alleged obligation to fence the pond, but upon an alleged obligation to fence off the road leading to the pond. But as the road leading to the pond for a distance of 100 yards after it leaves the public road does not belong to the defenders, there can be no obligation on them to fence it at its junction with the public road.

"The following cases were referred to by the pursuer:—*Brady* v. *Parker*, 14 R. 783; *Smillies* v. *Boyd*, 14 R. 150; *Gavin* v. *Arrol*, 16 R. 509; and *Hurst* v. *Taylor*, L.R., 14 Q.B.D. 918; but these cases appear to me to have very little bearing on the present case. They either relate to the liabilities of persons inviting customers into their premises, or to the obligations of contractors who form new roads or new works and allow the public to use old footpaths close to cuttings without taking proper measures to warn them from the cuttings. The pursuer in this case founded his claim upon an implied invitation on the part of the defenders to him to use the private road to the left. But (apart from the fact of the whole road not belonging to the defenders) the circumstance of the pursuer wandering along the road in question does not, according to *Prentice's* case, entitle him to complain of a pond at the end of it, and situated 265 yards from the public road.

"The accident to the pursuer has arisen from the misadventure caused by his mistake in choosing to take the road to the left on a dark night, and the defenders cannot be held to blame for it.

"At the adjustment of the record the pursuer added certain statements to the seventh article of his condescendence, founding upon the private road appearing to be the natural continuation of the public road to a person unacquainted with the locality, and upon the alleged fact of the defenders' having been warned of the danger. These statements do not affect the question of the defenders' liability in the circumstances narrated."

The pursuer appealed, and argued—The Sheriff-Substitute gave a fair statement of the case, and it was admitted that this case must be differentiated from that of *Prentice* cited *supra*, if the pursuer was to succeed, but there were two differences between the cases. In the case of *Prentice* it was proved that the pursuer had been walking on grass, so that he must have been aware he was not on a high road, whereas here the pursuer was admittedly on a road which led to the pond; and secondly, the case of *Prentice* had been decided after inquiry.

Counsel for the defenders were not called on.

At advising—

LORD JUSTICE-CLERK—The pursuer was going along the public road, and when he came to a particular point he turned a corner into what was really an unformed street. It was paved for some distance where he turned into it, but it afterwards went over open ground without any road at all. He went a considerable distance over this open ground, and it must have been quite plain to him that he was not upon the public road, and after going on for some time he fell into a bog.

In my opinion, the case falls quite within the principle of the case of *Prentice* v. *The Assets Company, Limited*, 17 R. 484, and the pursuer has not stated a case that can go to trial.

LORDS YOUNG, RUTHERFURD CLARK, and TRAYNER concurred.

The Court dismissed the appeal.

Counsel for Pursuer—A. S. D. Thomson—Deas. Agent—A. B. Kinnison, S.S.C.

Counsel for Defenders — Jameson — Macphail. Agent—F. J. Martin, W.S.

Tuesday, October 30.

FIRST DIVISION.

TURNER *v.* BOARD OF TRADE.

Ship—Shipping Casualty Appeal—Procedure before Court of Investigation—Duty of Board of Trade.

In an investigation held at the instance of the Board of Trade into the stranding of a vessel, the court of inquiry found that the master had been in default in neglecting to verify his position by the use of log and lead, and suspended his certificate for six months.

On appeal the Court (*diss.* Lord Adam) *reversed* the decision of the court of inquiry, *holding* that, it being a question of circumstances whether or not in omitting to use log and lead the master had been guilty of neglect warranting the suspension of his certificate, the Board of Trade had failed to possess the Court fully of the circumstances leading to one conclusion or the other, in respect (1) that, having examined the master as a witness, they had failed to question him as to his reason for omitting to use log and lead; and (2) that they had failed to produce reliable evidence as to the state of the weather, although it was in their power to have done so.

At an investigation under the Merchant Shipping Acts 1854 to 1887, held at Glasgow before the Sheriff-Substitute (BALFOUR) assisted by two nautical assessors, into the circumstances attending the stranding of the s.s. "Samara" of Glasgow, on or near Cannon Rock, County Down, on 1st August 1894, the Court of Inquiry reported as follows:—"The Court . . . finds that the stranding of the 'Samara' was caused by the master shaping too fine a course from the Codling Light-vessel, neglecting to verify his position by the log and lead, and failing to make sufficient allowance for tide. The Court therefore finds the master, John

Pirie Turner, alone in default, and suspends his certificate of competency for a period of six months from this date."

The result of the evidence, so far as it is necessary to refer to it, was as follows:—The steamer was on a voyage from Bilbao to Ardrossan. At 5·15 p.m. on the 31st July the Codling Bank Light-vessel bore east (true) at an estimated distance of one mile. From this position a course N.E. by N. (magnetic) was set and steered until 10 p.m. when the course was altered to N.E. ¾ N. The course N.E. ¾ N. was continued from 10 p.m., and the vessel kept going full speed at about 8 to 8½ knots an hour. The patent log was out, but it was not consulted, and at about 3·15 a.m., during the mate's watch, and while the master was on the bridge, the vessel struck the rocks going full speed, and remained fast. The evidence as to the weather experienced after Codling Light was passed was contradictory. The master and mate deponed that, although a drizzling rain was falling, they could see four or five miles, while an able seaman, who was on deck and on the look-out at the time the ship stranded, stated that he could not see one mile. No lights were seen before the ship struck. The course set might have been expected to bring the vessel abreast of the St John's Light or South Light between 2 and 3 a.m. The place where the ship struck was about a mile from the South Light. The master and mate said that this light could not have been lit or they would have seen it.

No questions were put to the master, who was examined as a witness by the Board of Trade, as to why he had not made use of the log and lead, and no evidence was submitted from the lightships or light-houses as to the state of the weather at the time when the casualty occurred.

The master appealed, and the appeal was heard by the First Division assisted by two Elder Brethren of Trinity House (Captain Ladds and Captain Barlow) as assessors.

Argued for the appellant—A heavy *onus* of proof lay on the Board of Trade, because the inquiry involved a heavy penalty on the master if found in default. This had not been discharged. The master was at his post on the bridge all night. The master and the mate both spoke to the course steered being a proper one, and their evidence was uncontradicted. The Board of Trade were bound to ask the master why he had not resorted to the log and lead if they were going to found a cause of complaint upon that—*Watson* v. *Board of Trade*, July 20, 1892, 19 R. 1078, see Lord President, p. 1083. No question on that head had been asked. The master's duty to use the lead only arose if the weather was thick. No independent evidence as to the state of the weather had been submitted at the inquiry. Since then the master had got the record kept by the light-ship close to the Cannon Rock, and it showed that the night was clear until the time when the ship struck.

Argued for the Board of Trade—The course, as found by the Court below, was too narrow. In any case, it was one which needed to be closely kept. If the master had used his lead he would have found the channel was steadily becoming shallower, whereas it should have steadily increased in depth. He had failed to take this simple and well-known precaution, and was therefore rightly found to have been in default.

At advising—

LORD PRESIDENT—The Court below have suspended the certificate of the master for a period of six months, and the grounds of judgment are concisely stated in the report of the Court. The facts upon which the Court below have proceeded are the following—(1) That the stranding of the "Samara" was caused by the master shaping too fine a course from the Codling Light-vessel, (2) neglecting to verify his position by the log and lead, and (3) failing to make sufficient allowance for tide.

Now, the question whether the first of these propositions is sustained by the facts of the case is one primarily of nautical skill, and we are advised by the Elder Brethren that in this case exception cannot well be taken to the course shaped by the master. We are also advised that the question of tide does not, having regard to the facts of the case, enter largely into this case. Accordingly, two of the three branches upon which this report by the Court and the sentence are supported are, as we are advised—and we gladly act upon that advice—not sustained by the facts of the case.

It remains therefore to consider whether the intermediate finding of the Court—that the master neglected to verify his position by the log and lead—is one which supports the decision. Now, the question of neglecting to verify the position by log and lead is a complex question—that is to say, it involves, first, the question whether there was an omission to verify the position by log and lead in a situation which required it, and secondly, whether that could be treated as an act of neglect of such a character as to warrant the decision of the Court. That last is a question of circumstances, and in my opinion it was incumbent upon the Board of Trade to possess the Court fully of the circumstances which would lead to the one conclusion or the other on the question of what was the character of the omission if that omission occurred. Now, upon that I observe two defects in the case presented by the Board of Trade. In the first place, this inquiry, like other inquiries of the same kind, opens without any vestige of written notice to the person accused of what are the *gravamina* to be advanced against him, and I find that in this case the Board of Trade, exercising their undoubted discretion, chose to put the master into the witness-box and examine him on the matters in hand. They of course enter upon the inquiry without a complete knowledge of the facts, but at the same time they have their own warrants in their

own knowledge for having the inquiry at all, and placing this man on his trial; and in this examination of the master the subject of verifying the position by the log and lead is not so much as mentioned. Now, that seems to me of itself to create a very grave doubt as to whether this conclusion can be supported, for the sources of evidence after all are limited on this question, and without laying down any absolute rule, I think the present case is a conspicuous one in which the ends of justice could not be accomplished without the master being afforded an opportunity of accounting for this omission if it in fact occurred. He was quite entitled, I think—his advisers were quite entitled—in the way in which the Board of Trade conducted the inquiry, to assume that, as for this matter of verifying the position by log and lead, that was not made matter of complaint. But then I do not rest upon that alone, but I rest upon the second and other deficiency in the evidence, of which I took serious note. The question of whether there was need to verify the position in that way, and of the knowledge of the captain as to what his position was, depends largely if not primarily upon the state of the weather. Now, upon that question of the state of the weather, some of the persons examined by the Board of Trade say one thing and some another, but there was ready to the hand of the Board of Trade one source of information which was completely reliable, and that was the evidence from the lighthouses, and that is not touched. The master not unnaturally fishes up now some extracts from the books kept by the people at the lighthouses, but that is very incomplete, if indeed quite regular evidence. These should have been there, and brought there, not by the master, but by the Board of Trade, who are anxious to make out the case against him. Therefore, in the absence of these two sources of information, I find myself in this position—if I am going to support this judgment I shall do so by clinging to the sole surviving member of the three findings, viz., the second finding, and I discover about that second finding that the Board of Trade has not taken two of the primary and necessary sources of information to place them before the tribunal. I am not prepared to support a sentence pronounced in these circumstances, and I am therefore for sustaining the appeal.

Lord Adam—I am glad your Lordships have come to the conclusion that this judgment should be set aside, because I think, in any view that can be taken of it, and of the circumstances in which the alleged default of the master took place, it was a very hard judgment. There is no doubt that he was in the discharge of his duty. He was keeping a good look-out at the time, and there is no bad feature in the case. It may be that he was guilty of bad seamanship, but if there was bad seamanship, I should not think it was such as warranted the penalty inflicted in this case. It was pointed out that the judgment has been rested on grounds which could not be supported. We are advised by the Elder Brethren that the captain on this occasion did not steer too fine a course, and the first ground upon which the Court of Inquiry proceeded is thus displaced, and it follows that the third ground on which the judgment is rested—namely, that he did not make a due allowance for the tides—must go too, because, if he did not steer too fine a course, he made due allowance for the tides. Therefore these two branches of the judgment must be given up. But then there remains a third, namely, that this vessel was lost on account of the carelessness of the master in not making proper use of the log and the lead. As to that, it appears to me on the evidence that the master steered a certain course from near the Codling light, and he ran that course for so many hours, and if the ship had kept its proper course, as he was assuming, it must and ought to have brought him in sight of the St Johns and other lights. That being so, if he had used his log, that would have told him where he ought to be, and it would also have told him that he either ought to have seen the lights, or, if he did not see them, that he was not in the position he should have been—either it was a very dark night, or he was not in the position in which he calculated that he was. Then what was his duty?—and we are advised his duty then, in the exercise of proper seamanship, was to betake himself to the use of the lead, and that the lead would have told him that he was not in the position in which he calculated he was. Well, it appears to me that that is a case of bad seamanship, for which the master is responsible, and for my own part I should have been of opinion that that was proved in this case. Now, I think we must take the evidence as we have it. Your Lordship suggests we ought not to hold bad seamanship proved in this case, because in the first place the captain was not asked any questions about why he did not use the log or the lead. I agree with your Lordship that that was an oversight, but at the same time the captain had ample opportunity of explaining all these matters before the tribunal, and he should have done it. It is quite true it would have been much better if his attention had been drawn to this particular point, and he had been asked questions upon it, but I do not think that the omission to put such questions is enough to absolve us from looking at the evidence as we have it. Then it is said the evidence is not complete, and I agree in that observation too. It would have been much better and more satisfactory if we had had further information, as we might well have had from the keepers of the other lighthouses, who would have told us the state of the weather, how dark it was and how misty it was, and so on, but still I must say, looking to the facts of the case and the evidence, I cannot persuade myself that if we had had such evidence as is suggested, and if questions had been put to the captain as suggested,

the case would have been in a different position.

LORD M'LAREN—I concur in the decision proposed by your Lordship, and in all the reasoning in support of it. But that on one point there is some diversity of opinion, I should not have desired to add anything, but I would like to point out very shortly that I think the position of this case has been entirely altered, and the complexion of the charge against the captain is altogether different from what it was in the course of the inquiry, in consequence of the further light we have had upon the questions of seamanship that have been argued. We are advised by our assessors that the course steered was a perfectly proper course, and I must say, looking at it as a question of geography, I should have been much surprised if any different opinion could have come to be entertained upon such a question, unless the action of the tides inshore had been very much greater than has been suggested. I understand from Captain Barlow that he has taken the trouble to verify the calculation made by one of the witnesses, and found it to be quite correct, and that really the tide, if it were such as is assumed in the tables, would not have carried the vessel more than six miles out of the course laid down. Now, we know that tides and currents are subject to unaccountable variations. Whether there had been such a variation at the time, or whether the vessel had been carried out of her course by bad steering, in neither view was the captain to blame under this head. Well, then, we are reduced to the second ground indicated in the sentence passed by the Court of Inquiry, that there was a fault of seamanship in the master not having taken means to verify his position by the log and lead. Now, at the time—between two and three A.M.—when the ship ought to have been abreast of these two lights, the St John's Light or the South Light, or one of them, one would suppose that the master of the ship, not seeing lights, would have seen there was something wrong in his course, either that the weather was exceptionally foggy, thicker than he supposed, or that he was a long way to the east, and therefore out of danger. Probably he took the latter view, and thought that he was so distant from the lights that he could not see them. Now, if he had been examined upon that point, and had not been able to give any further explanation, I should have thought—and I think all of your Lordships would have been of opinion—that that was an error upon which some censure or sentence might follow, but I agree with your Lordship in the chair that it is not in general safe to proceed, under an inquiry which has punishment or censure for one of its objects, without giving fair notice to the accused of all points that are to be made against him. I do not say that, because there has been an omission to examine the person in fault upon one of the subsidiary points of the case, that would constitute such a technical error of procedure that the sentence could not be upheld, but we are in this position, that what in the view of the Court of Inquiry was the principal fault of the master has now been displaced, and that on the other ground to which they must have attached very little importance, because no questions were put to him upon it, we are not fully in possession of the facts. We have no evidence as to the state of the weather, which is very material, because it would only be in the case of thick weather that the duty of surveillance would arise, and then we have not got such light in the examination of the captain and his mate as would have made apparent the reasons why he did not think it necessary to verify the ship's course. In these circumstances I think we could not, consistently with justice to the defender, maintain the sentence.

LORD KINNEAR concurred.

The Court pronounced this interlocutor—

"Sustain the appeal; recal the finding and sentence of the Sheriff-Substitute of Lanarkshire dated 16th August 1894 appealed against: Find that the stranding of the s.s. 'Samara' on the 'South' or 'Cannon' Rock, off the County Down, Ireland, on the morning of the 1st of August 1894, has not been proved to have been due to the default of the appellant: Find that the appellant's certificate ought to be returned to him: Direct that it be returned to him accordingly: Further, direct that this judgment be registered to the Board of Trade in terms of the rules to that effect; and decern," &c.

Counsel for the Appellant—Dickson—Salvesen. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Counsel for the Board of Trade—Solicitor General Shaw, Q.C.—W. Campbell. Agent—David Turnbull, W.S.

Saturday, November 3.

SECOND DIVISION.

KEITH JOHNSTON'S TRUSTEES *v.* JOHNSTON AND OTHERS.

Succession—Marriage-Contract—Legacy—Cumulative Provisions.

A father in his daughter's marriage-contract bound himself to pay to the trustees named therein "a sum of not less than one thousand pounds," on the death of the survivor of his wife and himself, for behoof of his said daughter in liferent, and her children in fee. Two years afterwards he executed a holograph codicil to a previously executed trust-disposition and settlement, by which he directed his trustees to hold his whole estate for behoof of his widow in liferent, and that on her decease the whole pro-