by the testimony of Witnesses, or the proper knowledge of at
least two of the Inquest or Testificates from the Magistrates of the
place where he died or was buried, and if he perished at Sea or was
killed in battle, his death must be proved by Common fame. 2°/ that he
died last vest and seized in Fee must be Instructed by the Instrument of
seizin and ground or Warrand thereof. But in re Antiqua, the Seisin,
without producing the precept will be sufficiently adminiculated by the
Charter and Disposition: And a tract of Consequent Seisins for 40
Years, are sufficient without any adminicle. It being Cleared, that
the deceased was once Infeft, he will be presumed to have Continued
and died so Infeft, till the Contrary that he was Divested appear.
3°/ that he died at the Kings peace is presumed: quia quod inesse debet
presumitur. Which presumption may be taken off by Contrary posi
tive evidence, that he died Rebel or was forefeited and attainted
for treasonable causes: Which Criminal Rebellion only, and Not
Rebellion or outlawry for Civil debt, hinders a person to die at
the faith and peace of the Soveraign 21 Novemb. 1626 Seaton of
Meldrom supplicant. But the Exception that the deceased
died a Rebel, may be taken off by replying, that he was Restored.
Stair ibid. § 34.

2°/ The second head of the brieve, that the raiser thereof is
nearest and Lawfull heir to the Deceased in such lands &c. Re
solveth in two points 1°/ that the Fee is provided to the Claim
ant, whether heir of line, of Conquest, heirs portioners heir
Male, heir of tailzie or provision: Which can be Instructed only
by his predecessors Infeftment, and other Ancient evidents. In
Dubio the presumption lies still for the heirs of line: So that if
it be not sufficiently Clear, that the fee is provided to special
heirs, as where three Consequent Seisins do not express the
several kinds of heirs; the heir of line or Conquest according
to Law will be served. The second point Included in this head
of the brief is that the Claimant is nearest lawfull heir:
which is sometimes Instructed by the Infeftment as when he
is Expressly named a member of tailzie who needs not prove
that he is the person whose name is there in Infeft, if it be
notorium. But ordinarly the proximity of blood to the fiar
last Infeft or substitute member of tailzie, must be known
to the Inquest or made appear: for it is not sufficient to in
struct or serve the Claimant nearest lawfull heir, without
telling the Relation as that he is eldest son of the Deceased
or eldest son of that son, or that the persons Craving to be
served are Daughters of the Deceased &c according to the
line of succession. It sufficeth thus to set forth and prove
the Claimants proximity of Blood in what ever degree

even beyond the tenth degree. Any degree proved is presumed to be the
nearest, till a nearer degree be Instructed: for it Resolves in
this negative, that there is no nearer Degree, which, as other
negatives proves it self. That the Claimant is not only nearest
heir by the Course of Law, but that neither he nor any of the
Intervenient Relations were bastards, is presumed, where the
Contrary is not known to the Inquest, unless Bastardy be Instructed
Stair lib. 3 Tit. 5 § 35. An Exception that the raiser of the Brief
is a bastard stops the service untill the question of bastardy be De
cided by the Spiritual Judge Reg. Maj. lib. 2 Cap. 50 Craig Feud.
lib. 2 Tit. 18 § 5. Spotswood pract. Tit. Bastardy. That is, by the
Commissaries of Edinburgh Craig ibid. Tit. 22 § 11. vers. quoad
secundum Caput. But a Wife is more favourably dealt with
in her service to a terce Vid. supra pag. 482. Bastardy of the Deceast
is not Receivable summarly against the service of an heir to him
15 January 1629 L. Corsbie contra Shaw. Proximity of Blood is
proved by Retours, Infeftments or other writes bearing designing
or acknowledging such a person to be a Relation of such a degree
to the last fiar. But there is not equall evidence Required in all
cases: for less proof will serve to hinder an estate from falling
Caduciary to the fisk as last heir, than will pass in a Compe
tition of persons of the same Blood, or members of the same
tailzie, who will be preferred according to the most pregnant
evidence. An Eldest son who was both heir Male and of line
to his father, being specially served tanquam Legitimus &
propinquior haeres to him in lands provided to the father &
his heirs Male, the service was understood in the terms of the
last Investiture 13 Novemb. 1712 E. Dalhousie contra Lord &
Lady Hawley. Because Legitimus et propinquior haeres is a Ge
neral Designation applicable to all heirs in suo Genere, tho
sometimes the word Masculus or provisionis be added ex
super abundanti. Lands being disponed to one and failing
of him by Decease, to his eldest son and the heirs Male of his
body; which failing to his second son and the heirs Male of
his body; and the Eldest son having survived the father &
died thereafter without serving heir to him: The right of
the Lands Disponed was found not fully vested in the
person of that son without a service; and therefore the second
son was allowed to be served and Retoured heir to the father
10 June 1714 Hamilton contra Hamilton of Dalziel. Because
the father, tho his heirs be not mentioned, was fiar; and
the eldest son brought in only by way of substitution and
succession failing the father by Decease. It hath been much
Controverted, whether the nearest heir at the predecessors
death may not be served, tho there be a nearer in spe or