Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Commonwealth Portland Cement Company, Limited, v. Weber, Lohmann, & Co., Limited, from the Supreme Court of New South Wales; delivered the 19th December 1904.

Present at the Hearing:

LORD MACNAGHTEN.
LORD LINDLEY.
SIR FORD NORTH.
SIR ARTHUR WILSON.

[*Delivered by Lord Lindley.*]

This is an Appeal from a Judgment of the Supreme Court of New South Wales affirming a Judgment of non-suit in an action brought by the Appellants against the Respondents.

The Appellants are manufacturers of cement. Their head office and works are at Portland, New South Wales. They had ordered machinery from abroad, and it was to arrive at Sydney in a steamer named the *Karlsruhe* consigned to the care of the Respondents who were shipping agents there. The ship arrived on Sunday the 6th October 1901. Monday was a holiday. The ship was reported early on Tuesday the 8th October. When the ship arrived no Customs duty was payable in New South Wales on machinery imported from abroad; but like other duty-free goods it had to be entered and cleared at the Customs House at Sydney and (as will be more fully explained presently) the Respondents had undertaken to pass it through the Customs House for the Appellants.

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By the New South Wales Customs Regulation Act 1879 (42 Vict. No. 19) 24 hours from the date of the report of the ship were allowed for entering and clearing duty-free goods, Sundays and holidays not being counted.

Before 24 hours for entering and clearing the machinery had expired and before it had been cleared, viz., in the afternoon of the 8th October, the machinery became liable to a heavy duty of 900*l.* odd, and it could not be afterwards cleared or landed until this duty was paid.

It was proved at the trial that there was ample time to enter and clear the machinery on the 8th October before the duty became chargeable. It was also proved that on the morning of the 8th October the Defendants did enter and clear some goods of their own brought by the *Karlsruhe*. It was further proved that it had been for some time common knowledge in Sydney that the Government of New South Wales was contemplating the publication of an Ordinance bringing into operation in New South Wales the Customs Act, 1901, passed on the 3rd October by the Commonwealth Parliament of Australia. Such an Ordinance was in fact published in the afternoon of the 8th October.

These being the admitted facts, the question arises whether the Appellants who had to pay the duty to get their goods landed are entitled to recover the amount from the Respondents as damages for their negligence. This question really turns on the duty of the Respondents; and this depends on their contract with the Appellants. The contract is to be found in a series of letters passing between the two companies, commencing on the 24th April and ending on the 3rd October 1901. The short effect of these letters was that the Respondents undertook to lighter and load on railway trucks the machinery of the Appellants brought by the *Karlsruhe* for

certain fixed charges, and they also agreed to pass the machinery through the Customs without extra charge. It is clear from the correspondence that the payment of Customs duties was not contemplated by either party. To enter and clear duty-free goods involved no difficulty or trouble worth mentioning to the Respondents, who were to receive and lighter them ; and it was very natural that the Respondents should further undertake to pass them through the Customs House without extra charge.

The Appellants contend that the obligation contracted by the Respondents included the duty to exercise reasonable diligence in entering and clearing the goods ; and that this involved the duty to protect the Appellants' goods from loss which was known to the Respondents to be imminent or at least probable. The Appellants further contend that it should have been left to the Jury to say whether such diligence was exercised or not.

The Respondents, on the other hand, contend that all they agreed to do was to enter and clear the goods in the usual way in the time fixed by the Customs Regulations. They contend that the Appellants are seeking to throw upon them a duty which they never undertook and which was never contemplated by either party.

There is no doubt that all agents are bound to take reasonable care in doing what they have undertaken to do ; but it appears to their Lordships that the Appellants cannot succeed unless they can show that it was the duty of the Respondents to attend to taxation by the Government and to take reasonable care to protect the Appellants' goods from taxation. Their Lordships are of opinion that the contract between the parties did not impose upon the Respondents any legal obligation to pay attention to what the Government might or might not do

as regards altering Customs duties; and that there was no evidence to go to the Jury of any breach by the Respondents of any duty which they owed to their employers.

This was the view taken by the Judge who tried the case and by the Supreme Court. In coming to the same conclusion, their Lordships have assumed that all the questions put, and successfully objected to, had been answered favourably to the Appellants. No wilful misconduct was imputed to the Respondents. The Appellants knew quite as well as the Respondents that the imposition of Customs duties was to be feared, and they knew that the goods were arriving; but the Appellants did not request the Respondents to expedite the clearing under the peculiar circumstances which had arisen, and which had never been contemplated by either party.

Under these circumstances their Lordships are of opinion that the non-suit was correct, and that there was no misdirection or improper rejection of evidence. The case was one in which a Jury would be very likely to go wrong by reason of the fact that the Respondents cleared their own goods early on the 8th October, and that the Respondents might have cleared the Appellants' goods at the same time. But what they might have done and what they legally were bound to do are two very different questions.

Their Lordships will humbly advise His Majesty to dismiss this Appeal, and the Appellants must pay the costs.