paid. It is admitted that in such a case the triennial prescription could not be set up against the claim. But it is as little applicable to the claim of relief insisted in by the mother herself.

Another class of cases appears on the books, which is perhaps open to more controversy. One of these is the case of *Macdonald* v. *Maclurg*, 19th February 1807, M. App., "Prescription," No. 6, in which aliment was afforded, without contract, to a natural child whose father had left the country and gone to Jamaica; and the plea of the triennial prescription was repelled. Another is a prior case of *Davidson* v. *Watson*, 16th November 1739, Mor. 11,077, in which a stepfather had alimented a child of his wife by her previous husband; and although the plea of the triennial prescription stated by her heir was sustained by this Court, the judgment was reversed on appeal. A third, of a somewhat similar character, though involved in specialties, is *Butchart* v. *Scott*, 28th June 1839, D. 1, 1128. From these cases some have been disposed to draw the general conclusion, that wherever no contract express or implied, has intervened, but aliment is pursued for as arising *ex debito naturali*, and as supplied in the character of *negotiorum gestio*, the triennial prescription is inapplicable. I do not think the Court now called on absolutely to decide the question. It appears very consistent with equity that prescription should not hold good where the debtor is out of the country, or is a child; but I am not aware that any limitation on that account has been sanctioned by the law. There are many reasons why, if the father be well known, and within reach, a claim *ex debito naturali* should be prosecuted as expeditiously as where it lies on contract, and the same prescription should apply. But the present is different from all such cases. The claim lies, as I think, on clearly implied contract. And, whatever may be held in these other cases, I think the law, in the present case, applies the triennial prescription.

I am therefore of opinion that the judgment of the Sheriff is right, and ought to be affirmed. But his Lordship is perhaps precipitate in *de plano* pronouncing judgment of absolvitor. The prescription only operated *quoad modum probandi*, and to exclude parole evidence; and the pursuer should have the opportunity of making good his claim by writ or oath.

LORD PRESIDENT concurred.

The Court refused the appeal, and remitted to the Sheriff to sustain a reference to oath, if offered.

Agent for Pursuer—Wm. S. Stuart, S.S.C.
Agent for Defender—John Auld, W.S.

Friday, June 21.

SECOND DIVISION.

LORD ADVOCATE *v.* THOMSON.

Teinds—Officers of State—Res Judicata.

Certain teinds having been found by an interlocutor of the Lord Ordinary, in a process of locality, to be "college teinds" and therefore entitled to have their liability for stipend postponed to that of the bishops' teinds held by the Crown, which interlocutor was for upwards of fifty years acquiesced in by all parties, and the Crown having been a party to that process, although not immediately interested, *held* that it was *res judicata* that the teinds in question were college teinds, and that the question whether they truly belonged to that class or not could not again be competently discussed.

This question arose in the locality of the parish of Cameron, St Andrews, and related to the order of allocation of different classes of teinds in that parish. Prior to 1866 it had not been necessary to allocate any part of the stipend, either on bishop's teinds or college teinds, but an augmentation having been awarded in that year, and the other teinds having been exhausted, it became necessary that these privileged teinds should be localled upon. In the interim scheme of locality the teinds of the lands of Lambieletham and Carngours, belonging to Mr Anstruther Thomson of Charleton, having been stated as bishops' teinds, and localled upon *pari passu* with the other bishops' teinds in the parish, Mr Thomson lodged objections, on the ground that the teinds of his lands were not bishops' but college teinds, and therefore entitled to postponement.

The Lord Ordinary on Teinds (GIFFORD) pronounced the following interlocutor, which, with the Note appended, fully explains the circumstances of the case:—

"*Edinburgh, 12th March* 1872.—The Lord Ordinary sustains the first plea in law stated for Mr Thomson, the objector, and finds, in terms thereof, that it is *res judicata* that the teinds of the objector's lands of Lambieletham and Carngours were in 1810 college teinds: Finds, in accordance with the final interlocutor pronounced by Lord Woodhouselee on 23d January 1810, that the teinds of the objector's said lands then belonged to the College of St Leonard's, one of the Colleges of St Andrews: Finds that it is not averred or offered to be shown that since the date of that judgment the teinds of the objector's said lands have ceased to be college teinds, or have in any way changed their character or position; and finds that the said teinds are still college teinds, and entitled to all the privileges belonging to such teinds in allocation and otherwise: Therefore sustains the objections for the said John Anstruther Thomson, to the effect that the teinds of his lands of Lambieletham and Carngours must be postponed in the order of allocation for stipend, not only to teinds held upon heritable rights, but also to bishop's teinds in the hands of the Crown, and remits to the clerk to rectify the locality accordingly, and decerns, etc.

"*Note.*—The question raised in the present record is very important, and the Lord Ordinary has found it to be attended with considerable difficulty. It relates to the order of allocation of the various classes of teinds in the parish of Cameron, and to the effect to be given to judgments pronounced in various processes of locality of the teinds of the said parish.

"The present process of locality commenced with a decree of augmentation and modification, dated 5th December 1866. Until this last augmentation was granted, the whole stipends have been paid from teinds either held upon heritable right, or to which no rights at all have been produced. Hitherto, that is, prior to 1866, it has not been found necessary to allocate any part of the stipend either upon bishop's teinds or upon college teinds, both of which exist in the parish.

"The augmentation of 1866, however, more than

exhausts the teinds held without heritable rights —that is, teinds in the hands of the titular, not bishop's teinds, and the teinds held upon heritable rights; and it is now necessary to come upon the teinds entitled to a preference or postponement in allocation — that is, upon bishop's and college teinds.

"In the interim scheme of locality now objected to, the teinds of the objector's lands of Lambieletham and Carngours are stated as bishop's teinds, and are allocated upon *pari passu* with the other bishop's teinds in the parish. To this mode of allocation Mr Thomson objects, on the ground that the teinds of his said lands are not bishop's teinds at all, but college teinds, belonging to the College of St Leonard's, St Andrews, and that college teinds cannot be allocated upon till bishop's teinds are exhausted. The Lord Advocate, as representing the Crown, the holder of the bishop's teinds in the parish, denies that the teinds of the objector's said lands are college teinds at all. He maintains that they are not even bishop's teinds, but are mere teinds held upon heritable right, and that, instead of being entitled to a preference or postponement in allocation as in a question with the bishop's teinds, they ought to have been allocated upon long ago for the old stipends, and they must now be exhausted before the bishop's teinds can be touched.

"The question ultimately between the parties is a question of fact—Are the teinds of the objector's lands college teinds or not? It was not disputed in point of law that college teinds must be postponed in allocation to bishop's teinds.—See Connell, vol. i, p. 508, and the cases there referred to.

"Now, the question of fact, whether the teinds of Lambieletham and Carngours are or are not college teinds, depends on the titles of these lands and teinds. This question, however, was not argued before the Lord Ordinary, because a preliminary question arose whether it was not already *res judicata* that the teinds in question were college teinds. The Lord Ordinary, with considerable difficulty, has sustained the plea of *res judicata*.

"The judgment founded upon as *res judicata* is a judgment pronounced by Lord Woodhouselee in conjoined localities of the parish depending in 1810. The judgment is dated 23d January 1810, and relates to various questions. *Inter alia*, it contains the following finding—'Finds that Mr Thomson of Charleton has an heritable right to the teinds of his lands of Wilkieston, and that the teinds of his other lands belong to the College of St Andrews.' It cannot be disputed that the 'other lands' here mentioned are the lands of Lambieletham and Carngours, and that by the College of St Andrews is really meant the College of St Leonard's, so that the judgment in question is a judgment *in terminis* in favour of the objector upon the very question now sought to be raised.

"This judgment was pronounced after a great deal of procedure, and after ample time had been allowed for investigation into the facts by all concerned. The question was distinctly raised by the objector's author, Mr Thomson of Charleton, by a representation lodged 19th February 1798, in which he distinctly claimed that the teinds of Lambieletham and Carngour belonged to the Leonardine College of St Andrews. He founded upon a gift by King James VI, and on the Acts of Parliament ratifying the same; and he offered to prove that he paid to the College annually for these teinds £20 Scots. On 4th July 1799 the Lord Ordinary, Lord Methven, appointed the heritors who alleged that their teinds were bishop's or college teinds to produce their receipts for teind-duty. This order was renewed on the 19th November 1801, and again on 20th May 1802; and in this last interlocutor the Officers of State were specially appointed to state their objections to the locality, and all concerned were allowed to answer Mr Thomson's representation of 1798—that is, the representation in which he claimed that his teinds were college teinds.

"Answers to Mr Thomson's representaaion were lodged for the common agent, in which the common agent contented himself with calling for receipts for the teind-duty. The Officers of State did not object, although they were parties to the process, and although a representation by them, with answers by the common agent, was actually discussed along with Mr Thomson's representation. On 23d December 1809 Lord Woodhouselee made avizandum to himself with the whole representations and answers, without prejudice to replies being given in, and productions made in the process; and on 23d January 1810 he advised the whole case, and pronounced, *inter alia*, the finding now founded on by the objector as a *res judicata*. This judgment was acquiesced in by all parties. It was given effect to in all the subsequent localities, and in the final localities ultimately adjusted; and the result is, that down to the present time the teinds of the objector's said lands have not been localled upon at all, effect being given to the plea that they are college teinds, and must be postponed in allocation.

"The Lord Ordinary has come to be of opinion that this judgment constituted *res judicata*, and that no sufficient cause has been shown why it should not be given effect to in the present process. No reduction thereof has been raised. It is not said that the judgment was obtained clandestinely or unfairly; and it is admitted that it has been acquiesced in and given effect to for sixty years. The Crown now maintains, however, that without any reduction the judgment of 1810 must be disregarded and ignored, and that the teinds in question must now be placed among teinds held on heritable right, although that was the very thing which the objector's author successfully resisted in 1810, upon which he got a judgment, and in virtue of which judgment he has been exempt ever since. The pleas urged by the Crown may be shortly noticed.

"(1) The judgment of 1810 was pronounced in a previous locality. This is true; but it is now finally fixed that a judgment in one locality pronounced *in foro contentioso* forms *res judicata* in subsequent localities of the same parish. — See *Blantyre* v. *The Earl of Wemyss*, May 22, 1838, 16 S., 1009; *Hopetoun* v. *Ramsay*, March 22, 1846, H.L., 5 Bell's Appeals, 69; *Duke of Buccleuch in Locality of Inveresk*, Nov. 10, 1868, 7 Macph., 95. The principle has been applied in this very locality, where a finding that teinds were bishop's teinds was held *res judicata* — *Graham Bonar* v. *Lord Advocate*, Nov. 3. 1870, 29 Macph. 58.

"(2) It was said that the Crown was not a party to the judgment of 1810; that is, the Crown did not answer Mr Thomson's representation. But the Crown was a party to the process. Answers were ordered for the Crown, if the Crown had anything to say; and the Crown was actually a party to the discussion and to the judgment, for a representa-

tion by the Crown was actually disposed of and given effect to in the very same interlocutor. The Lord Ordinary thinks it must be held that the Crown was a party to the whole procedure.

"(3) It was urged that the College of St Leonard's was not a party to the judgment; but the answer is, that Mr Thomson, as perpetual tacksman, really represented the College. He had an interest to plead, and was allowed to plead that the teinds were college teinds, and the judgment which he obtained was a judgment in favour of the College as well as in favour of himself. The College are benefited by the judgment, and no doubt, if they have interest, would adopt it.

"(4) It was urged that the merits of the question were not discussed before Lord Woodhouselee, or decided by him. This may or may not be true. It is impossible to say what took place before Lord Woodhouselee, or what arguments or views were submitted, before he made avizandum on 23d December 1809. It would be very dangerous to assume that nothing passed which does not appear in the comparatively meagre records which have now been recovered, but which certainly raise the question by reference to the gifts and statutes which constitute the title of the teinds. It is safer to presume that everything was urged which could be urged, and that all parties were satisfied with the resulting judgment.

"(5) And this affords the answer to the plea founded upon the statute 1600, cap. 14, which enacts that the Crown is not to be prejudged by the sloth or negligence of its officers in pursuing or defending actions. There is no proof that there was either sloth or negligence. On the contrary, the Crown was there fully represented by competent counsel and agents, and the Lord Ordinary sees no ground for even suspecting that they did not fairly do their duty. It was hardly maintained, and in the Lord Ordinary's view could not be maintained, that the statute of 1600 makes it impossible to have *res judicata* against the Crown.

"(6) It was urged that the Crown in 1810 had really no interest to inquire whether the teinds in question were college teinds or not. But this is not so. The direct interest might not immediately emerge, but the question as to the order of allocation was directly raised, and the Crown, as holding the bishop's teinds, had an interest to object to a claim of postponement in allocation to the whole of these teinds. No doubt it was not necessary to discuss whether bishop's teinds or college teinds came first in allocation, and the question is still open in point of law, if the Crown thinks fit to raise it; but it was surely fixed by the judgment of 1810 that the objector's teinds were not held on heritable right and liable *primo loco* in the locality, and yet this is what the Crown now seeks shall be found.

"(7) The Crown admitted that the judgment of 1810 was binding in a question with the common agent, and with all the other heritors whom he represented; but it was urged that the common agent did not represent the Crown. It is certainly true that a common agent does not necessarily represent the titular or titulars, at least when adverse interests arise. But a common agent really represents all having interest in the allocation, and he decides and reports upon the rights of all who have any interest in the teinds. So far as his proceedings are not objected to, he really represents all concerned. Heritors are only interested as titulars or tacksmen of the teinds of their own lands.

"(8) But if the judgment of 1810 be binding against the whole heritors (and the Crown admitted that it was so), it is difficult to hold that it should not be binding on the titular and on the holder of the bishop's teinds. It would be very anomalous, very awkward, and perhaps lead to inextricable confusion, to hold the objector's teinds college teinds in a question with heritors, and not college teinds in a question with the Crown—that is, to hold a matter of fact decided in the same process in two different and opposite ways. The only answer to this would be to hold everything wrong since 1810, and to open up everything as from that date. But this is impossible, and on the whole the Lord Ordinary feels compelled to give effect to a judgment which was certainly intended at the time to be a final judgment, and which has been acquiesced in and acted on as such for sixty years."

The Lord Advocate reclaimed.

SOLICITOR-GENERAL and KINNEAR for the reclaimer.

WATSON and ORPHOOT for the objector.

The Court, however, adhered unanimously to the interlocutor of the Lord Ordinary.

Agent for Reclaimer—Warren H. Sands, W.S.
Agents for Objector—Leburn, Henderson, & Wilson, S.S.C.

Saturday, June 22.

GRAY *v.* GRAY.

Deathbed—Succession—Debtor and Creditor.

Held that a disposition of heritage executed on deathbed to the prejudice of the heir-at-law was reducible, although it bore to have been granted in payment of a debt not otherwise proved.

David Gray, wright and joiner at Harthill, father of the pursuer and defender, died on 4th May 1871, possessed of certain heritable subjects. The pursuer was his eldest son and heir-at-law. Sometime after the death of David Gray, the pursuer was informed by the defender that the deceased had left the latter his heritable property, under the burden of providing a free house to their sister Mary Dickson Gray. The deed founded on by the defender was dated 1st May 1871, and was of the following tenor:—"I, David Gray, wright at Harthill, in consideration of the sum of One hundred and twenty-five pounds sterling, advanced and paid to me, and on my behalf at sundry times preceding the date of these presents, by John Gray, wright at Harthill, my son, which sum is hereby held and declared to be the full and adequate price and value of the subjects hereinafter described and conveyed, and of which sum so paid to me as aforesaid I do hereby acknowledge the receipt, and discharge the said John Gray, have sold and disponed, as I do by these presents sell, alienate, and dispone from me, my heirs and successors, to and in favour of the said John Gray, his heirs and assignees whomsoever, heritably and irredeemably, all and whole that piece of ground," &c.

The following document was also granted by the defender to the deceased:—

"*Harthill, 3d May* 1871.—Mr David Gray, Harthill,—My dear father, With reference to the dis-