

to take Effect in case the Lands be not disposed or erected, Stewart Answering to Writ. Doubts. Fit. Return of Lands to the Superior, and Fit. Return of Lands to the King. If a contravening Member of Tailzie is cut off by a Decree of Irritancy, all the Heirs of his Body are thereby excluded: Because this Tailzie succeeds only as Heirs to the Contravenor. McKenzie Fit. But if the Contravenor was nomination substitute in the Tailzie, the son would succeed, tho' he be cut off. McKenzie Fit. Because he may serve Heir of Tailzie to the offest who did not contraven.

When a Tailzie is made to a Heir Female, or to one or more Sisters not married, must her eldest Child bear the Name of the Maker's Family; but all her young Children should bear his Name if they get any Patrimony out of it. The Husband of the Heiress should also use the Name and Arms always. Nor is it sufficient to wear the Arms quartered or so, the Design of the Maker of the Tailzie being to introduce him as a Child into his Family. McKenzie Fit.

If an Heir of Tailzie be burdened to marry a Gentlewoman named in the Writ he ought to do it, the Tailzie being sub modo without any Restraint on his Liberty to marry. For if he think fit, he may chuse to accept the Right with that Liberty, or not; and unlawful Restraints are not such as withhold Gain, but only those that infer Loss. Stewart Answering to Writ. Doubts. Fit. Tailzies. Now, the such a Tailzie and Resignation thereon were made in Liege pointee, the Maker might hereafter on Deathbed by a Paper apart, before Infeudment, burden his Tailzie as he pleased: Seeing the Heir is not so stated in the Right of Succession that he cannot be disappointed by the Tailzier. For as he being Master of the Right in his own Hands may evacuate and cancel it: So he may qualify it as he pleases. Stewart Fit.

In Tailzies, Heirs Male or Heirs of Line of the Body of every Branch or Member doth succeed, according as it is specially provided. If the Maker of the Tailzie have no Sons, but only Brothers, the Purchase would ascend as long as to the elder. When a Tailzie doth not terminate in Heirs whatsoever, and all the Heirs therein specified do fail, the Fee should not fall to the King or other Superior, as ultimus heres, while any Person can make up a Title to it as Heir of Line: Tho' it was once otherwise decided 25 July 1680 Wallace and Tenant contra Tenant and the Lord Drum. Which rigorous Decision directly crosses the Design of the Maker of the Tailzie, and forfeiting a Man for the Error & Omission of a Notary or Writer, to insert the Cause, which failing to such a Person's Heirs whatsoever, hath been justly disapproved at among us by our greatest Lawyers Craig Feud. Lib. 2. Tit. 16. McKenzie Fit. The original Fee to a Man and his special Heirs of Tailzie ought not to be extended further, than to those in Favour of whom it is specially granted.

Obligations in Favour of Heirs of Tailzie, are always effectual against Heirs of Line, in Relation to whom the Heir of Tailzie is considered as a Stranger, and not obliged to represent the Predecessor in that which is contrary to the Terms of the Tailzie 20 January 1680 Binny contra Binny 3 Feb. 1677

1677 Drummond contra Drummond

Tailzies are made the same Way they are established, according to the Rule. *Unumquodque disolvitur eo modo quo collatum est.* That is by consent of the Superior accepting Resignation and granting a new Infeudment to the Resigner himself and his Heirs whatsoever, or to any other Person in his Right. Craig Feud. Lib. 2. Tit. 16. §. 8. vers. rumpitur autem. But if the Superior without his Consent to Resignation in favour of the Heir of Tailzie, so much as to resign him by the Superior, may upon the personal Obligation of the Maker of the Tailzie remaining still Tiar, be obliged to divest himself in favour of any Person for the Maker shall grant a posterior Right to, who may adjudge it. Implement, and force the Superior to receive him, tho' the Superior himself was substituted in Heir of Tailzie, Feud. Lib. 2. Tit. 3. §. 43.

Now for the Maker of a Tailzie is empowered to break it, by reserving a Faculty to alter or innovate, it is set forth infra Page 526. 1146. 1147.

One having without an antecedent onerous Cause Tailzied his Estate with the usual prohibitory and irritant Clauses, to himself in Life and to his Father in Fee; and failing of him by Decree, to the Heirs Male lawful issue he begotten of his own Body; and so forth failing these to other Heirs of his Tail: The said Tailzie while it remained in the Terms of a personal Right, not perfected by Charter and Seisin, was found revocable and revoked by the Heir thereof with Consent of the first InSTITUTE 23 June 1713 Scot contra Scot. Because a Destination is not of that irrevocable Force with a Bond to pay a Sum or perform a Deed. For in the one case a Man transfers a Right of Exaction to the Creditors: Whereas a Man in the ordering his Succession, is presumed to have it still at his Disposal; unless there be an onerous Cause for the Tailzie, which fixes the Obligation. And the prohibitory and irritant Clauses were only a Condition adjected to his own voluntary Deed, which qualified it upon the Receiver's Part. So that such a naked Bond of Tailzie for no antecedent onerous Cause, might, before it was completed by Infeudment, be revoked by the Grantor with Consent of the first InSTITUTE. For tho' that first InSTITUTE could not by himself alter the Tailzie, having got the Right sub modo; why might he not with Consent of the Grantor who imposed that Qualification upon him, renounce such an incomplete Deed, whereby they had only spun Succession? as had the Grantor of the Tailzie taken it to himself, and failing Heirs of his Body to his Father; and subjected himself as well as the other Heirs to all the prohibitory Clauses: Could not he, while the Tailzie remained incomplete alter the same? No Doubt he could, for a Person cannot by such a gratuitous Destination, where he lies under no Obligation to another, tie himself up from the free Exercise of his Property, and