Judgment of the Lords of the Judicial Committee of the Privy Council on the Consolidated Appeals of The East London Harbour Board v. *The Caledonia Landing, Shipping and Salvage Company, Limited, and of The East London Harbour Board* v. *The Colonial Fisheries Company, Limited, from the Supreme Court of the Colony of the Cape of Good Hope; delivered the 2nd April* 1908.

Present at the Hearing:

THE EARL OF HALSBURY.
LORD MACNAGHTEN.
LORD ATKINSON.
SIR ARTHUR WILSON.

[*Delivered by the Earl of Halsbury.*]

These are consolidated Appeals from a judgment of the Supreme Court of the Colony of the Cape of Good Hope.

The Appellants are the East London Harbour Board, constituted under the Act No. 36 of 1896 of the Colony, and have the control and management of the Harbour of East London. The Respondents in the first Appeal are the owners of the steam tug "Caledonia"; the other Respondents are the owners of a coal hulk called the "Nini." There were originally two actions. The action by the owners of the "Caledonia" was an action claiming 4,000*l.* as damages sustained by reason of the alleged negligence of the Appellants in removing from her berth and fastening improperly the "Caledonia" to a certain hulk called the "Alpha," whereby the

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tug broke adrift and was lost. The owners of the "Nini" also brought an action, claiming 345*l.* for the damage occasioned to that vessel. By consent the actions were consolidated and heard together.

The action was tried before Chief Justice Sir H. De Villiers and Mr. Justice Hopley on several days in the months of August and September 1906. It appeared that the steam tug "Caledonia" was sent by her owners to be laid up at East London on the 30th of August 1905, and the "Nini," a wooden hulk used for coals, was moored to the satisfaction of the harbour authorities somewhat lower down the river than the "Caledonia." There is no dispute that these two vessels were properly and securely moored in their original positions, but by the authority of the Harbour Master or Port Captain, as he is sometimes called, they were removed from their original positions, and (as is found by the Chief Justice and assented to by Mr. Justice Hopley) they were not properly or securely moored in their new positions.

They were moved in order to make a clear course for a regatta which was to be held on the 9th of October. In view of the temporary purpose for which the removal took place, less attention seems to have been paid to the moorings than if it had been intended to moor them permanently. The regatta took place. It was over at 4.15 on the afternoon of Monday, the 9th. It is found as a fact by the Court below that there would have been time to restore the "Caledonia" to her original moorings on this day, but neither then nor on the 10th were any steps taken to remove either of the vessels to her original moorings. At about 9.30 on the night of the 10th October an extraordinary freshet occurred. The "Caledonia" was driven out to sea at about 3.30 on the morning of the

11th, with her caretaker on board, and was never seen again. The "Nini" was sunk on the west bank of the river. Upon the question of fact, the Court below finds that the two vessels were lost by reason of the negligence of the Harbour Board officials. Their Lordships entirely concur with that finding. It would be difficult for them to differ upon such a question of fact as is here involved from the learned judges who saw and heard the witnesses—an advantage that their Lordships have not, of course, had.

The responsibility of the Defendants for the acts of their officers is hardly susceptible of argument. It would be perilous to navigation in any port, if the authority of the Port Captain or Harbour Master could be questioned. In more than one case it has been pointed out how dangerous a principle would be involved if such a question as the place of mooring or the method of mooring were not, in the first instance at all events, absolutely within his authority (1892, A.C., *Reney* v. *Magistrates of Kirkcudbright*, 264, at p. 270). Their Lordships do not disagree with the reasoning of the Chief Justice, or with the view that a regatta was a legitimate use of the river. The motive of the Harbour Master in ordering the shifting of the berths of the two vessels certainly does not make his act one outside the scope of his employment.

The attempted defence to the action that the moving and re-mooring were done under the orders of a competent pilot, one Barrie, and were part of his duties as done under the compulsory pilotage provisions of the 87th section of the Act No. 36 of 1896, is sufficiently answered by the fact that Barrie neither professed to act, nor, as a fact, did act, as a pilot at all. That he was

a pilot was an accident. He was in the regular employment of the Board, and was simply acting as their servant in what he did.

The most plausible defence was the extraordinary and unusual flood which occasioned the accident. But the circumstance that the vessels were moved from a much less dangerous position, and the fact that insufficient precautions were taken, while there was yet time (as both the learned Judges find) to make better provision for their safety, notwithstanding the warnings given by the state of the weather and the gradual increase of the flood, are fatal to such a defence.

Their Lordships will therefore humbly recommend His Majesty to dismiss the Appeals. The Appellants will pay the costs.