1736.

TROTTER
v.
MARCHMONT,
&c.

HENRY TROTTER, of Morton Hall, Esq. - - } *Appellant;*

ALEXANDER, EARL of MARCHMONT; WILLIAM, EARL of HOME; ANDREW HOGG of Harcarse, Esq.; WILLIAM HOME and ROGER MOODIE; - - } *Respondents.*

12*th February*, 1736.

COMMONTY.—PRESCRIPTION.—The proprietor of a moor (over which several heritors had rights of servitude,) possessed other lands, to which no servitude on the moor belonged, but the tenants of which were in use for above forty years, of pasturing cattle, &c. in common with the occupiers of the dominant lands. Found in a process of division of the moor, that the proprietor of the moor, (besides one fourth *tanquam præcipuum*,) was entitled to a share in respect of these other lands.

TITLE TO PURSUE.—ACT 1695, c. 38.—Found that a person, having only a right of servitude, is entitled to pursue a division under the Act 1695.

[Fol. Dict. I. p. 155. III. p. 137. Edgar p. 16.—Rem. Dec. I. No. 42, p. 83. Mor. Dict. p. 2462.]*

No. 38. THE Barony of Fogo, with the common moor of the same, belonged originally to the Earls of Home. The lands were afterwards parcelled out among different heritors; the greater part, with a servitude of pasturage and feal and divot on the moor, belonging to the respondents, and the remainder being possessed by the appellant and his predecessors, in virtue of a wadset from the Earl of Home. The appellant was also infeft in the lands of Char-

* The part of the case which is given in these reports, (relating to the claim of *præcipuum*,) was not made the subject of the appeal.

terhall and Whinkerstanes, which were contiguous to the common, but did not form part of the Barony of Fogo.

An action was raised by Hogg of Harcarse, one of the heritors, for dividing the common in terms of the act 1695, c. 38.

The appellant claimed a share of the moor, *tanquam præcipuum*, to himself as proprietor, being in right of the Earl of Home. He further claimed a portion in respect of his lands of Charterhall and Whinkerstanes, the tenants of which had been in uninterrupted possession of a right of commonty thereon for above forty years. The Earl of Home objected that although the tenants of these lands might have had such possession, yet that was to be presumed to have been only by licence of the appellant's ancestor, who although infeft in those lands, had at the same time the wadset from Lord Home's ancestor of the moor itself; such licence by the wadsetter could not acquire to those lands any right of commonty upon the moor, to the prejudice of the other dominant tenements.

A question having also arisen touching the title of a person having only a right of servitude to pursue for such a division, the court (31st December 1723) found "that a person, though having only "a right of servitude, was entitled to pursue a di-"vision on the Act of Parliament 1695; And that "the defender (Mortonhall) could not prescribe a "right of servitude on the Moor of Fogo, for his "lands of Charter-hall, Whinkerstanes, &c. by any "possession the tenants of the said lands might "have on the said moor after the date of the wad-"set right of the lands of Fogo and the said moor "by the Earl of Home to his predecessors."

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Thereafter (7th January, 1724,) it was found "that the proprietor ought to have a fourth part "of the moor allocated to him, *tanquam præcipuum*, "as the value of his property, and that the re- "mainder ought to be divided proportionally, "conform to the act of Parliament, amongst the "neighbouring heritors who had possessed the "same as commonty; allowing the proprietor "always a share in that division effeiring to his "lands, whereof the tenants had promiscuous pos- "session with the heritors of the dominant tene- "ments," &c.*

A petition was presented by Mortonhall against the previous interlocutor of the 31st December, upon advising which, the court (23d Jan.) found "that he could not prescribe a right of servitude "on the Moor of Fogo for any lands belonging to "him in property, not contained in the wadset "right, by any possession the tenants of the said "lands might have had on the moor after the date "of the wadset right; without prejudice of any "right, or claim of servitude, or possession, com- "petent to him or his predecessors for their other "lands prior to the wadset; and that the said pos- "session, during the wadset, could not entitle him "to any greater share in the division than what "corresponded to the wadset lands, either with "respect to the Earl of Home in case of redemp- "tion, or with the other heritors."

Mortonhall again petitioned, and stated that the previous judgments had been pronounced on the footing that his and his predecessors' right to the

* This is the only interlocutor in the case which is reported. It was not appealed from.

lands had been only a wadset, but he had since discovered that it had been absolute and irredeemable, a crown charter having been granted in 1662 of the lands of Fogo, &c.; and, therefore, the possession of his tenants ought to have the same effect as if the Earl of Home had been proprietor.

It was *answered* that no proof of this was produced. The crown charter proceeded only on the wadset, and did not bear to be "irredeemably," but simply "heritably;" while the expired appriising of the reversion, founded on by himself, showed that his right previously rested entirely on the wadset. But whatever the nature of his title might have been, the lands of Whinkerstanes and Charterhall could have no right to a share of the Moor of Fogo, never having belonged to the family of Home, from whom the other heritors had already got rights of servitude; and, therefore, neither the Earl nor Mortonhall could grant to other lands new rights inconsistent with theirs. As to the possession, Mortonhall does not pretend that he had any prior to the wadset; and then being proprietor of both, the one could not prescribe a right of servitude over the other; *res sua nemini servit.* But even if it could be held that these lands were entitled to a share, this could not be to the prejudice of the other dominant tenements, but must come off the portion which had been allotted to Mortonhall as proprietor.

Replied,—That although it might be the case that neither the Earl nor Mortonhall could grant servitudes inconsistent with those previously existing, yet it did not appear that the introducing the lands of Whinkerstanes, &c. was either posterior to those rights, or, if posterior, inconsistent with

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them. The extent of those servitudes could only be ascertained by the use; and as Mortonhall's possession by his tenants, both of Fogo and Whinkerstanes, was admitted, it followed that this was not inconsistent with them. They were thus distinctly limited and defined in their extent; and, therefore, cannot interfere with the proprietor's disposing of the residue, so long as he did not trench upon them.

Although it is true that *res sua nemini servit*, *i. e.* that, holding Mortonhall to be proprietor of the Moor, he could not claim any interest *jure servitutis;* yet his possession for forty years has the effect of limiting the other servitudes, and therefore preserves to him the right in the remainder which is his, as part and pertinent of his property.

The court (17th July, 1731,) "found that Mor-
"tonhall had not proven the allegeance, viz. that
"the lands of Charterhall and Whinkerstanes had
"any possession or servitude in the Moor of Fogo
"before he acquired the wadset from the Earl of
"Home, and therefore adhered," &c. Commission was afterwards granted by the Lord Ordinary (19th February, 1732,) for dividing the commonty among the heritors, "excluding from the division
"the lands of Charterhall and Whinkerstanes."

Entered Jan. 31, 1734. Amended Feb. 19, —

The appeal was brought from the interlocutors of the 8th January, and 31st December, 1723; the 23d January, and 15th February, 1724; the 26th November, and 27th December, 1726; 6th February, 17th and 30th July, 1731; and 19th February, 1732; the 15th December, 1733, and 18th January, 1734.

Judgment, Feb. 12, 1736.

After hearing counsel, "it is ordered and ad-
"judged, &c. that the said interlocutors of the

" 15th December, 1733, and 18th January, 1734,
" be, and the same are hereby reversed; and that
" so much of the other interlocutors complained of
" as exclude or tend to exclude the lands of
" Charterhall and Whinkerstanes from a share in
" the division of the common in question be, and
" the same are hereby also reversed; and that the
" said other interlocutors in all other respects be,
" and the same are hereby affirmed: And it is
" further ordered, that the said Lords of Session do
" grant a new commission to divide the said Com-
" mon among the several heritors, producing their
" interests, including in the said division the lands
" of Charterhall and Whinkerstanes."

For Appellant, *Duncan Forbes, William Hamilton.*

For Respondents, *James Erskine, A. Hume Campbell.*