At advising—

LORD JUSTICE-CLERK—The real question in this case is whether, in the circumstances disclosed, it is in the interests of the children to be left where they are or transferred to the custody of their mother. It is always a question of circumstances, and, after giving the case the best consideration I can, I have come to the conclusion that it is not right for the Court to interfere with the present custody of these children.

LORD YOUNG—I am, without any hesitation, of the same opinion. The leading consideration for us is, what is best for the children? They were not taken from the mother, but were put by her where they are. They have been there for some time, and it has been ascertained on inquiry that they have been there with great advantage to themselves; and I think that, in view of what the reporter says, we must come to the conclusion that their continued residence there will be for their advantage. Now, when a mother in such circumstances makes an application to us to order her children to be sent to her, we are not only to consider her legal right, but also to consider her relation to them as her illegitimate children. She only earns seven shillings a week, irrespective of what her eldest daughter is earning, and she can suggest nothing in the way of advantage to be gained by their being handed over to her. I agree with your lordship entirely in thinking that, upon the whole information before us, we shall do what is best for the children by refusing to interfere, and we do this by refusing to grant the prayer of this petition.

LORD TRAYNER—I have had some difficulty in this case, arising from the fact that, even though the children are illegitimate, the proper place for them is with their mother, not merely for the upbringing of the children, but for the sake of the mother herself. If I had seen my way to give the mother the custody of the children, the leaning in my mind would have been in that direction. But I think, in the circumstances, that it is best for the children that they should remain where they are at present. I can only add that the mother should have all reasonable access to her children, and if in the future she can gain their confidence and affection, she will very soon get them back, as they will very shortly attain the age at which they may choose their own place of abode. In the meantime I cannot help saying that it appears to me to be for the best interests of the children that they should remain where they are.

LORD RUTHERFURD CLARK was absent.

The Court refused the petition.

Counsel for the Petitioner — M'Ewan. Agent—William Green, S.S.C.

Counsel for the Respondent — Lorimer. Agent—Stuart & Stuart, W.S.

Wednesday, July 3.

FIRST DIVISION.

[Lord Low Ordinary.

DELHI AND LONDON BANK, LIMITED *v.* LOCH.

Foreign—Judgment Debt—Decree Destroyed after Period in accordance with Rules of Foreign Court—Presumption.

The pursuers sued L's executrix for £6000 alleged to be due to them under a decree which they had obtained against L in the Court at Delhi in 1860. They stated that, in accordance with the practice of the Delhi Court, the original decree had been destroyed in 1877, and that they were accordingly unable to produce it, or an official extract of it. They, however, produced an extract from the Court Books for the year 1860, bearing that judgment had been given in their favour.

The Court *dismissed* the action as irrelevant, *holding* that the necessary presumption arising from the destruction of the decree was that it had ceased to be operative within the jurisdiction of the court which pronounced it, and therefore that it could not be enforced by the courts of this country.

Agreement—Agreement by Debtor to Make Payments to Account of Judgment Debt if Decree not Enforced—Decree Destroyed according to Practice of Court — Whether Debtor's Executor Barred from Objecting to Validity of Claim.

The pursuers sued L's executrix for a sum which they alleged to be due to them under a decree obtained by them in a foreign court against L more than thirty years previously. They stated that they were unable to produce the original decree, or an official extract of it, as it had been destroyed in accordance with the practice of the foreign court, but pleaded that the defender was not entitled to object to the non-production of the extract-decree, in respect that they would have enforced it against L but for an agreement concluded between them and L, whereby he undertook to pay instalments to account of the debt during his life, and, in consideration of this undertaking, they on their part agreed not to take proceedings in execution of the decree during his life.

The Court *dismissed* the action as irrelevant, *holding* that the question of the validity of the pursuers' claim was in no way concluded by the alleged agreement.

This was an action at the instance of The Delhi and London Bank, Limited, against Mrs Loch, executrix of John Adam Loch, for payment of £6000.

The origin of the debt claimed was a bond granted by the deceased J. A. Loch in 1847 in favour of the Delhi Bank Corporation for

a sum of £1400. According to the pursuers' averments the bank had been looted and the bond destroyed during the Indian Mutiny, but thereafter an adjustment of accounts had taken place between the bank and Mr Loch, bringing out the amount of the latter's indebtedness; in 1859 the bank had instituted proceedings in the Court at Delhi against Loch in respect of the debt, and in 1860 had obtained decree against him for 18,869 rupees; in 1865 the Delhi Bank Corporation had been wound up, and the pursuers had taken over their whole assets and liabilities.

The pursuers further averred (in the record as amended in the Inner House)—"(Cond. 2) . . . It is a rule and practice of the Court at Delhi that signed judgments and other papers in connection with cases and in possession of the Court are destroyed after a certain period. In accordance with this rule and practice the original judgment in the action against Mr Loch was destroyed in September 1877, and the pursuers are unable to obtain the same or an official extract thereof. But the registers of the said Court are in existence, and these show that judgment was granted, the date of the judgment, the amount of the sum decerned for, and the judge by whom decree was awarded. A copy of an extract from the General Register of the Civil Court Office of Delhi District relative to said proceedings is produced and referred to. . . . An application was presented to the Court for execution following upon the judgment for the amount of the debt, costs, and interest, and an order was made authorising execution. Thereafter Mr Loch from time to time made certain payments to account, in consequence of which the pursuers did not at the time enforce the order for execution, and subsequently in the year 1870 the pursuers concluded an agreement with Mr Loch, as after mentioned, under which, upon certain conditions, they agreed not to enforce execution during Mr Loch's lifetime. . . . The pursuers allowed the time to elapse without obtaining an extract until the death of Mr Loch solely in reliance on the said agreement of 1870, Mr Loch's recognition of the debt, and of the pursuers' right to exact payment thereof, and on the payments to account made from time to time by Mr Loch. . . . (Cond. 5) From time to time Mr Loch made payments to pursuers on account of said debt. Such payments were made in 1861, 1866, 1867, and 1869. On 12th January 1868 Mr Loch, in reply to a demand by the pursuers, wrote that having resigned the Civil Service, and his annuity not being a full one, and not so large as his salary had been, it would be quite impossible for him to pay so much as £5 per month, but that he would, if the bank agreed to it, pay quarterly £10 out of his annuity for the remainder of his life. Following upon this Mr Loch, on 3rd August following, wrote pursuers remitting £30, being three quarters' payment, and undertaking that £10 per quarter would be regularly paid in future. Subsequently on 11th February, and again on 3rd May 1870, Mr Loch wrote the pursuers offering to pay £20 per quarter during his life on condition that the pursuers should refrain from taking legal steps against him during his life. This offer was accepted by pursuers, and on 27th June 1870 they wrote him, through their manager, to the following effect:—'Referring to your letter of the 30th March, and our rejoinder of the 5th May last, with reference to the bank's claim on you, amounting with interest to 31st December last to the sum of rupees 87,781: 3: 9: as per enclosed statement of account made up to that date, I am instructed by my directors to state that, provided you pay to us in London during your life on account of the said debt and future interest the sum of £20 per quarter commencing as on 5th May last, no legal proceedings will at any future period, so long as the said payments are regularly made, be taken against you personally by this bank in respect of your said debt or the future interest thereon. Mr Loch's letters are produced, and here held as repeated *brevitatis causa*. Following on said arrangement Mr Loch, on 3rd August 1870, made payment of £20, being the first quarterly instalment under the agreement, and he continued to pay the said quarterly instalments down to the date of his death. The pursuers insured the life of Mr Loch with a view to recouping themselves in part in the event of his death for the debts due by him, and he concurred in their doing so, and underwent the medical examination necessary for the purpose. (Cond 6.) The payments made by Mr Loch as before condescended on were credited to his account with the pursuers, and statements of the account showing the balance due from time to time by Mr Loch were periodically sent to him by pursuers. From 1880 to the date of Mr Loch's death these statements were rendered at the end of each period of three months. No objection was ever stated by Mr Loch to any of the statements of accounts so rendered, but on the contrary he accepted of them as correct and made his payments upon them. On 7th May 1883 Mr Loch wrote as follows to the pursuers:—'I enclose you a cheque for £20 for the past quarter, and beg you will acknowledge its receipt. On receiving your letter of the 6th of February last with your account of the balance against me in English money, I was greatly surprised to find that it was £31,644, 8s. 8d. I cannot understand how such an immense sum can be made up considering the original sum borrowed was only £1400 in 1847, when I and my sureties signed the bond. I should like to know very much if the bank has still the original bond. At the time of the Mutiny in 1857 I had paid up £900 of it, and only owed the bank £500, and since 1868 I have paid £1120, besides other payments I made in India before I left the service. I merely state the above to show the bank that I have not only paid off the original loan I borrowed in 1847, but also £600 of interest.'" . . .

The defender averred that by the law of India an order for execution could not be enforced against a judgment debtor after the expiry of three years from its issue. She admitted that Mr Loch had made certain

payments to the bank, but explained that these payments had been made in error.

The pursuers pleaded—"(1) The sum concluded for being due and resting-owing to pursuers, they are entitled to decree therefor with expenses. (3) The pursuers having in reliance on the agreement of 1870, on Mr Loch's recognition of the debt and of the pursuers' title, and on the payments to account, allowed the time to elapse during which an extract of the decree could have been obtained, the defender is not now entitled to found on the non-production of such extract."

The defender pleaded—"(2) The pursuers' averments are irrelevant, and insufficient in law to support the conclusions of the summons."

On 17th February 1893 the Lord Ordinary, before answer, allowed the parties a proof of their averments.

The defender reclaimed, and, after partly hearing the case, the Court adjourned it to allow the pursuers an opportunity of amending their record. After amendments by the pursuers and answers thereto by the defender had been added to the record, with leave of the Court, parties were reheard.

Argued for the defender—The averments of the pursuer were still irrelevant; they had not complied with the directions of the Court to make definite and specific statements as to the exact terms of the decree, and the causes owing to which they were unable to produce it. The *casus omissionis* stated by them was not a proper one, or of a nature entitling them to a proof. It was held in the case of *Shaw* v. *Shaw's Trustees*, June 13, 1876, 3 R. 813, that for "an essential part" of their case, such as this decree was, the pursuers would have to raise an action of proving the tenor. The agreement of 1870 did not help them, for it was on the decree, and the decree alone, that they could found their action.

Argued for the respondents—The defender was precluded from founding on the destruction of the decree, because, if it had not been for the agreement of 1870 under which Mr Loch admitted his indebtedness, the execution would have been carried out. The facts averred were enough to justify the Court in holding the debt had been constituted. The whole documents taken together might be adduced to show the defender's liability—*Gordon* v. *Glendonwyn*, February 23, 1838, 16 S. 645; *Thomson* v. *Lindsay*, October 28, 1873, 1 R. 65. The defender was at any rate barred by the agreement of 1870 from objecting to the validity of the claim—*Shepherd* v. *Reddie*, March 1, 1870, 8 Macph. 619.

At advising—

LORD PRESIDENT—We have now before us all that the pursuers have to allege in support of their action, and various objections have been stated to the relevancy of their averments. Of these the most fundamental relates to the decree upon which the action is necessarily based. As your Lordships recollect, the case is that, founding upon some bond alleged to have been lost in the Mutiny of 1857, the Delhi Bank in 1860 obtained a decree against Mr Loch in the Court at Delhi for 18,000 rupees. From the date of that decree it is plain that the claim of the Delhi Bank against Mr Loch was, to apply the language of the civilians, not that he should pay the sum in the bond, but that he should satisfy the judgment contained in the decree. Accordingly the printed claim in this action begins with the sum alleged to have been decerned for. The pursuers go on to say that it is a rule and practice of the Court at Delhi that signed judgments are destroyed after a certain period, and that, in accordance with this rule and practice, the judgment against Mr Loch was destroyed in September 1877, and the pursuers are unable to obtain the same or an official extract thereof.

Whether this is an accurate statement of the practice of the Court of Delhi I do not know, but this is what the pursuers tell us. Now, what possible right have we to entertain an action on an old and non-existent decree of a foreign court, which that court has deliberately destroyed, and which apparently could not be enforced within the jurisdiction of that Court by ordinary process. It seems to me that, *prima facie*, the inference to be drawn from a court destroying a written judgment and the means of extracting it is that the judgment which that writing records is no longer in force. The pursuers tell us nothing which rebuts that presumption. They have placed before us the documents which they propose to found on by way of setting up the decree. Those documents are more or less unsatisfactory; but, at best, they point merely to the historical fact that in 1860 some such judgment was pronounced, while on the vital question whether this judgment is still alive they have nothing to say whatever.

The pursuers have endeavoured to support their case, apart from the decree, by founding on an alleged agreement in 1870. The averments on this subject are in cond. 5, and the agreement as there alleged comes to no more than this, that Mr Loch undertook to pay £20 a quarter, provided no legal proceedings were taken against him during his life. It is enough to say that the present action is not brought to enforce this agreement; that Mr Loch is dead; and that the question now is, whether the pursuers have a good claim or not. That question is in no way concluded or prejudiced by the alleged agreement. Claims had been made against Mr Loch; he agrees to pay so much a quarter on condition of immunity from further claims during his life; but the Bank are free to make the best they can of their claim after his death. This they are now doing.

My opinion is that the averments of the pursuers are irrelevant to support any of their pleas. An agreement was adduced against the title of the pursuers, but in the view which I take of the record it is not necessary to enter upon this question.

I think that the interlocutor of the Lord Ordinary, dated 17th February 1894, should be recalled, and the defender assoilzied.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court recalled the interlocutor of the Lord Ordinary, and assoilzied the defender.

Counsel for the Pursuers — Guthrie — F. T. Cooper. Agents—Henry & Scott, W.S.

Counsel for the Defender — Jameson— W. Campbell. Agents—Boyd, Jameson, & Kelly, W.S.

Tuesday, July 9.

FIRST DIVISION.

A B, PETITIONER.

Administration of Justice—Law-Agent—Misconduct — Deletion from Roll — Re-admission.

Circumstances in which the Court *re-admitted* a law-agent whose name had been removed from the roll on account of an act of embezzlement committed fifteen years previously, for which he had been sentenced to three months' imprisonment, but who had satisfied the Court as to the probity of his conduct since his liberation.

On 26th December 1879, A B, a law-agent in Glasgow, was convicted of having embezzled a sum of £600, which he had obtained for clients as a loan over subjects belonging to them, and was sentenced to a term of three months' imprisonment. After his liberation, on 30th May 1880, A B, by letter addressed to the Registrar of Enrolled Law-Agents in Scotland, instructed the withdrawal of his name from the roll, and this was done. On 4th June 1895, A B presented a petition craving the Court "to re-admit the petitioner as a law-agent, . . . and to decern and ordain the Registrar of Law-Agents to restore the name of the petitioner to the Register of Enrolled Law-Agents."

The petitioner stated, *inter alia*, that, after obtaining the loan and pending the settlement of the transaction, he had instructed one of his clerks to place the amount in a separate account with his bankers; that, as he afterwards discovered, his clerk had paid the money to his general bank account; that at the time he believed himself to be solvent; that, owing to losses occasioned by the unprecedented depression which followed the collapse of the City of Glasgow Bank, he had become insolvent, and his estates had been sequestrated in July 1879; that the amount of the said loan being immixed with his own funds was, after his sequestration, not available to the borrowers, who laid an information with the Fiscal, upon which the petitioner had been charged with embezzlement, and after trial convicted; that since his release he had endeavoured to earn an honest livelihood in Glasgow, that he had acted as a clerk in the employment of a Glasgow firm of writers, and was now managing and conveyancing clerk to another firm, and that on 3rd December 1894 he had presented a petition for discharge under the Bankruptcy Acts, which had been granted. He produced numerous certificates in his favour, including one signed by nearly one hundred law-agents and conveyancers, which spoke highly of his ability and integrity.

On 5th June the petition was ordered to be intimated to the Incorporated Society of Law-Agents, and answers were lodged by the Society, in which they averred that their Council had examined the proceedings in the petitioner's bankruptcy with reference to his allegations regarding the circumstances leading to his trial, and they begged to refer the Court to these proceedings should their Lordships think these allegations material; that they had ascertained that there was precedent in the practice of the English courts for restoring to the roll solicitors who had been convicted of such a crime as this; that they understood the Glasgow Faculty of Procurators had had notice of the petition, and did not oppose it; and that in the circumstances "the respondents are content to leave in the hands of the Court the question which they respectfully submit falls to be decided, viz., whether, without detriment to the interests of the profession and of the public, the petitioner can be restored to the Roll of Law-Agents?"

Argued for the petitioner—The formal answer given by the Incorporated Society of Law-Agents left the matter to the discretion of the Court. No answer had been made by the Society of Procurators, and individually they had written certificates in his favour. There were English precedents for granting the petition, which showed that great weight was attached by the Court to evidence in the petitioner's favour such as was produced here. Each case was decided according to its circumstances, and no general principles need be laid down. The case of *Unwin*, March 28, 1882, 72 Law Times (O.S.), 388, was very similar to the present one. In the case of *Robins*, 1865, 34 L.J.Q.B. 121, re-admission was granted after only six years' probation. In "*Anonymous*," 1853, 17 Beav. 475, it was granted after ten years. In *Pyke*, 1865, 34 L.J.Q.B. 121, re-admission was only refused because no affidavits as to conduct were produced.

At advising—

LORD PRESIDENT—The petitioner, whose conviction was in 1879, has since that date lived in Glasgow, where the offence for which he was convicted was committed, and has worked industriously in the business of the law. We ordered his application to be intimated to the Incorporated Society of Law-Agents, and that body has considered all the circumstances, and has inquired into the bankruptcy proceedings, out of which arose the criminal indictment upon which the petitioner was found guilty. We have strong testimony in the certificates contained in the appendix to the petition, and it is to be noted that many of them have been obtained from persons belonging to a profession which is most