, intersecting the rivulet at different places, but keeping very near it. With the same view, another line was drawn from the Ford in a north-east direction to the Hill of Knocknedy, including a very small portion of the land to the west of the first five march stones set up in 1577.

It was also alleged by him, that the proprietor and tenants of Ashintully had, from time immemorial, pastured their cattle upon that tract of land *which is on the west, or Mortcloich side of the line of march* described in the decreet arbitral, and to the southward of it, and northward from that point up as far as the 12th march stone or Relach, which tract is called Corry of Mortcloich.

The respondent, on the other hand, contended, and offered to prove, that the boundaries between the two properties were always those as fixed by the decreet arbitral in 1577; and as to the claims of servitude or commonty which Ashintully had by the said decree over the lands of Mortcloich, that these were given up in 1771, on the occasion of straightening the marches, with a view to enclose the lands. This was done by arbitrators mutually chosen, and the whole settled and adjusted by ordering a stone wall to be erected to form the march between the two properties. This was proved by letters of agreement and other documents lodged in process.

A proof was allowed; and, being reported, the Lord Ordinary (Justice Clerk M'Queen) pronounced this interlocutor: "Having considered the state of the process, proof Feb. 7, 1797.
"adduced, and writs produced, &c., finds that the line of
"march between the lands of Whitehill *alias* Mortcloich,
"belonging to the pursuer (respondent), and the lands of
"Ashintully, belonging to the defender, was fixed and as-

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" certained by the decreet arbitral produced, bearing date " the 5th of June 1577; and finds, that the said march line " is to be the rule in all time coming, except in so far as the " same has been altered by these parties and their prede- " cessors, by a stone dike built along the burn side of Ash- " intully, which dike, instead of the burn, is now to be the " march between the said parties their lands, in all time " coming; and also, excepting in so far as the same has " been altered by a stone dike leading from the said burn " in a north-easterly direction to the Shank of Knockan- " dyne, which includes five of the old march stones to the " east of said dikes; and that the said march line is to run " in a straight line from the uppermost, or fifth, of these " stones, to the south march stone west of said dike, and " from thence by the chain of march stones and summits " described in the said decreet arbitral, till it reach the " highest summit marching with Glenshee, as described in " the plan produced, and marked by the Lord Ordinary as " relative thereto. And finds, that all the grounds on the " west of the foresaid line is the exclusive property of the " pursuer, and that all the grounds on the east of the said " line is the exclusive property of the defender; and that " neither of the parties have a right of common property " or servitude of any kind whatever, upon the other party's " lands, bounded and described as aforesaid; and decerns " and declares accordingly."

To this judgment his Lordship adhered by various inter-
Nov. 30, 1797. locutors, the last of which is dated 30th Nov. 1797.

On reclaiming petition to the Court, and farther procedure
June 26, 1798. had, the Lords, by several interlocutors, finally adhered to
Nov. 28, —— the above interlocutor.
May 28, 1799.
Jan. 14, 1800. Against these interlocutors the present appeal was
Feb. 12, —— brought to the House of Lords.
Mar. 11, ——
July 1, —— *Pleaded for the Appellant.*—It is established by the
July 4, —— proofs in the cause, that the proprietors of the estate of
Nov. 17, —— Ashintully, and their tenants, have been in the uninterrupt-
Feb. 4, 1801. ed enjoyment of a privilege of pasturing upon, and other-wise using the lands called the Corry of Mortcloich, as a property, common between them and the proprietors of Whitefield, or as subject to a servitude of pasturage, and casting fuel, feal and divot, or peats and turf, at least since the year 1577. Nor is it any answer to this, to say that this was a mere tolerance allowed, according to the custom of that part of the country between conterminous proprie-

tors of uninclosed lands, because it is further established by the decree arbitral itself, which specially excepts the lands in question, as commonty or servitude lands. The uniform possession of the proprietors of Ashintully and their tenants, is proved by witnesses that this was ascribed to a *right* held over the lands of Mortcloich, and not to a mere tolerance. But even supposing that the right of pasturing on the Corry of Mortcloich was not reserved by the decree arbitral 1577, or has not been acquired by prescriptive possession, the finding in the interlocutor, "That neither party has a right of common property, or servitude of any kind whatever, upon the other party's lands," is erroneous, and must be altered; because the appellant is, at any rate, entitled to a servitude upon the ground thus described in the first exception contained in the decree arbitral, "That piece of ground and moss from the Ford of Corryvoigle, at the east, up the meiths to a well and a stripe," &c. which, *ex concessis* of the respondent, comprehended what is called the Scholar's Moss, and the ground between it and the bounding line marked on the plan No. 20 and 21, extending to fifty six acres and upwards. This, together with the prescriptive possession had, ought to be sufficient to establish the servitude. No doubt, this possession was seldom exercised as to the peat, &c., but as to the pasture, it was exercised unchallenged.

No doubt it is contended that this and every other claim of servitude was given up at the time of the transaction for straightening the marches in 1771. But the proof does not afford evidence of this, but rather shows that the former possession of pasturage was continued.

Pleaded for the Respondent.—In regard to the two exceptions in the decree arbitral, the first is a servitude not of pasturage, but of casting fuel, feal and divot, upon the piece of ground and moss, the description of which cannot apply to the Corry of Mortcloich, but to Scholar's Moss, marked No. 21 on the plan. But as to this, it is established by the proof, that no such servitude was ever used by the tenants of Ashintully, either upon the Corry or upon Scholar's Moss, within the memory of man. It is therefore clear that this right of servitude was long ago lost *non utendo;* and even had it not been so, it was completely done away by the march dike erected, agreed to by the two proprietors in 1771. The other exception was deemed o so little importance that the decree arbitral was closed, and the testing

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clause engrossed, before it was thought of, but the witnesses depone that they never heard that any part of Corry of Mortcloich ever bore the name of Croftnastree or Strifecroft; and that the only piece of ground known by that name, the tenants of Ashintully have never had any possession of.

With respect to the Corry of Mortcloich, it is an open pasture field, and is surrounded on all sides by the property lands of Whitefield. It is situated on the west of the march burn, having between it and the burn, arable, meadow, and pasture ground interjected; parts of which were exchanged at settling the line of the march dike in 1771. It is declared to be the exclusive property of the estate of Whitefield, both by the decreet arbitral of 1577 and that of 1771. It is described in the appellant's summons of division as the common of Whitefield, which name has been given to it, as being possessed in common by all the *tenants of that property.* It is not alleged that any of the tenants of Ashintully did ever cast fuel, feal or divot, on this Corry, which appear to be the great criterion of property in that country; as, by mutual consent, a promiscuous pasturage of all the open grounds upon the estates of Ashintully and Whitefield took place; though their marches were perfectly known, and strictly observed, in casting fuel, feal and divot. But when the appellant became purchaser of Ashintully, he put an end to this mode of promiscuous pasturage himself, by poinding the cattle of Whitefield when they crossed the march line. But, in point of fact, all claims of common or servitude, by either of the parties, beyond their marches, was put an end to by the decree arbitral 1771, and the march dike built pursuant thereto. This march dike was also to be erected, as the decree bears, at the mutual expense of both parties, as is usual.

By the law of Scotland, no person can, by prescription, acquire a right beyond the limits of his own boundary; and unless the appellant could show a title from the proprietor of Whitefield posterior to the year 1771, his claim of common is completely barred.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellant, *Wm. Adam, Wm. Robertson.*

For the Respondent, *C. Hope, Ad. Gillies.*

Unreported in Court of Session.