

No 32.

*2do*, By statute 1457, c. 71. and 1503, c. 9. it is declared lawful for all persons to set their lands in feu-farm; and that in case of the granter of such feu-rights falling in ward, or incurring any feudal delinquency, the sub-vassal shall only be liable in the same sub-feu farms or duties which he was bound to pay to his immediate superior. These statutes were in force when the defender's original feu-right was granted; and, of course, all that can be exacted from them is the sub-feu duties stipulated in their investitures.

*Answered*; Leases do not afford any exception against the superior having obtained decret of non-entry; and feu-rights, from their assimilation to leases, cannot have a stronger effect.

*2do*, The statutes quoted relate only to ward-lands, and expressly except 'feus granted with diminution of the rental.' Nor do these statutes extend to the ordinary casualties attending feudal contracts. From the indispensable qualities of these contracts, the superior must have it in his power, upon the demise of his vassal, to pursue a declarator of non-entry, and thereby to enter to the full possession of the lands. The sub-vassals may, indeed, by proper steps, in-state themselves in the right of their immediate superior; but, by doing so, they come under every obligation to which this superior was subject.

THE LORDS found the pursuer entitled to the full rents and duties of the lands till a vassal was entered; and thereafter to the duties payable to him by his immediate vassal; but, in regard of the circumstances of the case, and unfavourable nature of the claim to the full rents, found these due only from the date of this interlocutor.

Lord Ordinary. *Alva.* Act. R. Dundas. Alt. Rae, Maclaurin, Blair. Clerk, Campbell, C. *Fol. Dic. v. 4. p. 20. Fac. Col. No 32. p. 53.*

---

 SECT. IV.

Full Mails not due from Citation, where the Defender has a colourable Excuse.

No 33.

No non-entry was found due where the vassal was taken prison-

1554. March 19. ROLLAND against His VASSAL.

ANENT the action pursued by the Laird of Rolland against his free tenant, for non-entries of his lands holden of him, it was *alleged* by the said tenant, That the said Laird's father was slain at Pinkie, by reason of the which the said

lands came in non-entries, and the gift thereof disposed to the pursuer, by reason of the act of the field foresaid, at the which the defender was taken prisoner, and holden thereafter long in England, in which time he might not pursue his action to compel the superior to enter to the superiority of his lands, nor yet might enter himself to the same, for the causes foresaid; wherefore the said pursuer had no just action to pursue the said non-entry during the space that the said defender was prisoner, as said is; which allegiance and exception was admitted, and *absolvitor* given to the said defender against the said pursuer.

*Fol. Dic. v. 2. p. 6. Maitland, MS. p. 114.*

1635. *January 29.*

MONCRIEFF *against* L. BALNAGOWNE.

MR ARCHIBALD MONCRIEFF having a pension granted by the King, out of the blench or feu-duties payable to the King by L. of Balnagowne, out of the lands of —, which were erected to Balnagowne in a barony, the lands of old being of the abbacy of Ferne, and diverse of these lands so erected, pertaining to others, who had the property thereof feued to them; and others of the lands pertaining in property to Balnagowne's self, who by the erection of the whole, became superior to the other feuers; and the said Mr Archibald Moncrieff having obtained decret against the L. of Balnagowne, as apparent heir to his father, who was addebted in that duty to the King, out of which his pension was gifted to be paid, decerning the ground to be poinded therefor; the said decret being given against him, only as apparent heir to his umquhile father, and not as heir, nor infest, nor as charged to enter heir; and upon the said decret, having comprised all the lands, as well pertaining to the Laird as to the other feuers, for not payment of the pension which he had, as said is, out of the feu-duties, and which were owing to him of diverse years, for which he had deduced the comprising, and obtained the said sentence; he pursues the L. Balnagowne, and the possessors of the lands comprised, for the mails and duties thereof. And the defender *alleging* the comprising to be null, because it was deduced against him, as apparent heir only, he neither being decerned as heir, nor as lawfully charged to enter heir, nor as infest; the LORDS repelled this allegiance, and sustained the decret and comprising, especially in respect of the same standing unreduced, which the LORDS found they could not annul in this summons so summarily, by way of exception, albeit the alleged nullity had been in itself relevant; as also the LORDS thought it not relevant, even albeit it were in a reduction; for they thought and found, that a decret to poind the ground might well be decerned against one called to represent the party debtor deceased, only as naked apparent heir, and that the comprising might be so deduced thereupon, for a defunct's debt, against him, albeit neither infest, nor being heir, nor charged to enter heir. Yet this would appear

No 33.  
er by the public enemy, and remained prisoner all the time libelled.

No 34.  
Sub-vassals were found liable for the full rent, not their feu-duty only, from citation in an action of mails and duties, at the instance of the superior, although they had received no previous warning to remove.