or possibility? In Answer to this I shall Consider 1/ the Case of a Nearer heir in hope, or of one Conceived and Existing in the Mothers belly the Unborn. 2/ That of a Nearer possible heir, Neither born Nor Conceived. In the first case, no doubt the service must stop till the birth of the Child in Utero, which Law Considers as born in all things tending to its advantage l. 7 ff de Statu Hom. By presuming that it is not only a living Child and Not a false Conception, but also that it is a Male and Not a female: Upon which Account daughters cannot be served heirs, while there is any probability of a posthume Child who is presumed to be a Son that would Exclude them, till the Contrary appear. The Roman law is so favourable, that it allows the Mother to possess in the Interim for the Child. But with us the estate Remains in Non entry, and the Nearest agnates of the birth may as protutors Continue the predecessors possession Stair lib. 3 Tit. 5 § 50 pr. The second case of a Nearer heir in simple Possibility neither born nor Conceived, May happen either in the Succession to an Intestat according to the Proximity of blood, or in tailzied Succession. When the Legal Succession falls to heirs at law, the Nearest heir at the time should succeed, without Waiting the possible existance of a Nearer. Thus a father may upon his only Child's dying without issue, serve heir Immediately to him, tho' the father might afterwards Chance to have More Children, which would have Excluded him if born tempore Devolutæ Successionis. But it hath been More Disputed in tailzied Succession, whether the Next Member of tailzie at the predecessors death could be allowed to serve heir to him, while there was a possibility of the Existance of a Nearer Member of the tailzie? v.g. One having tailzied his lands to himself and heirs of his body, which failing to the heirs of A. his body; which failing to the heirs of B. The Question is, whether the heirs of B. can enter heir to the Maker of the tailzie dying without issue, while A. has No heirs of his body, tho in a possible capacity to have such heirs? It may be pleaded for the possible heir. That the Words <u>which failing</u> in a tailzie, are to be Understood of failing simply, or existing at no time. For 1/ where Children to be procreated are Instituted or Substituted heirs, they are understood to be Called Conditionally, because of the Uncertainty of their Existance. And the Capacity of a person Instituted and Substituted Conditionally is to be Considered only at the Existance of the Condition, So that the Succession is Pendent and Cannot medio tempore fall to the Next heir. Which is agreeable to the opinion of many Lawyers, Peregrin. de Fidei=Commiss. pag. 309. 310. Voet.

Voet. Comm. ad Tit. ff de Hæred. Instit. § 12. And in Many Cases, the Exercise of property is In pendenti sine Domino: As in all Suspensive conveyances, v.g. Where in Nasciturus a Child to be born is Institute, and where a tailzie is made to one upon Condition that he Marry such a person; Where Law Conjoins the entry of the heir Conditionally Instituted with the Predecessors death, who during the Interval is Represented in some Measure by the hæreditas Jacens. 2/ if the Next heir at the predecessors death were allowed to enter without Regard to a Nearer heir in hope, mens estates might be Carried away by a Mere Subtility contrary to their Intention, from their Children and Descendants to very remote Relations, and perhaps to the King as Ultimus hæres, and thereby those whom the predecessor favoured Most excluded for ever. Nor doth any Nation allow a greater Latitude to persons in the free Disposal of their Estates, than our Law doth in tailzies, whereby Most of our Ancient families Stand. One the other hand it may be Urged in Behalf of the Actual heir at the time. 1/ The Words <u>which failing</u>, by all the rules of Grammar and Common sence are applicable only to the present time. For 1/ The Civil law Considers the Capacity of the heir at the failing of the Succession. 2/ These words Import not a Conditional Substitution, but only the order of Succession, as if the tailzie had run thus: to me and the heirs of My Body, and after them to the heirs of A. his body and after them to the heirs of B. For tho in a Disposition that Clause, <u>failing heirs of my body Dispone to such persons</u>, were truely a Conditional provision; Yet in a tailzie where there is a Substitution, <u>which failing</u>, Imports No Condition either Suspensive or Resolutive. 3/ It were unreasonable, that an heir should Delay to embrace a Succession fallen to him, till all the possible Events of a Nearer were Discussed and purifyed. Seing if the Succession were pendent upon the account of a future possibility, there would be Dominium sine Domino. If property were thus Suffered to hang in the Clouds of Uncertainty Many great Inconveniences would follow, Inconsistent with the design of the Maker of the tailzie: Creditors would not be answered, law having provided No rule in that Case for Carrying on Diligence; The Superior would want a Vassal and the Casualties thereby arising; Vassals would want a Superior to enter them; many rights and debts for want of one having title to pursue might be lost by Prescriptions. 4/ If the Next heir tempore Devolutæ Successionis could not enter the estate would be truely Nullius, and Caduciary to the King as ultimus hæres. 5/ Whatever might be