" respondents, the sum of L.60, for their costs in " respect of the said appeal."

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STORMONT v. HENDERSON.

For Appellant, *Dun. Forbes*, and *C. Talbot.*
For Respondents, *P. Yorke*, and *A. Hume Campbell.*

DAVID, VISCOUNT of STORMONT, *Appellant*;
JOHN HENDERSON, *et alii*, kindly tenants of Lochmaben, - - } *Respondents.*

20th April 1732.

TACK—KINDLY TENANT—In a question between the crown's kindly tenants of Lochmaben, and the heritable keeper of the castle, it was found that the tenants, although having neither charter nor sasine, had yet such a right of property in the lands that they could not be removed, and might assign their rights.

[Fol. Dict. II. p. 419. Mor. Dict. p. 15195.]

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BY a charter from the crown, the lands of the four towns of Smalholm, Hitae, Hek, and Greenhill, and other lands of Lochmaben, with the hereditary custody of the castle of Lochmaben, and the office of steward of Annandale, and all right, title, and interest, which his majesty or his predecessors had or might have to the said premises, were granted (under the burden of certain annual payments) to the Earl of Annandale.

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The lands of the four towns of Lochmaben, above mentioned, were possessed immemorially by the respondents and their ancestors, as *kindly* tenants of the crown, paying rent and services to the constables or keepers of the castle of Lochmaben.

1613. 1634. The Earl of Annandale, of these dates, obtained two decrees of removing *in absence* against some of these tenants.

In 1665, David, viscount of Stormont, having married the countess of Annandale, who had her liferent in this estate, brought an action of removing against several of these tenants. Appearance was made for them, and in defence, it was pleaded, that their right was perpetual, and independent of the will of the pursuers claiming under the Earl of Annandale, who was only keeper of the castle. But afterwards, an agreement being entered into with Lord Stormont, the tenants allowed judgment to July 18, 1665. go in absence, and his Lordship granted a deed obliging himself, his heirs and successors, notwithstanding the decree of removing, no ways to remove the tenants or their nearest of kin, during his wife's right of liferent, or his own right of property in the lands.

A dispute having arisen between Lord Stormont (the appellant's father) and the respondents, regarding the payment of the land tax, in which his 1720. Lordship threatened to remove them if they did not submit to bear the whole burden; they raised an action against him, for recovering payment of his share of the said tax which had been paid by them, and for declaring their immunity from pay-

ing his proportion of the tax in future, and *that they were the crown's irremoveable tenants.* A cross action was brought by Lord Stormont for removing them, and having it declared that they were removeable at his pleasure.

The respondents founded upon immemorial possession, and on three warrants under the royal sign manual, granted upon petitions presented by the tenants to the king; the first two by James VI. 1592. 1602.
ordering the keeper of "the castle to desist from "molesting the tenants, and to suffer and permit "them peaceably to occupy their possessions." The third, by Charles II. declaring "that the June 1664.
"tenants should have been protected, and these "warrants above mentioned, obeyed as constant "leases, according to the true meaning thereof; "and further, his majesty renews the said warrants "and leases, and authorises the said tenants and "their successors, to possess and enjoy their re-"spective lands, they paying and performing "yearly the rents and services paid and performed "by their ancestors, anno 1602, and prohibits and "discharges the keepers of the castle of Lochma-"ben, or any one who shall pretend right to the "said crown lands in all time thereafter, under all "highest pain, to exact more rent, or remove them "from their ancient possessions, so long as they "thankfully perform the same."

Upon the question of right the Court found Nov. 24, 1726.
"that the pursuers of the said declarator" (the respondents) "had such a right of property to the "lands that they could not be removed, and might

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"dispone their right to extraneous persons." And this judgment was adhered to.

The appeal was brought from these two interlocutors.

Pleaded for the Appellant:—If the respondents' predecessors had been ancient kindly tenants of the crown, that would not give them a right of being irremoveable by the grantee of the crown, or of assigning their right of kindly tenancy; for this would contradict the fundamental principle of law, that there can be no perpetual assignable estate in land without infeftment, *(nulla sasina, nulla terra,)* there being nothing in Scotland similar to the law of copyholds in England. Although kindly tenants are well known in Scotland, it never was held that by the continuance of the favour, they acquired an absolute right against the heritors of the lands.

It is an established rule, that kindly tenants cannot assign, because the only title which they have to the Lord's favour, is their being kindred to the ancient possessors, which is inconsistent with the notion of the power of assigning.

The two warrants of King James neither give a new right nor confirm any old one, and amount to no more than a command to the constable of the castle of Lochmaben not to oppress the tenants. The warrant from King Charles II. ordering the two former warrants to be observed as leases, was obtained upon a misrepresentation, for the crown had then no right to the lands; and for that reason, when the warrant was brought to the Exchequer, it was stopped and never passed the seal.

But even supposing that the warrants amounted to leases, yet undoubtedly they give no power to assign, and by law no leases are assignable, unless they contain a power of assigning in formal words.

By these interlocutors the respondents are established in a right which hath no name, nor any foundation in law, and is incompatible with the right established in the appellant and his ancestors by charters and infeftments, in virtue whereof they have possessed the lands for above 100 years.

The allegation of immemorial and uninterrupted possession is contradicted by the three decrees of removal of 1613, 1634, 1665.

Pleaded for the Respondents:—The Respondents and their ancestors have enjoyed their possessions by this tenure of *kindly irremoveable tenants of the crown*, time out of mind, and long before charters or infeftments were in use in Scotland. In the earliest times, proprietors of lands had no titles in writing, but their rights were known and ascertained by their possession, and enrolments in the King's Courts, or in the courts of the other over-lords; and when the estate descended to an heir or a purchaser, the title of the ancestor or author was cognosced by a jury, and the verdict of that jury gave them a full right.

And although since the feudal law was fully adopted into the law of Scotland, titles have generally been constituted by writings, that affords no objection against the respondents, whose right is more ancient than that period of the law of Scotland. There yet remain other rights of the same kind, such as the udal rights in Orkney, where

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there are no titles in writing, but lands are by possession only transmitted from father to son; the titles of the tenants or rentallers of the bishoprick of Glasgow, of the monastery of Paisley, and of those who held under the keepers of the King's castles of Dumbarton and Stirling, were of the same nature till of late, and several of the bishop's tythes are held in no other manner to this day.

The right of the respondents is prior to that of the appellant, and not inconsistent with it. The lands in question never ceased to belong in property to the crown. They remained perpetually with the crown as the crown's own property, and the respondents' ancestors continued still *the crown's kindly tenants*. The right of keeping the castle was alone granted to the appellant's successors, as appears from his own title, and particularly from Lord Maxwell's service, by which he is retoured heritable keeper of the castle, but not proprietor of the lands.

The respondents' right has been acknowledged by the crown in the several deeds above mentioned, and although the appellant pretends that the sign manual 1664 was stopped in Exchequer, he has adduced no evidence of the fact, nor can it possibly be true, because a sign manual is not a writing which requires to be passed in Exchequer, but has its full effect by the King's subscription.

The decrees of removing 1613—1634 were obtained in absence, against the inhabitants of the town of Lochmaben, the nature of whose right is not known, but not against any of the respondents' ancestors, and they were part of the encroachments

which occasioned the complaints to the crown. The decree 1665 was likewise obtained in absence, and upon a special agreement, by which it was not to be carried into effect. Never having been acted on, it is now lost by prescription; nor has any decree in absence the least effect after parties appear and plead on their rights, as the respondents have now done.

An argument was also raised on the fact, that in 1695, when the question arose between the appellant's father and the respondents concerning the land tax, the appellant's father had insisted, *that they were irremoveable tenants*, and ought on that account to be taxed, thus acknowledging their right to be such as they now pleaded.

After hearing counsel, "it is ordered and adjudged, &c. that the appeal be dismissed, and that "the two interlocutors therein complained of be, "and the same are hereby affirmed." Judgment April 20, 1732.

For Appellant, *P. Yorke* and *Dun. Forbes.*

For Respondents, *C. Talbot, Ch. Areskine,* and *Ro. Dundas.*