try or furiosity by an assise of thirteen sworn men, was now wholly despised and neglected, and no more used. Yet Sir George might have remembered that it has now been long obsolete, as *Dury* observes, 21*st February* 1632, *Alexander* against *Kinneir*. *Advocates' MS. No.* 9, *folio* 71.

1670. *February.* HEIRS of the LAIRD of CRAWFORDSTON *against* BROWN of Ingliston, and his Children.

ELEISTON his lady, Barnecleuch his lady, and the other two sisters, pursue, as apparent heirs of line to the deceased Laird of Crawfurdston, their father, an exhibition of the charter chest, writs, and evidents of the lands, against Brown of Ingliston, and his children, whose mother was one of Crawfurdston's daughters; as also of some dispositions made in his and his children's favours by the Laird in his lifetime, of the said estate: likeas to hear and see it found and declared that the said dispositions, bonds, and others, must be reputed and holden to be yet in the defunct's charter kist, and so never delivered evidents in the defunct's lifetime, and so to belong to none; but to be looked upon as if they had never been made, and to be no hindrance to thir pursuers as heirs of line to succeed to their father's whole estate, in so far as the same were lying in the defunct's charter kist undelivered at the time of his decease, and were meddled with by thir defenders, and taken out thereof in great haste immediately thereafter, and transported that night, with the other evidents of the lands, in codwares, to another place.

This being proven, the Lords, in respect of the said precipitate diligence and intromission, found the said dispositions, and others, noways to have been delivered evidents in the maker's lifetime, but that they must be reputed as if they were yet in the charter kist.

Then the defender excepted that, however the Lords might find him bound to exhibit the said dispositions, and others, to be cancelled or declared undelivered evidents, yet that he could not be obliged to exhibit the disposition of such a date to be declared an undelivered evident, because the same bears a clause dispensing with the not delivery thereof.

This being found relevant, the pursuers insisted to have their right, as heirs aforesaid, declared, to any lands belonging to their father which were not contained in that disposition, sustained by their Lordships. This the Lords admitted, and ordained them to condescend; which they did, and named the lands of Stewarton.

ALLEGED by the defender,—That these lands are expressly contained in his disposition.

It was ANSWERED,—It is true they are in the disposition, but that is only the superiority thereof that is disponed: for Crawfurdston at the time of the disposition had no other right thereto; and it is offered to be proven that he has, since the said disposition, acquired the heritable right and property thereof; and therefore the right thereof must pertain to thir pursuers.

The Lords repelled the allegeance, in respect of the answer or reply, and as-

signed a day for proving thereof. Likeas, the Lords found a bond granted by Crawfordston to this defender, of L.21,000, in all probability was only made in warrandice, and to secure the foresaid disposition made by the said Crawfurdston to the defender; and therefore restricted it that it should not affect neither the defunct's heirship nor executry, no not any lands save those contained in the said disposition, for the making of which effectual it was presumed to be granted allenarly.

Advocates' MS. No. 10, *folio* 71.

1670. *April.* BURNET *against* BURNET.

THE tutor of Leyes pursuing the mother to the pupil, at the secret council, for exhibition and delivery of the person of the pupil to him as tutor of law, and so having the sole and undoubted right to keep and educate the pupil. (*Vide Parl.* 1661, *act* 8*th*, against *Papists* and *Jesuits, in fine. Vide act* 9, *Parl.* 1567:)

EXCEPTED,—The pupil cannot be delivered up to this supplicant, because he being a quaker, the child's education is not to be committed to him, in regard of the hazard there is therein of the pupil's perversion by his tutor's poisoned principles; and alleged the law of the kingdom in the case of Popish parents, appointing their children to be taken from them, and to be educated in godly company; now if children may be taken from parents, because of their religion, *multo magis* may they be taken from tutors, where the obligation is more remote, and the lines of the law of nature more dim.

REPLIED,—His being of a different religion can noways make him tine, or deprive him of that uncontroverted right and privilege due to him, as the nearest agnate, by the law of God, of nature, nations, and the inviolable practice of this kingdom: for if that were, how comes it that popish noblemen retain, even since the reformation, their privileges of sitting and voicing in Parliament, if they take the oaths of allegeance and supremacy; of presenting to churches whereof they are patrons, &c.; albeit, there may arise very great detriment and prejudice to both kirk and state by that latitude or such concessions; and yet it is sustained, because it being their natural right, there could not be law found whereby to deprive them thereof. As for the act of Parliament, it is of the nature of all others *viz. strictissimi juris*, and not to be extended *de casu in casum*. Yet to obviate the apparent hazard, he was content the pupil should be boarded at schools, in any place the mother and his other friends should agree upon; and so that he might be in the custody of neither of them.

Vide Fabrum in codice, lib. 1*mo, tit.* 5*to, De Legibus et Constitut. Principum.*

Advocates' MS. No. 11, *folio* 72.