same. But I think it is quite extravagant to say that the "Rio Bento" was at the time and place of the collision either a wreck or obstruction to the harbour of Glasgow, or the dock or piers or approaches to the same, and indeed nothing of that kind is relevantly alleged. The "Rio Bento" was at the time of the collision in the possession and under the management of her master and crew, and the place where the collision took place was several miles distant from the harbour, docks, and piers of Glasgow.

In these circumstances, and for the reasons I have now adverted to, the judgment of the Lord Ordinary is in my opinion well founded, and ought to be adhered to.

LORD GIFFORD concurred.

LORD JUSTICE-CLERK—[His Lordship, after stating the nature of the case, and the result of the evidence as showing that blame did not attach to the "Toward" for the collision, but that it was due to carelessness on the part of the "Rio Bento," then proceeded]—On the question of the propriety or sufficiency of the light exhibited by the "Rio Bento," it cannot be denied that there is much conflict in the evidence on this subject; and if this was to be solely decided by opinion, I think the weight of testimony inclines against the proposed judgment. I attach no importance to the evidence of such witnesses as Mr Anderson and Mr Dunlop—testimony which does not impress my mind as trustworthy in point of recollection, and is immaterial if it were. The evidence of the Clyde superintendent and of Captain M'Fie and the river pilots is of a much higher class. But the simple question is not one of opinion, but one of fact—Did those in charge of the "Rio Bento," who by accident or by fault had placed an obstruction on a public highway, give sufficient warning to the public of its nature and position? I am very clear that, looking to the actual position of this stranded vessel, they did not. It is not necessary that we should lay down any general rule on this matter, but the very same considerations which go to show that the error of the master of the "Toward" was excuseable, show also that the single light exhibited was insufficient and deceptive. There might be situations in which one light so exhibited might be sufficient, but it was not so as things turned out. An impediment which in effect blocked up half the navigable channel, ought to have been intimated to the persons using the navigation, and it is idle to say it could not have been done. Anything which would have given notice that the obstruction was not at anchor would have sufficed to put the approaching vessels on their guard. If two lights would or might have been misleading, and perhaps they would, no unusual ingenuity would be required to effect so simple an object.

I concur in thinking the claim against the Clyde Trustees entirely untenable.

The Court adhered.

Counsel for the Owners of the "Rio Bento"—Maclean—Mackintosh. Agents—J. & J. Ross, W.S.

Counsel for the Owner of the "Toward"—Trayner—Wallace. Agents—Frasers, Stodart, & Mackenzie, W.S.

Counsel for the Clyde Trustees—Balfour—Asher—Robertson. Agents—Webster, Will, & Ritchie, S.S.C.

Wednesday, June 19.

FIRST DIVISION.

[Lord Adam, Ordinary.

MACFARLANE (WALKER'S EXECUTOR) *v.* MACBRAIR (WALKERS' TUTOR AD LITEM) AND OTHERS.

Writ—Delivery—Husband and Wife—Succession.

A husband out of his own funds advanced £500 to trustees of certain public harbour works, taking an assignation of the works in security in favour of himself and his spouse and the survivor of them. The assignation was found in his repositories at his death. He was survived by his wife. *Held* that there had been no delivery to her so as to divest him of the right to the sum contained in the bond in his lifetime.

Succession—General and Special Disposition.

Held that a mere general disposition of a testator's estate will not interfere with a special destination to the testator himself and his spouse and the longest liver of them, contained in a bond granted over certain harbour works in security of advances by the testator, unless there be some indication of a purpose that it should do so, apart from the general terms of the disposition.

Circumstances *held* insufficient to indicate any such purpose.

This was a multiplepoinding raised to determine certain questions as to the right of succession to part of the estate left by Alexander Walker, builder, Dundee, who died on 22d January 1877. The action was raised by the executor appointed by Mr Walker in his testament of date 5th June 1876. The purposes for which the executor was directed to hold the estate were—(First) Payment of all the deceased's just and lawful debts, deathbed and funeral charges, and the expenses to be laid out in confirming and recovering his means and estate: (Second) Payment of one-third of the free residue of his means and estate, after converting it into cash, to Mrs Isabella M'Leish or Walker, his widow; one-third equally between Ann Shepherd Walker, his daughter, and Harry Walker, his son; and the remaining one-third to his mother Mrs Ann Shepherd or Walker, residing in Wellington Street, Dundee, relict of Simon Walker, sawyer, Perth; and in the event of her predeceasing him, to his sister Mrs Jane Walker or Bell, wife of James Bell, pensioner, residing in Glasgow. Mr Walker was survived by his widow, his children, to whom Mr Macbrair was appointed *tutor ad litem*, and his mother. He left no heritable estate. His moveable estate amounted to upwards of £3000.

Among the moveable estate, and included in the condescendence of the fund *in medio*, was a bond granted by the Dundee Harbour Trustees "in

consideration of the sum of five hundred pounds sterling advanced and paid to them by Alexander Walker . . . . and Mrs Isabella M'Leish or Walker, his spouse," as security for which the trustees assigned the harbour works "to the said Alexander Walker and Mrs Isabella M'Leish or Walker, equally between them, and to the survivor of them, and to the heirs, executors, administrators, and assignees of the survivor," to be held by them, and the survivor and their foresaids, until the said sum of £500, and interest at the rate of 4 per cent. per annum from the 19th March 1875 till the term of Whitsunday 1878 (when the principal sum was declared to be repayable on six months' previous notice), should be satisfied and paid."

Mrs Walker objected to the sum of £500 being included in the personal estate of the deceased, maintaining that as the assignment was delivered and recorded on her behalf, her husband was divested of the right to it during his life.

The Lord Ordinary (ADAM) allowed Mrs Walker and the real raiser a proof of their averments, and thereafter, by interlocutor dated 24th January 1878, found that this sum formed part of Alexander Walker's estate at the time of his death. He added this note:—

"*Note.* . . .—It appears from the evidence that the £500 for which the bond was granted was the money of Mr Walker—no part of it belonged to Mrs Walker.

"It further appears that Mr Walker during his life received payment on his individual receipt of four termly payments of interest.

"It was proved that the assignment was kept in a drawer, to which both Mr Walker and his wife had access, along with other papers belonging to him, and it was there found after his death.

"It appears to the Lord Ordinary that the assignment was not a delivered deed, but remained in the possession and subject to the control of Mr Walker during his life.

"The Lord Ordinary therefore thinks that this sum of £500 was not the property of Mrs Walker during her husband's life, but formed a part of his means and estate at the time of his death, and therefore has been rightly included in the condescendence of the fund *in medio*. *Hill*, M. 11,580; *Balvaird*, 5th December 1816, 19 F.C. 220.

"It may be that Mrs Walker may have a good claim to the sum in the bond in respect of the terms of the destination; but the real raiser, who alone appeared to oppose Mrs Walker's objections, had no interest in the question, and the Lord Ordinary has not decided it."

The question was then raised by Mrs Walker, whether she was entitled to the £500 in respect that the special destination in the bond was not defeated by the posterior general settlement, and that the testator intended her to have this provision as well as the third of the estate provided to her by his testament. The Lord Ordinary (ADAM), by interlocutor dated 26th February 1878, ranked and preferred the claimant to this sum, adding this note:—

"*Note.*—. . . The question now is, whether his widow, the claimant Mrs Isabella M'Leish or Walker, is entitled to this sum of £500 in respect of the special destination thereof in her favour contained in the assignment, or whether it is to be distributed as part of the free residue of Mr Walker's estate, in terms of his settlement of 5th June 1876?

"The settlement only embraces Mr Walker's moveable estate; but by the 68th section of the Dundee Harbour Act 1869, which was in force at the date of the assignment, it was declared that all mortgages or assignments to be granted by the trustees under the authority of that Act, and all monies lent on the security of the rates and revenues, should be moveable or personal estate, and transmissible as such, and should not be of the nature of heritable or real estate.

"Unless the assignment in question is carried to Mrs Walker by the terms of the special destination in her favour, it will be carried by the settlement, and falls to be distributed as a part of the free residue of Mr Walker's estate.

"The assignment bears that the trustees, in consideration of the sum of £500 paid to the treasurer by Alexander Walker and Mrs Isabella M'Leish or Walker, his spouse, 'do hereby sell, assign, and make over to the said Alexander Walker and Mrs Isabella M'Leish or Walker, equally between them, and to the survivor of them, and to the heirs, executors, administrators, and assignees of the survivor, the harbour and works, &c.,' to be held until the sum of £500, with interest, should be satisfied and paid.

"Mrs Walker is the survivor, and maintains that this special destination in her favour is not revoked by the subsequent general conveyance by Mr Walker to his executor of his whole moveable estate.

"The Lord Ordinary is of opinion that, giving effect to the principles adopted by the House of Lords in the case of *Glendonwyn* v. *Gordon*, May 19, 1873, 11 Macph. p. 33. the claimant Mrs Walker is entitled to succeed. It was there stated by Lord Colonsay that a general disposition *mortis causa* does not derogate from a prior special destination, unless it be made clear that it was intended so to do.

"The case of *Glendonwyn* no doubt related to the successors of an heritable estate; but the principle does not seem to be limited to settlements of heritable estate, and it will be observed that both Lord Colonsay and the Lord Chancellor referred to the case of *Campbell* v. *Campbell*, 1 Pat. 343, which related solely to moveable estate, as an authority in support of the principle.

"If, then, the general disposition contained in Mr Walker's settlement of his whole moveable estate to his executor is not to be presumed to apply to the sum of £500 in the assignment previously specially destined to Mrs Walker, it appears to the Lord Ordinary that there is nothing else in the case to lead to the inference that it was intended so to apply. The Lord Ordinary therefore thinks that Mrs Walker is entitled to the sum of £500 in addition to one-third of the estate under the settlement. The cases on the subject are all referred to in the cases of *Glendonwyn*, *ut supra*, and *Thoms* v. *Thoms*, March 20, 1868, 6 Macph. 704."

Mrs Walker reclaimed against the interlocutor of 24th January 1878; Mr Macbrair, the *tutor ad litem* to the children, against that of 26th February 1878.

The authorities are quoted in the Lord Ordinary's notes.

At advising—

Lord President—If the bond by the Harbour Trustees of Dundee had been delivered by Alexander Walker to his spouse, or to some one for her behoof, I am of opinion that it would have operated a transference of the sum of £500 with the security provided, but unless it was delivered, and unless something was done to remove from Mr Walkers's control the security which came in place of the money he had invested it remained his property. That is in accordance with legal principle and a long train of decisions, but the rule of law is so well stated by Lord Kames in the case of *Hill* v *Hill*, which was quoted to us, that it is worth while to quote a few sentences from the report. He says, —"Delivery is in one case only a material circumstance to vouch the establishment or transference of a right, namely, when the person who delivers has the disposal of the subject; for in that case solely the delivery must import his will to vest his right in another. Hence it is that when a man lends a sum and takes the bond in name of a child *in familia*, delivery of the bond to the father has not naturally any other signification than that the bond, which comes in place of the money, is to be under his power as the money formerly was. It cannot import a delivery for behoof of the child, because the debtor who delivers the bond has no vote in the matter, but must deliver the bond to the father, from whom he got the money."

Now, that seems to be a principle directly applicable to this case; the fund remained in the repositories and subject to the control of the testator during his lifetime. I am therefore of opinion that the judgment of the Lord Ordinary is sound, and that this sum was properly included in the condescendence of the fund *in medio*.

Another question is raised by the interlocutor of the 26th February:—The ground of the Lord Ordinary's judgment in that interlocutor is, that while this assignation by the Dundee Harbour Trustees remained the property of the husband during his lifetime, the terms in which it was conceived by his desire and left in his repositories made it a special assignation in favour of his wife. The opposite contention is based on the general terms of Alexander's Walker's settlement. In it he appoints an executor and directs him in what manner his estate is to be divided. He directs his executor to pay one-third of his estate to his wife, one-third to his children, equally between them, and one-third to his mother, and in the event of his mother predeceasing him that third is to go to his sister. It is said that the general conveyance of his whole estate to his executor necessarily comprehends this sum of £500 and the security upon which it stood. I am of opinion that the Lord Ordinary has taken the sound view of this matter also. It must be kept in mind that this is not a destination of a sum of money made by a stranger or by an ancestor which he had power to evacuate; but it is a special destination made by himself in favour of himself and his spouse and the longest liver of them. A mere general disposition of a testator's estate by a testamentary writing will not interfere with such a special destination unless there be some indication of a purpose to do so altogether apart from the general terms of the conveyance, and in this case there is no indication of any such purpose.

Lord Deas—The clearest and safest ground for disposing of this question is to be found in the terms of the assignment taken by Mr Walker in favour of himself and his wife and the survivors of them, and in Mr Walker's testament, taken in connection with the surrounding circumstances, such as the relationship of parties, the state of the family, and other things. Now, on a consideration of these deeds and facts, I am of opinion, first, that this deed of assignment did not take this bond out of Mr Walker's power; and, second, I am just as clearly of opinion that he contemplated that that sum of £500 should be a provision for his widow, and did not intend his subsequent testament to be a revocation of that destination. The deed of assignment is peculiar in its terms:—The principal sum may be called up at Whitsunday 1878, but unless called up then is to go on bearing interest at the rate of 5 per cent per annum until called up. I think Mr Walker contemplated that if he should die before the term of Whitsunday 1878 his wife should have power to discharge that bond and apply the money as she pleased. He died in January 1877, and it appears to me that there is not the slightest reason to suppose that he intended the testament to stand as the sole testamentary provision for his wife. He had children of a very tender age, and their provisions could not be touched till they became major without procedure attended with considerable expense and difficulty. His best course, therefore, was to place a fund absolutely at the disposal of his widow, and I see no reason to doubt that that was his intention, and that this destination was a *mortis causa* destination in favour of his widow.

Lord Mure concurred.

Lord Shand—The substantial question between the parties is, Whether Mrs Walker is to have the benefit of the special destination in her favour contained in an assignment by the Dundee Harbour Trustees, dated 5th April 1876, in favour of Mr Walker and his spouse and the survivor of them?

The general rule which is applicable in this case has been the subject of many decisions, and it is, I think, particularly well expressed in the joint opinion of Lord Benholme and Lord Neaves in the case of *Thoms* v. *Thoms*, 6 Macph. p. 724. That opinion was concurred in by your Lordship and Lord Mure. It runs thus:—"Now, here a general rule comes into play, that where there are two *mortis causa* conveyances or bequests to different donees—the first special and the second general—the general grant is not presumed to import a revocation of the special grant, but both are read together; and the second is held to affect the succession *minus* the subjects given in the first. The grounds of this rule are plain and obvious. A gift *mortis causa* left in a man's repositories is effectual on his death unless revoked either expressly or by implication. A second gift or conveyance, if inconsistent with a first, is in general an implied revocation; but that implication is not made in the circumstances above supposed. There is in that peculiar case no such clear incompatibility as to make the one deed destroy the other; and the two deeds, both flowing from the same granter and both preserved as subsisting, can both receive effect in

a way that is not an unnatural interpretation of them."

In the present case that rule applies, but the question remains, whether those who oppose the claim are able to point to anything in the terms of the settlement or the actings of the deceased that can be held sufficient to indicate an intention to revoke the first special destination and to include this bond in the estate disposed of by the general settlement. There is no such provision in the settlement, and there is no acting on the part of the deceased, such as calling up the fund, or refusing payment at a certain date, which would indicate an intention that this fund should come into the general estate at his death. I am therefore of opinion that the Lord Ordinary is right in his second interlocutor.

As to the earlier judgment, I confess I am sorry that Mrs Walker raised the question she did raise at that time. Mrs Walker maintained that the assignment was a *de præsenti* conveyance, so as to take this fund out of the estate of the deceased during his lifetime. I agree with your Lordships in thinking the Lord Ordinary is right there too.

Lord Deas—I ought to add that we do not in my opinion require any general rule to decide this question. I go merely upon the intention of the testator as I find it in these deeds.

The Court adhered.

Counsel for Mrs Walker (Claimant)—Maclean—Thorburn. Agents—J. & J. Gardiner, S.S.C.

Counsel for Macbrair (Walker's *Tutor ad litem*)—Dean of Faculty (Fraser)—Lorimer. Agents—Macbrair & Keith, S.S.C.

Wednesday, June 19.

SECOND DIVISION.

[Lord Craighill, Ordinary.

GRAY *v.* BROWN.

Issues—Terms of Issue in an Action of Damages for Seduction—Where No Promise to Marry alleged.

Terms of issue adjusted in an action of damages for seduction, where the pursuer alleged that the defender had seduced her by means of courtship and professions of honourable attachment, by which he induced the belief that he would make her his wife, but where no specific provision to marry was alleged.

This was an action of damages for seduction, in which the pursuer averred that about the summer of 1876 "the defender began to pay her attentions . . . an intimacy sprang up, and the defender frequently expressed to the pursuer his admiration of and love and affection for her, and conducted himself towards her as one who desired to make her his wife. His courtship appeared to be an honourable one, and the pursuer believed it to be so." In Cond. 3 the pursuer, *inter alia*, averred that "the defender paid his addresses to her, and professed to entertain for her an honourable love, and the greatest esteem and regard. In consequence of his so conducting himself towards her, and she being, moreover, very young, and feeling flattered by the courtship of a man so much her superior in years, the pursuer gave her affections entirely up to the defender, and regarded him with entire trust and confidence. She looked upon him as her future husband, and on that footing permitted endearments and caresses from him. The defender took advantage of the feeling towards him on her part, which he had inspired as aforesaid, and of the trust she reposed in him, and of the belief which he well knew he had caused her to entertain that she would be his wife, to seduce her." Cond. 4 was, *inter alia*, as follows:—"She was prevailed on to permit connection by the love for him which the defender had induced by means of his said courtship and professions of honourable attachment, and making the pursuer his wife, and in reliance upon the prospect she entertained of one day being such."

The Lord Ordinary (Craighill) reported the case with a view to the adjustment of issues.

The pursued argued—It was not necessary to include in the issue the means by which the seduction was accomplished; it was enough merely to put the question, was the pursuer seduced? In the cases quoted for the defender, where the means of seduction were described, there was a specific promise of marriage, and besides in them the pursuer proposed the issue, and undertook of her own free will the burden of proof.

Argued for defender—It was settled that where a profession of honourable courtship was alleged to be the means by which seduction was accomplished, it was necessary to insert it in the issue; here what was averred amounted to this, and it ought to be inserted.

Authorities referred to—*Monteith* v. *Robb*, March 5, 1844, 6 D. 934; *Kay* v. *Wilson's Trustees*, March 6, 1850, 12 D. 845; *Stewart* v. *Menzies*, June 27, 1837, 15 S. 1198; *Walker* v. *M'Isaac*, January 27, 1857, 19 D. 340; *Paton* v. *Brodie*, December 10, 1857, 20 D. 258; *Forbes* v. *Wilson*, May 16, 1868, 6 Macph. 770; Macfarlane's Issues, 378–381; Fraser on Husband and Wife, vol. i. 504.

The Court appointed the following issue for the trial of the cause:—"Whether, in the course of the period betwixt May 1876 and October 1877, the defender courted the pursuer, and professed honourable intentions towards her; and whether by means of such courtship and professions the defender seduced the pursuer, and prevailed upon her to permit him to have carnal connection with her, to her loss, injury, and damage. Damages laid at £1000.

Counsel for Pursuer—Rhind. Agent—Wm. Spink, S.S.C.

Counsel for Defender—Campbell Smith. Agent—Adam Shiell, S.S.C.