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

morning of Monday, 8th December. It was set and lit by the pursuer's wife, and she used kindling wood for lighting it which she got at her grocer's. The only coal used was part of that supplied by the defender on 6th December. No other substance was used in making said fire except said coal and wood. The pursuer's wife did not use any oil or other inflammable material in lighting the fire. The said fire had been burning for over half an hour when the explosion occurred. Before the explosion occurred the whole of the wood used to light the fire had been consumed, and the fire was then solely a coal fire and the coal was burning brightly. The explosion was a very loud and very violent explosion, and besides injuring the pursuer both the pursuer's wife and his son John were struck and injured by substances thrown out by the explosion. With reference to the averments in answer, intimation of the said occurrence was made to the defender immediately after it happened. . . . (Cond. 5) The defender in his capacity as coal merchant was responsible for the supply of the said coal, and was bound as a public seller of coal to supply to customers generally, and to the pursuer as a customer on the occasion in question, coal fit and safe to consume in a house fire, which the said coal was not. The pursuer ordered the coal, as the defender knew, for ordinary domestic consumption in a household fire, and it was supplied by the defender to the pursuer for that purpose. It was in point of fact unfit for the said purpose, as it contained *said* explosive substance which was responsible for the above-mentioned explosion. This the defender knew or ought to have known. The defender was in fault in supplying coal containing such explosive substance, and did so in breach of his duty to the pursuer. In carrying out his duty it was incumbent upon him to take precautions to ensure that the coal supplied to the pursuer had been examined and cleaned or screened after being taken from the ground. In any event it was his duty carefully to inspect the said coal, or cause it to be inspected, prior to delivery to the pursuer. If he had taken these precautions or any of them he would have detected the presence of and been able to remove all foreign and deleterious substances such as *said* explosives, and so would have prevented the accident. The defender, however, did not do so, but instead thereof negligently sold and delivered to the pursuer coal which had not been subjected to such examination and cleaning or screening or to such inspection, and so caused the accident. Further, the pursuer having make known to the defender the particular purpose as above stated for which the said coals were required, the pursuer relied absolutely on the defender's skill or judgment to supply him with coal in a condition suitable and safe for that purpose. The defender, however, failed to supply coals fit for the said purpose although it was in the ordinary course of his business to do so. He was accordingly in breach of the warranty implied by section 14 (1) of the Sale of Goods Act 1893, thereby causing the accident which gave rise to the injuries complained of. With reference to the averments in answer, the defender's position as a middleman devolves upon him the duty of ensuring that coals delivered to him are screened, and are in any event prior to delivery by him inspected by him or on his behalf."

The pursuer *pleaded, inter alia*—"4. The pursuer is entitled to damages as concluded for in respect (*a*) that the defender in breach of said contract and the implied warranty under section 14 (1) of the Sale of Goods Act 1893 supplied to the pursuer coal not reasonably fit for ordinary domestic consumption and (*b*) that the pursuer, relying on the defender's care and skill, caused the said coal to be consumed in an open fire, as he was entitled to do, and in consequence suffered the injuries from explosion as condescended on."

The defender pleaded, *inter alia*—"1. The pursuer's averments being irrelevant the action should be dismissed."

The issues proposed by the pursuer included the following:—"2. Whether on or about 6th December 1919 the defender in the course of his business as a coal merchant and retail seller of coals for domestic consumption supplied coal to the pursuer knowing that the said coal was required for domestic consumption by the pursuer; whether the said coal or part thereof was not fit for such domestic consumption in respect that it contained an explosive substance; and whether the pursuer relying on the defender's knowledge and skill as a merchant and retailer of domestic coal caused the said coal or part thereof containing, unknown to the pursuer, the said explosive substance to be consumed in an open fire with the result that the pursuer sustained injury through an explosion of the said explosive substance, to the loss, injury, and damage of the pursuer."

On 26th November 1920 the Lord Ordinary (ANDERSON) sustained the first plea-in-law for the defender and assoilzied him from the conclusions of the summons.

Opinion.—"In December of last year the pursuer resided with his wife and family in a top flat house of a tenement at 450 South York Street, Glasgow. The defender is a retail coal dealer in Glasgow, selling coal in bags which he receives filled from wholesale coal merchants.

"On Saturday 6th December 1919 the defender sold and supplied to the pursuer a bag of household coal for which the pursuer paid on delivery.

"About 7·30 on the morning of Monday, 8th December 1919, when the pursuer was standing in his kitchen before going to his work a violent explosion of the coal in the kitchen fire took place. As a result of the explosion the pursuer avers that various hard substances were driven out of the fireplace and one of these, a piece of metal, struck the pursuer on his right eye and so injured it that the eye had afterwards to be removed.

"The pursuer avers that the explosion was caused by 'an explosive substance in the coal' supplied by the defender to the

pursuer. The fire on the morning in question had been set and lit by the pursuer's wife before seven o'clock. It had been burning for over half an hour prior to the explosion. The only coal used was part of that supplied by the defender on 6th December.

"In these circumstances the pursuer has brought the present action against the defender claiming damages for the loss of his eye.

"The pursuer bases his claim of damages on two legal grounds (1) on the common law ground of the defender's negligence from which the accident is said to have resulted, and (2) on the ground of breach of contract — the defender's alleged breach being of the implied warranty referred to in the Sale of Goods Act 1893, section 14 (1).

"At the debate on the adjustment of issues the defender's counsel maintained that the pursuer had failed to state a relevant case to support his action on either of the foresaid grounds.

[*His Lordship then considered the common law ground of action.*]

"I therefore hold that the pursuer has failed to aver a relevant case at common law against the defender.

"2. *As to the pursuer's claim under the Sale of Goods Act* 1893. Section 14 (1) of this statute establishes an exception by way of implied warranty to the rule of *caveat emptor* in the law regulating the contract of sale. It has been held that the implied warranty extends to latent as well as patent defects—*Frost* 1905, 1 K.B. 608.

"In support of their contention that the pursuer's averments on this branch of the case were irrelevant, the defender's counsel took four points—(1) It was argued that the coal was not bought and sold for a 'particular' purpose, but only for the general purpose for which all coal is bought and sold, namely, to be burnt. The case would have been different, it was said, had some particular user been suggested, *e.g.*, for bunkering—*Crichton & Stevenson*, 1908 S.C. 818. In my opinion this contention is not well founded. The coal was acquired for a particular purpose, to wit, for household consumption. This imported a demand for a quality of coal which would be suitable for cooking food, diffusing heat, and which could be used for these purposes without discomfort to the householder. (2) It was next urged that the buyer had not disclosed to the vendor that the coal was required for a particular purpose. The section provides that this disclosure may be made by implication, and I have no difficulty in holding that when the tenant of a tenement flat buys a bag of household coal from a retailer he impliedly makes known to the seller that the coal is required for domestic use of the nature I have indicated. (3) It was next contended that the pursuer had not averred that the particular purpose of user had been made known to the seller so as to show that the buyer relied on his skill and judgment in the matter complained of. The buyer did not rely, it was said, on the seller's skill and judgment to exclude explosive substances from the coal, but only to obtain a supply of coal reasonably fit for household purposes, and the pursuer's case on record comes to nothing more than this. Accordingly it was urged he cannot found upon the statute, as there has been no implied warranty as to explosive substances, but only as to the supplying of reasonably fit household coal. This is a formidable contention, but I find a ground of decision even clearer in the fourth point taken by the defender's counsel, which was this—(4) The implied warranty, it was maintained, has been fulfilled. The pursuer did receive a bag of coal which was reasonably fit for the disclosed purpose. On the pursuer's averments it was urged no tribunal could competently reach the conclusion that the coal supplied was not reasonably fit for that purpose. It had all been used, and apart from the incident complained of had apparently proved to be excellent household coal. Accordingly if the explosion was due to imprisoned gas the whole of the coal, with the exception of an infinitesimal portion of it, was reasonably fit for the disclosed purpose; if the explosion was due to the presence of a foreign body in the coal, then the whole of the coal supplied, without exception, was reasonably fit for that purpose.

"The food cases—*Stocks*, 15 S.L.T. 339, *Govan*, 15 S.L.T. 510, 658, and *Clelland*, 16 S.L.T. 65, and the milk case (*Frost, supra*), so far as these cases are laid on the Sale of Goods Act, were strongly relied on by the pursuer's counsel. The distinction, however, between these cases and the present appears to me to be this—that in these the averment of the pursuer was that *all* the food and *all* the milk purchased was tainted or contaminated, and therefore in its entirety was not 'reasonably fit'; in the present case the pursuer's averments disclose that the whole of the coal, or practically the whole of it, was reasonably fit.

"I shall therefore sustain the defender's first plea-in-law and dismiss the action."

Other cases referred to were — *Gillespie Brothers & Company*, 1896, 2 Q.B. 59; *George*, 1869, 5 Ex. 1; *Heaven*, 11 Q.B.D. 503; *Clark*, 1903, 1 K.B. 155; *Priest*, 1903, 2 K.B. 148.

The pursuer reclaimed, and argued — There was an implied warranty that the coal should be reasonably fit for the purpose for which it was required — Sale of Goods Act 1893 (56 and 57 Vict. cap. 71), sec. 14 (1). The section only implied the warranty under certain circumstances, but all the circumstances necessary to imply the warranty were present. The pursuer had bought the coal for a "particular purpose," viz., household consumption, and he had impliedly made known "the particular purpose" to the defender. That was sufficient to show that he relied on the defender's skill or judgment—*Crichton & Stevenson* v. *Love*, 1908 S.C. 818, 45 S.L.R. 600, *per* Lord President (Dunedin) at 1908 S.C. 823 and 824, 45 S.L.R. 603. The reliance of the buyer on the seller's skill or judgment did not need to be proved affirmatively — *Knutsen* v. *Mauritzen*, 1918, 1 S.L.T. 85, *per* Lord Sands (Ordinary) at 86. The defender had clearly broken the implied warranty, for the coals proved not to be fit for the

particular purpose for which they were required. The test of their fitness was whether or not the particular purpose was satisfied—*Clarke* v. *Army and Navy Co-operative Society*, [1903] 1 K.B. 155; *Preist* v. *Last*, [1903] 2 K.B. 148. Decisions under the Mercantile Law Amendment (Scotland) Act 1856 (19 and 20 Vict. cap. 60) did not apply to the present case. The following cases were also cited:—*Frost* v. *Aylesbury Dairy Company*, [1905] 1 K.B. 608; *Langridge* v. *Levy*, 1837, 2 M. & W. 519, 1838, 4 M. & W. 337; and *George* v. *Skivington*, 1869, L.R., 5 Exch. 1. The Court should send the case for trial by jury preferably to allowing a proof—*Willison* v. *Petherbridge*, 1893, 20 R. 976, 30 S.L.R. 851; *Johnstone* v. *Hughan*, 1894, 21 R. 777, 31 S.L.R. 655. In *Govan* v. *J. & W. M'Killop*, 1907, 15 S.L.T. 658, the Court allowed a proof, but that was because difficult questions of contract were involved.

Argued for the respondent—There was no implied warranty that the coal should be reasonably fit for the particular purpose for which it was required, because the coal was not supplied for a "particular" purpose, but only for the general purpose of being burnt—*M'Latchie* v. *Douglas*, 1896, 13 Sh. Ct. Reps. 117, *per* Sheriff (Dundas) at 121; *Hamilton* v. *Robertson*, 1878, 5 R. 839; *Dunlop* v. *Crawford*, 1886, 13 R. 973, 23 S.L.R. 702. The two last cited cases were decided under the Mercantile Law Amendment (Scotland) Act 1856, but authorities which interpreted the words "particular purpose" under that Act were directly in point in interpreting the same words under the Sale of Goods Act 1893. Moreover, the pursuer had not averred that the particular purpose had been made known to the defender so as to show that he relied on the defender's skill or judgment. In order to show that, the pursuer would need to prove that he had pointedly brought the matter to the notice of the defender—*Crichton & Stevenson* v. *Love*, *per* Lord President (Dunedin)—but that was not averred. On the facts as averred it could not be said that the pursuer had placed reliance on "the seller's skill or judgment." On the pursuer's own averments the coals were reasonably fit for the particular purpose for which they were required. The explosion which occurred had nothing to do with the question of the fitness of the coals. The action was therefore irrelevant and should be dismissed. *Wilson* v. *Dunville*, 1879, 6 L.R., Ir. 210, was also referred to.

At advising—

LORD JUSTICE-CLERK—The pursuer avers that the defender sold and supplied to him a bag of household coal, which bag contained in addition to coal an explosive substance, viz., a detonator or other manufactured metal substance which while in the pursuer's fire exploded and injured the pursuer's eye, in consequence of which it had to be removed.

He maintains that the defender is liable to him in damages (1) on the ground of negligence at common law, and (2) because of breach of warranty under the Sale of Goods Act, sec. 14 (1).

The ground of action so far as laid at common law is negligence on the part of the defender in not causing the coal to be examined and cleaned or screened, and in not inspecting the coal before it was delivered to the pursuer. If the defender had not been so negligent, it is averred, the presence of the dangerous article would have been discovered; it would have been removed and the accident avoided.

I am very doubtful as to the relevancy and sufficiency of specification of the pursuer's averments so far as the common law ground of action is concerned. From the authorities which were cited to us and the argument presented at the debate it is plain that delicate questions of law may arise. The pursuer accepted the position that the defender is a coal merchant. He refers to him as a middleman, and he does not suggest that the defender was in any way concerned in the mining of the coal or otherwise than as a seller of what was supplied to him by some wholesale dealer. In the result, however, though not without difficulty, I have come to be of opinion that on this branch of the case it would be safer to allow a proof before answer, and I accordingly move that we should do so.

So far as the action is based on the statute I agree in the result arrived at by the Lord Ordinary, and have nothing to add.

LORD DUNDAS—The Lord Ordinary concludes his opinion by intimating his intention to sustain the defender's first plea-in-law and dismiss the action. By some unexplained blunder, however, his interlocutor does not dismiss the action but assoilzies the defender. The defender's counsel at once admitted that this error must in any view be put right.

The pursuer's case is laid at common law upon negligence, and also upon section 14 (1) of the Sale of Goods Act 1893. In so far as the latter ground is concerned I agree with the Lord Ordinary that the pursuer's averments cannot be admitted to probation. It may be noticed in passing that though he avers that he made known to the defender the particular purpose for which the coals were required, and that he relied on the latter's skill or judgment, he nowhere says that he made the purpose known to the defender "so as to show that" he so relied. But apart from this, the case as based upon section 14 (1) of the statute seems to me to fail utterly, because it is not said or suggested that the coal supplied was not in fact reasonably fit for the disclosed purpose. No complaint is made of the quality of the coal supplied or any part of it. The complaint is that a foreign substance had found its way into the bag. The case is manifestly different from one where the quality of the goods supplied has become tainted by some deleterious element and so rendered unfit for its purpose. The section of the Act has, in my judgment, no application under the circumstances. The pursuer's fourth plea must therefore be repelled, and his case so far as laid under the statute be dismissed as irrelevant.

As regards the pursuer's averments so

far as made in support of his action at common law upon negligence, I confess that even accepting the verbal explanations of his counsel as to what they were really intended to mean, they appear to me to lie perilously near, if indeed they do not go beyond, the line which separates relevancy from irrelevancy. But it is perhaps safer and better to adopt the course proposed by your Lordship, viz., to allow a proof before answer rather than to throw them out here and now as plainly irrelevant. In this view it is probably safer also to avoid anticipating the result, and to refrain from comment beyond saying that a good many of the Lord Ordinary's observations appear to me to be powerful and formidable.

LORD ORMIDALE—The pursuer's claim for damages is laid on two grounds—first, on negligence at common law, and second, on breach of the implied warranty under section 14 (1) of the Sale of Goods Act 1893.

I agree with the Lord Ordinary that the averments of the pursuer are irrelevant to infer a breach of warranty under the Sale of Goods Act, and I do so on the short ground that, taking it that the coal was supplied for the particular purpose of household consumption, nothing that is said about it leads one to infer that it was other than reasonably fit for that purpose. There is no complaint about the coal as coal. As the amended record now reads, it is not averred that the explosion was in any way due to a defect in the coal, and coals and only coals were the goods bought and supplied under the contract. What caused the accident was a thing the pursuer did not purchase, viz., a detonator or other manufactured metal substance—an article quite foreign to the coal.

As regards the common law ground of action I have more difficulty. The averments as to the defender's duty and his neglect of it are on the very border line between relevancy and irrelevancy, and I further think that it would have been better pleading if the pursuer had in reply to the defender's answer one stated expressly whether he admitted or denied that the coal the defender sells is sold in bags which he receives filled from the wholesale merchants. I am not prepared, however, as regards the question of negligence at common law to dismiss the action without inquiry, but I agree that in the circumstances the inquiry should be by proof and not by jury trial.

LORD SALVESEN did not hear the case.

The Court pronounced this interlocutor—

"Recal the said interlocutor: Disallow the issues proposed by the pursuer: Find that the pursuer's averments so far as laid under section 14 (1) of the Sale of Goods Act 1893 are irrelevant, and repel his fourth plea-in-law: *Quoad ultra* remit to the Lord Ordinary to allow the parties a proof before answer in common form upon the case so far as laid at common law, and to proceed as accords. . . ."

Counsel for the Reclaimer (Pursuer)—Fraser, K.C.—Crawford. Agents—Gardiner & Macfie, S.S.C.

Counsel for the Respondent (Defender)—Mackay, K.C.—Aitchison. Agents—J. & A. F. Adam, W.S.

Saturday, February 5.

SECOND DIVISION.

[Sheriff Court at Glasgow.

VALENTINE *v.* GOW HARRISON & COMPANY.

Ship—Seaman—Contract of Service—Ship's Articles—Construction—Pay for Overtime.

A ship's articles contained the following conditions regarding overtime:—"*In port when watches are suspended* the hours of work for navigating and engineer officers (except chief engineer) shall be as follows:—Monday to Friday, 7 a.m. to 5 p.m.; Saturday, from 7 a.m. to 1 p.m. *Time worked* outside these hours, and on Sunday, Christmas Day, and New Year's Day, to be paid for at the rate of 2s. 6d. per hour, except in the following cases:— . . . *Officers in Charge.*—No overtime payable where navigating or engineer officers are appointed as officers in charge for night duty and are given equivalent time off duty."

Held that, under the articles, navigating or engineer officers appointed as officers in charge for night duty and not given equivalent time off-duty were not entitled to overtime pay for such duty, unless when so employed they had actually worked.

John Lough Valentine, engineer, 39 Kelvindale Street, Glasgow, *pursuer*, brought an action against Gow Harrison & Company, steamship owners and brokers, Glasgow, *defenders*, for payment of the sum of £66, 5s., which he alleged was due to him under a contract of service with the defenders.

The contract of service incorporated the ship's articles, which, *inter alia*, provided—"*In port when watches are suspended* the hours of work for navigating and engineer officers (except chief engineer) shall be as follows:—Monday to Friday, 7 a.m. to 5 p.m.; Saturday, from 7 a.m. to 1 p.m. *Time worked* outside these hours, and on Sunday, Christmas Day, and New Year's Day, to be paid for at the rate of 2s. 6d. per hour, except in the following cases:— . . . *Officers in Charge.*—No overtime payable where navigating or engineer officers are appointed as officers in charge for night duty and are given equivalent time off-duty. *Ports Outside U.K.*—No overtime payable at ports outside U.K. where vessel does not load or discharge cargo and remain for more than 24 hours, except that time spent by navigating officers outside working hours as defined above in the actual work of loading or discharging cargo may be computed