a bond of annuity to his widow, and that the facts as to rental, &c., as they happened to be at the time of his death, were exactly as I have stated them in this illustratively put case—Would the widow be entitled to any annuity under the bond, and if so, of what amount, and by whom, and with what funds to be paid? I am therefore of opinion that the Lord Ordinary's interlocutor disallowing these deductions ought to be altered, and that the deductions claimed are in their nature right, the particular sums stated in the petition being hereafter, and as the result of further inquiry by the Court, shown to be correct, and also as these deductions happened to be at the "death of the granter of the annuity."

LORD TRAYNER—Under the provisions of the Aberdeen Act (5 Geo. IV. c. 87) an heir of entail in possession is authorised to provide for his wife a liferent provision by way of charge on the entailed estate, such provision not to exceed one-third of the free yearly rent of the estate. In pursuance of this statutory authority the late Earl of Galloway (the petitioner's predecessor in the estates) provided his wife (the respondent) with an annuity or liferent provision of £3000, and the purpose of the present petition is to have that annuity restricted, on the ground that it exceeds the amount of one-third of the estates' free rental. It was argued for the petitioner that the language of the statute did not authorise a provision in favour of the wife of an heir in possession equal to one-third of the free rental, but of one-third of the *free* rental after deducting from it public burdens, &c. I think this reading of the statute is not admissible. The plain meaning of the statute, in my opinion, is that the liferent provision to be made for a wife shall not exceed a third of the free rental, that free rental being ascertained by the deduction from the gross rental of the several burdens on the estate which the statute specifies. The free rental of the estate is so ascertained. But what the petitioner contends for is that the free rental should be ascertained by deduction of the burdens from the gross rental, and that the same burdens should again be deducted from the free rental so ascertained, and that the provision in favour of the heir's wife should not exceed one-third of the rental appearing after these deductions had been twice made. I think that is a perversion of the statutory provision, and quite inconsistent with the construction thereof received and acted on ever since the Aberdeen Act was passed.

In addition to the general argument on the words of the statute the petitioner maintains that in acertaining the amount of the free rental there should be deducted from the gross rental certain charges (1) for upkeep of estate buildings and fences, and (2) for management and superintendence. These deductions the Lord Ordinary has disallowed, and I agree with him that they should be disallowed. It will be observed that the statute allows as deductions in ascertaining the free rental those charges which burden and affect the lands (and through them, and only through them, the rents), and the burdens specified in the statute show that the burdens referred to are only such as burden or affect the lands and estate in the sense that they are such as the lands and estate may be made answerable for, or, in other words, debts and obligations exigible from the lands for which the lands might be attached. Now, the deductions sought to be made by the petitioner are not of that character at all. An heir of entail in possession is not bound to do anything, however little, towards keeping up the estate buildings and fences. Any debt he might incur in doing so would be a personal debt for which the entailed estate could not be made answerable—such debt could not affect or burden the lands. The same may be said about the expenses of management. The heir in possession may manage the estate for himself, in which case he certainly could not claim as regards the estate any consideration for doing so, or the estate may be left without management. But, in any case, the extent of management and expenses so incurred, if any (which is a matter entirely in the discretion of the heir in possession), cannot burden or affect the lands so as to make them answerable therefor. I think therefore that the Lord Ordinary was right in disallowing the deductions, and that his judgment should be affirmed.

LORD MONCREIFF was absent.

The Court adhered.

Counsel for the Petitioner—Dundas, K.C.—Blackburn. Agents—Russell & Dunlop, W.S.

Counsel for the Respondent—Ure, K.C.—Cullen. Agents—Strathern & Blair, W.S.

Wednesday, November 12.

SECOND DIVISION.

A *v.* B.

Minor and Pupil—Custody — Legitimate Children — Question between Parents—Father Convicted of Theft—Husband and Wife—Parent and Child.

In a petition presented by a father for the custody of the child of the marriage, a girl of one year and nine months, and for an order on the mother to deliver her up to him, the petitioner admitted that about a year previously he had pleaded guilty to a charge of theft of sums amounting to £12, and had been sentenced to four months' imprisonment. He stated that on coming out of prison he had obtained his present situation, which had been kept open for him by his employers, and that his wages were 27s. per week. The wife did not deny the truth of this last statement, and made no specific charge of dishonesty or bad conduct against the petitioner since he came out of prison.

Upon the mother intimating, after an opportunity for inquiry had been given to her, that she was not in a position to add anything to her averments, the Court, without further inquiry, *found* the petitioner entitled to the custody of the child, and *ordered* it to be given up to him.

On 25th July 1902 A presented a petition in which he prayed the Court to find him entitled to the custody of his child C, born 8th October 1900, and to make an order ordaining his wife B to deliver the child to him. In the petition the petitioner averred that he was married to the respondent in 1900, and that there was one child of the marriage; that in November 1900 he fell into ill-health and got into pecuniary difficulties, which coupled with interference on the part of his wife's relations led to unpleasantness between petitioner and his wife; that after a quarrel between them in July 1901 the respondent did all she could to make his life miserable; that "the petitioner thereafter became despondent, and as he was in great straits for money he took sums amounting to about £12 which did not belong to him, and pleaded guilty in the Sheriff Court to a charge of theft of this sum, and was sentenced to four months' imprisonment on the 8th August 1901"; that after being released from prison on 7th December 1901 the petitioner obtained his present situation as an inspector of telephones which had been kept open for him by his employers, who were acquainted with the circumstances leading up to the charge of theft; that his wages were 27s. a-week, and his circumstances were now such as to enable him to maintain his wife and child, and that after his release from prison he wrote on several occasions to the respondent at her mother's address expressing regret for his offence and asking her to return to him, but she did not reply.

On 5th August 1902 the respondent lodged answers in which she averred that the petitioner's conduct had caused the home to be broken up; that after September 1900 he became a bookmaker and consorted with betting men; that in November he pawned some of her marriage presents; that his conduct had seriously affected her health; that in July 1901 she took in summer lodgers with the view of assisting to pay the rent; that on her getting £1 from them at the end of the month the petitioner demanded this sum from her, stating that he wanted 10s. "to put on a horse" and 10s. to give to his mother; that the respondent refused and the petitioner used bad language; that two days thereafter he was arrested on a charge of theft, to which he pleaded guilty and was sentenced to four months' imprisonment; that the indictment showed that the petitioner was charged with eight different thefts of sums ranging from 2s. to over £3, extending from 26th April 1901 to 26th June 1901; and that these thefts were chiefly committed in houses to which he had obtained entry by representing that he had been sent to inspect the electric fittings. The respondent averred further as follows:—"In addition to the charges then made it is believed and averred that there were other similar complaints against him, and respondent now believes that the petitioner carried on a systematic series of thefts extending over a considerable period, and had often pretended to her he was working and earning wages when in point of fact his gains were dishonestly obtained. It is believed and averred that the petitioner has during the greater part of his married life lived a life of deceit and crime, and his conduct has been such as to render him totally unfitted to be a proper custodier of a young child, having due regard to its morals and welfare. The respondent is not satisfied that the petitioner has really amended his way of living, and she considers that it would be in the highest degree detrimental to the best interests of the child, and injurious to her moral well-being, that her upbringing should be entrusted to the petitioner, even if he were in a position to maintain her, which the respondent does not admit. The child of the marriage, a girl of one year and nine months of age, requires maternal care, which the respondent is able to give her. The petitioner has no home to which he can take the child. He is at present living with his mother, and he is unable to make proper provision for its maintenance and upbringing. . . . While respondent has in the circumstances narrated ceased to live with petitioner, and is at present working for the support of herself and child, she has informed petitioner that if he will prove the sincerity of his professions of penitence by leading a respectable life she will be willing to go back to him with the child on being assured that there is reasonable probability of his proper conduct for the future. She has offered, and hereby offers to the petitioner, all reasonable access to the child, which has never been refused by her."

On 4th November 1902 the case came before the Second Division of the Court.

Argued for the petitioner—Where a wife was in desertion the husband had an absolute right to the custody of his child unless it could be shown that the physical or moral interests of the child would be endangered—*Lang* v. *Lang*, January 30, 1869, 7 Macph. 445, 6 S.L.R. 294; *Nicolson* v. *Nicolson*, July 20, 1869, 7 Macph. 1118, 6 S.L.R. 192; *Lilley* v. *Lilley*, January 31, 1877, 4 R. 397, 14 S.L.R. 281; *Bloe* v. *Bloe*, June 6, 1882, 9 R. 894, 19 S.L.R. 595; *Rintoul* v. *Rintoul*, October 22, 1898, 1 F. 22, 36 S.L.R. 21. The above rule of the common law had not been displaced by the Guardianship of Infants Act 1886 (49 and 50 Vict. cap. 27), sec. 5—*Sleigh* v. *Sleigh*, January 20, 1893, 30 S.L.R. 272. None of the statements in the answers showed that the moral or physical interests of the child would suffer. The petitioner was therefore entitled to the custody of his child.

Argued for the respondent—The petitioner was not entitled to accuse the respondent of living in desertion as he himself had

broken up the home by committing a criminal offence and being sent to prison. The effect of the Guardianship of Infants Act had been to reduce the old legal right of a father to the custody of his children to a *prima facie* right in a question with the mother, and the bare fact that the spouses were living apart without a decree of judicial separation would not prejudice the mother's claim or prevent the Court considering the surrounding circumstances —*MacKellar* v. *MacKellar*, May 19, 1898, 25 R. 883, opinion of Lord President Robertson, 884, 35 S.L.R. 483. The admission of a conviction for crime on the part of the petitioner entitled the respondent's statement that the father was not a fit guardian for the child to great weight. Looking to this admission, to the respondent's statements, and to the age of the child, the Court would best safeguard the physical and moral interests of the child by permitting the mother to retain it, the father being given right of access—*Reid* v. *Reid*, January 9, 1901, 3 F. 330, 38 S.L.R. 237.

The Court adjourned the case for a week, in order to give the respondent further opportunity for making inquiry as to the truth of the petitioner's statement that he was in a position to maintain his wife and child, and for stating anything additional which she was able to allege against the petitioner.

On November 12th, when the case was called, the respondent's counsel intimated that he had nothing further to add.

LORD JUSTICE-CLERK—There is no doubt that it is a well established principle that, unless there are reasons of a substantial character to the contrary, where a child is weaned and no longer requires the immediate attention of its mother, the father is entitled to its custody. That principle has been laid down in many cases — some of them very different in their circumstances from the present. This case is peculiar in this respect, that, so far as I have been able to gather, there is nothing whatever against the petitioner except the fact that he fell into pilfering habits for a short time and was convicted on his own confession and sent to prison. That took place a considerable time ago, and nothing has been stated against the petitioner's character since. When the case was before us formerly it was adjourned in order to give the respondent an opportunity of stating anything further against the petitioner if she felt herself justified in doing so, and she has stated nothing, so that the question which the Court has now to determine is simply this, whether that single incident in the petitioner's history to which I have alluded is of itself sufficient to exclude the petitioner from having his right as a father made good. Now it is nearly a year since the petitioner came out of prison. This petition was not presented till July last, and between July and the present time the respondent has not been able to lay her hand on anything else which she could lay before the Court for the purpose of showing that the petitioner ought not to have the custody of his child. The offence of which the petitioner was convicted was one no doubt highly discreditable to him, but unless such a thing is to be kept up against a man for ever, I see no reason why, after this lapse of time during which there was nothing against the petitioner, he should be deprived of his ordinary rights as a parent. I think therefore that the petitioner is entitled to have a judgment finding him entitled to the custody of the child. In moving your Lordships to decide the case in accordance with the view I have expressed, I would express my sincere hope that the parties may come together again in a forgiving spirit, and that by mutual forbearance happy relations may once more be established between them.

LORD YOUNG—In my opinion the petitioner has right to the custody of his child.

LORD TRAYNER—I agree in thinking that this petition should be granted.

LORD MONCREIFF—I agree, although not without some difficulty. I think that the respondent is entitled to a certain amount of sympathy if her statements are true. But the allegation of the petitioner is that after he had been released from prison he went back to the situation which had been kept open for him by his employers, and that he is now earning good wages. These statements are made by the petitioner and they are not disputed by the respondent. That being so I think that the petitioner has made out a case for obtaining the custody of his child, but if he relapses into his former ways his wife will have, I think, an unanswerable claim to the custody of the child.

The Court found the petitioner entitled to the custody of his child, and ordained the respondent to deliver up the child immediately to remain in his custody.

Counsel for the Petitioner—T. B. Morison. Agent—George T. Welsh, solicitor.

Counsel for the Respondent—D. Anderson. Agent—J. Anderson, solicitor.

Friday, November 14.

FIRST DIVISION.

[Sheriff-Substitute at Hamilton.

GOLDER *v.* CALEDONIAN RAILWAY COMPANY.

Master and Servant — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *Schedule* 1, *sec.* 1—*Death Resulting from Injury—Death from Disease Accelerated by Injury.*

A workman was injured in the course of his employment by jumping off a bogey, and died about two months after the injury. In an arbitration