delivered in the High Court of Justiciary in the case of *A B* v. *Dickson* (1907 S.C. (J.) 111, 44 S.L.R. 672) that even the crime of rape is a bailable offence, but it is obvious that it would be exceedingly detrimental to the public interest if it was supposed that every person who was accused of any crime short of murder, treason, or the like, was entitled to be set at liberty until the day of his trial upon finding a certain amount of bail. I think that is not the law. In the ordinary case bail ought only to be allowed where the person accused has previously been a law-abiding citizen, with regard to whom there can be no reasonable doubt that although he is released on bail he will attend his trial when it comes on. It does not in my opinion apply to people who have been law-breakers in the past, and still less to persons like the two men accused in this case who have a record of many previous convictions, and have both served sentences of penal servitude. I think, accordingly, that there was an error of judgment on the part of the authority by whom this man Macdonald was released upon bail in so releasing him. I think he ought not to have been released. There may be cases even of serious offences which were not formerly regarded as bailable where the Sheriff who has to deal with the application for bail may, on reading the papers submitted by the Crown, come to the conclusion that the case is not one in which a conviction will probably follow, although it may be right that the circumstances charged in the indictment should be investigated. In such cases the Sheriff has a discretion to set the person at liberty on his finding suitable bail, but I think the law still is that bail should not be granted as a matter of right in the case of serious offenders, but on the contrary that it is a privilege which the Sheriff is entitled to confer, only, however, after very careful consideration whether, looking to the public interest, it is right that the privilege should be granted in the particular case. The result of this man having been released upon bail might have been that he might have got away from the country and have escaped punishment (assuming that he was guilty of the charges that he was accused of), and would suffer no punishment except the forfeiture of the pecuniary sum which he or his friends had deposited or guaranteed. In the present case the man has not escaped. He is still in the country; but he has put the authorities to the expense of again summoning a large body of jurymen before a Judge of the High Court on the charge which ought to have been dealt with here and now. I say that this is a very unfortunate circumstance, and would not have happened if the authorities charged with the matter had not permitted both these men to be released upon bail. I have taken an opportunity to make this statement because I think that a misapprehension has arisen as to the scope and effect of Lord Dunedin's observations. I believe that these were made after a careful study of the Crown precognitions, which satisfied him that, although the charge against the accused was a very serious one, the accused himself had previously been a law-abiding subject, and that the jury who had to try his case might reasonably come to the conclusion that he was an innocent man. Strictly speaking, the observations were *obiter*, as the Solicitor-General consented to bail. But I certainly have not understood the decision as meaning—what it has since been largely interpreted to mean—to convey instructions to sheriffs or others who are charged with the duty of fixing bail to allow accused persons out on bail without regard to whether the circumstances are such as warrant the granting of the privilege. I think it right to make these observations for the benefit of those who have to deal with such matters in future, in order that so far as possible such a lamentable waste of public money as has occurred to-day may be avoided.

Counsel for H. M. Advocate—MacRobert, K.C., A.-D. Agent—W. F. Mackintosh, Procurator-Fiscal.

Counsel for the Accused — MacGregor. Agent—J. Ross, Solicitor.

COURT OF SESSION.

Saturday, January 22.

FIRST DIVISION.

DEMPSTER'S TRUSTEES *v.* DEMPSTER.

Succession — Trust—Direction to Purchase Alimentary Annuity—Absence of Provision for Continuing Trust—Right of Beneficiaries to Payment of Capital.

A testatrix by her trust-disposition and settlement directed her trustees to set aside a certain sum, and to purchase from the Government or any Scottish insurance company of good standing a joint annuity payable to her daughters A, B, and C, equally during their joint lives and the lives of the survivors or survivor of them, "which annuities shall be for their alimentary use allenarly, not subject to their debts or deeds nor liable to the diligence of their creditors, and without power of anticipation." There was no provision for a continuing trust, but "all requisite powers for carrying out the purposes of the settlement" were conferred upon the trustees. *Held* that A, B, and C were entitled to immediate payment of the sum directed to be set aside.

James Dempster and others, testamentary trustees of the late Mrs Jessie Grant or Dempster, Pollokshields, Glasgow, acting under her trust-disposition and settlement dated 27th May 1913, and codicil dated 25th June 1914, *first parties*, and Margaret Marshall Dempster, Mary Aitken Dempster or Sharpe, and Annie Mitchell Dempster, daughters of the testatrix, *second parties*, presented for the opinion and judgment of the Court a Special Case dealing with a bequest in favour of the second parties.

The trust-disposition and settlement provided—"In the seventh place I direct my trustees to set aside the sum of five thousand pounds sterling, and the amount of the appropriate stamp duty exigible in respect of the annuity after mentioned, and to purchase from the Government or any Scottish insurance company of good standing a joint annuity, payable to my daughters Miss Margaret Dempster, Mrs Mary Aitken Dempster or Sharpe, and Miss Annie Mitchell Dempster, equally during their joint lives and the lives of the survivors or survivor of them, which annuities shall be for their alimentary use allenarly, not subject to their debts or deeds nor liable to the diligence of their creditors and without power of anticipation: . . . And I confer upon my trustees all requisite powers for carrying out the purposes of this settlement and of any codicil hereto." It further conferred upon the trustees wide powers to retain and vary investments, to lend the trust funds, and to exercise their discretion in connection with the trust affairs.

The Case stated—"4. The second parties have requested the trustees to pay over to them the said capital sum of £5000 and the amount of the appropriate stamp duty on a bond of annuity purchasable for that sum, which the parties agree to be £50. The Post Office Department of the Government do not issue joint annuities upon more than two lives, and the Department refused to give the trustees any quotation. The trustees have obtained quotations from many insurance companies, and ascertained that the highest annuity upon three lives which they can buy for that sum of £5000 is £305. A larger income could be obtained by investing at present the total available sum of £5050 in trust securities. The first parties, however, maintain that under the seventh purpose of the said trust-disposition and settlement they are bound to purchase an annuity, and not bound to make payment of said capital sum to the second parties. 5. The second parties maintain that they are entitled to require the first parties to pay to them the said capital sum of £5050, and that the first parties are bound to pay the said sum to them."

The *questions of law* were—"1. Are the first parties bound to purchase an annuity as directed in said trust-disposition and settlement? or 2, Are the second parties entitled to immediate payment of the said sum of £5050?"

Argued for the first parties—The remaining provisions of the deed being for payment only, the wide powers given to the trustees had been conferred upon them to enable them to carry out the directions in the seventh purpose. They were bound to do so although the whole objects of the provision could not be accomplished—*Hutchinson's Trustees* v. *Young*, 1903, 6 F. 26, 41 S.L.R. 14. They could maintain the alimentary character of the fund by purchasing an annuity payable to themselves. Where provision was made that the annuity was to be alimentary only, the trustees were not entitled to pay the capital to the beneficiaries—*Turner's Trustees* v. *Fernie*, 1908 S.C. 883, 45 S.L.R. 708.

Counsel for the second parties were not called upon.

LORD PRESIDENT—The only question in this case is whether the trustees in carrying out the seventh purpose of the settlement are bound to purchase an annuity, or whether the parties in whose favour the bequest of the annuity was conceived are entitled to immediate payment of the capital sum directed to be expended in its purchase. The purpose in question directs the trustees to set aside a sum of £5000, and "to purchase from the Government or any Scottish insurance company of good standing" an annuity on the joint lives of three ladies. The annuity is directed to be "for their alimentary use allenarly, not subject to their debts or deeds, nor liable to the diligence of their creditors, and without power of anticipation."

It is well settled that a direction simply to purchase an alimentary annuity without the provision of machinery, as by a continuing trust, for protecting and effectuating its alimentary character—a simple direction to purchase an annuity which is to be alimentary, and which is to be protected from creditors—leaves the annuitant free to claim the capital sum which was directed to furnish the price of the annuity. As recently as in 1916 a case of precisely that character came before the other Division of this Court. It is reported under the name of *Brown's Trustees* v. *Thom*, 1916 S.C. 32. Prior to that there had been many cases to the like effect, of which it may be worth while to cite one decided in this Division of the Court in 1901, and reported under the name of *Kennedy's Trustees* v. *Warren*, 3 F. 1087.

Now it is true that in one case, that of *Hutchinson's Trustees* v. *Young*, 6 F. 26, where the direction was perfectly specific with regard to the precise class of annuity which the testator had in mind, and to which the testator limited the choice of selection by his trustees, it was held that the trustees were bound to purchase an annuity of the class defined even although all those qualities and characteristics which the testator directed to be attached to the annuity could not be effectually secured and protected by the purchase of an annuity of that particular class. But no question of that kind arises upon the present clause. It is true that the present clause mentions "Government annuities," the same class of annuities as was concerned in *Hutchinson's Trustees*, but it by no means limits the choice of the trustees to Government annuities. It is in vain therefore to appeal to the authority of *Hutchinson's Trustees*. That case is shown by subsequent comments to be of limited application, and it is not one which can govern the decision of the present question. On the contrary, it seems to me that by opening the trustees' selection to the whole range of insurance companies—which are not further defined than as "Scottish" and "of good standing"—the testatrix in effect does no more than direct her trustees to purchase—of course from a respectable source—an alimentary annuity for these ladies.

Therefore, as this case presents none of the specialties which were relied on in *Hutchinson's Trustees*, it appears that we ought to answer the first question in the negative and the second question in the affirmative.

LORD MACKENZIE—In this case I think there is not much room for doubt as to what the testatrix wished to do by her settlement, but I think there is equally little doubt that she has not effected her purpose, and accordingly I agree with your Lordship.

LORD SKERRINGTON—I agree that the questions can be answered in only one way having regard to the manner in which the case was argued to us. For reasons which I indicated in my opinion in a recent case—*Dunsmure's Trustees* v. *Dunsmure*, 1920 S.C. 147, I have difficulty in understanding why the constitution of a continuing trust has been thought to be essential to the creation of a valid alimentary right, provided of course that the right is not conceived in such terms as to entitle the alimentary creditor to have possession of the fund which provides the alimentary annuity or liferent. This opinion does not seem to me to be inconsistent with what was said by Lord Dunedin in the case of *M'Dougal's Trustee* v. *Heinemann*, 1918 S.C. (H.L.) 6, p. 12. I am glad, however, that the money bequeathed for the benefit of the second parties is not to be wasted in the purchase of annuities which would yield a smaller annual return than could be got from a trust investment.

LORD CULLEN—I agree that the questions should be answered as your Lordship proposes.

The Court answered the first question of law in the negative and the second in the affirmative.

Counsel for the First Parties—Chree, K.C. — J. Stevenson. Agent — James Gibson, S.S.C.

Counsel for the Second Parties—Wilton, K.C. — Reid. Agents — Tait & Crichton, W.S.

Saturday, January 29.

SECOND DIVISION.

[Lord Anderson, Ordinary.

DUKE *v.* JACKSON.

Sale—Sale of Goods—Implied Warranty as to Fitness — Alleged Breach — Action of Damages for Breach of Contract—Averments—Relevancy—Sale of Goods Act 1893 (56 *and* 57 *Vict. cap.* 71), *sec.* 14 (1).

The Sale of Goods Act 1893, sec. 14 (1) enacts — "14. *Implied conditions as to quality or fitness.*—Subject to the provisions of this Act and of any statute in that behalf there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:—(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose. . . ."

The purchaser of a bag of coal which he had bought from a retail coal merchant sustained personal injuries as the result of an explosion which took place in his kitchen fire where the coal was being burnt. In an action of damages at his instance against the seller on the grounds of negligence and breach of contract, he averred in support of the latter ground that the explosion "was caused by an explosive substance, viz., a detonator or other manufactured metal substance contained in the bag of coal," and pleaded that the defender had, in breach of the implied warranty under section 14 (1) of the Sale of Goods Act 1893, supplied coal which was not reasonably fit for the particular purpose for which it was required. *Held* that the action so far as laid on breach of contract was irrelevant, in respect that the pursuer's averments did not infer that the coal was not in fact reasonably fit for the purpose for which it was supplied.

John Duke, iron grinder, Glasgow, *pursuer*, brought an action of damages for £750 against Alexander Jackson, coal merchant, Glasgow, *defender*.

The claim was based on two grounds, viz., (1) negligence—[this ground of action is not dealt with in this report]—and (2) breach of contract, the alleged breach being of the implied warranty referred to in the Sale of Goods Act 1893, sec. 14 (1).

The pursuer averred, *inter alia*—". . . (Cond. 2) On Saturday, 6th December 1919, the defender sold and supplied to the pursuer a bag of household coal, for which the pursuer paid the defender on delivery. The defender was the pursuer's coal merchant, and all the coals the pursuer got were purchased from the defender. . . . (Cond. 3) On the morning of Monday, 8th December 1919, when the pursuer was standing in his kitchen before going to his work in the morning, at or about half-past seven o'clock, there was a violent explosion of the coals in the kitchen fire. As a result of the explosion various hard substances were thrown out of the fireplace, and one of these, a piece of metal, struck the pursuer on his right eye, became embedded therein, and so seriously injured it that the eye had to be afterwards removed. (Cond. 4) The said explosion was caused by an explosive substance, *viz., a detonator or other manufactured metal substance contained in the bag of* coal supplied by the defender to the pursuer. [The words in italics were added by way of amendment at the bar of the Inner House]. The fire in the pursuer's kitchen in which the explosion occurred was lit by the pursuer's wife before seven o'clock on that