Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Smyth v. *The Queen, from the Supreme Court of Victoria; delivered 3rd August* 1898.

Present:

LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD MORRIS.
SIR HENRY STRONG.

[*Delivered by Lord Morris.*]

In the present case the Appellant appeals from a judgment of the Supreme Court of Victoria which answered against the Appellant the question reserved at the trial of this action and from the order dated 8th November 1897 directing that judgment should be entered up for the Respondent. The Appellant's suit was by petition of right—he claimed to be entitled to superannuation allowance as the holder of an office in the public service for which he was superannuated—he had passed the age of 65. The Appellant had been appointed to his office of "Crown prosecutor" on the 7th April 1861 for certain District Courts of the Colony. The appointment was as follows:—

"Whereas all treasons felonies misdemeanours "and offences compoundable in any Circuit Court "in the Colony of Victoria must be prosecuted "by information in the name of Her Majesty's "Attorney-General or Solicitor-General in the "said Colony or of such other person as the "Governor of the said Colony may appoint.

" Know ye therefore that I the Governor afore-
" said do by these presents appoint that at the
" Circuit Courts to be holden at Sandhurst
" Maryborough and Castlemaine all such treasons
" felonies misdemeanours and offences as afore-
" said shall be prosecuted in the name of Charles
" Alexander Smyth Esquire Barrister-at-Law."

The Appellant was subsequently appointed to an additional Circuit. The duties of the said office of Crown prosecutor are set forth in the 7th paragraph of the Appellant's petition of right. The salary given to this office was 600*l.* a year.

The Appellant having declined to accept certain new conditions and duties proposed to be attached to his office his tenure was by letter of the Attorney-General of the 17th January 1895 terminated and an Order of Council was made formally terminating the Appellant's appointment. It appears that at an earlier period viz. in 1890 the Appellant had proposed to resign in consequence of ill-health on a retiring allowance which was acceded to by the then Attorney-General and the sum of 386*l.* 13*s.* 6*d.* was placed on the estimates for such retiring allowance but the Appellant's health became restored and he did not resign but continued in his office.

On his removal in 1895 the Appellant again applied for his superannuation allowance but such application was refused the Attorney-General having given an opinion that Appellant was not entitled to any pension. The Appellant consequently instituted the present proceedings. At the trial Sir H. Wrixon a former Attorney-General was examined and gave evidence as to the duties of the Appellant's office of " Crown " prosecutor." It was found as a fact by the learned Judge that the statements of the duties of Appellant's office were correctly stated in the

7th paragraph of the petition of right. It was proved and it is conceded that there was a separate and distinct class of officer known as "prosecuting barristers." They are referred to in the Appropriation Acts as a distinct class. Their duties were simply to prosecute as advocates in the particular cases in which they might be employed. This case entirely turns upon the construction of the Public Service Act 1890 viz. whether the Appellant comes within Clause 107 and if he does is he excepted by the excluding Clause 3 ?

Section 107 says all persons classified or unclassified holding offices in any department of the public service at the time of the Public Service Act 1883 should still be entitled to superannuation or retiring allowance compensation or gratuity to be computed under the provisions of Act No. 160.

Section 3 says except where otherwise expressly provided nothing in this Act shall apply to any prosecuting barrister and in the Interpretation Clause it is provided that the expression "officer" "shall mean and include all persons employed "in any capacity in the public service." Their Lordships are of opinion that the Crown prosecutors such as Appellant paid yearly would come within and be included in the terms of Section 107 —an opinion which was entertained by the Supreme Court also—the question in the case therefore is reduced to the construction of Clause 3 viz. are Crown prosecutors excluded by the terms of that clause ? They are not named in it but it was contended that the words "prosecuting barristers ' included and was meant to refer to "Crown "prosecutors." Their Lordships cannot accede to such a construction. The learned Judge who gave the judgment of the Supreme Court recognises that there were two well recognised

classes of functionaries whose titles were not used in common but on the contrary were described in Official Acts and documents with separate references and whose duties were dissimilar except in one respect the duties of the Crown prosecutor being of a much higher nature and employed at a salary the point of similarity being that while the whole duty of a prosecuting barrister was to act as an advocate on getting a brief it was one of the duties of a Crown prosecutor to prosecute in a case in which he had presented. Why then should an exclusion by name of a well known class be held to be an exclusion of an equally well known and distinct class whose duties are so dissimilar? The learned Judge in the Supreme Court seems to have substantially decided on the ground that it could not be reasonably supposed the Legislature intended by the use of the words "prosecuting "barristers" to refer to the class "prosecuting "barristers" because they could not come within the other provisions of the Act. There may be some difficulty in assigning a reason why the class "prosecuting barristers" under such circumstances were excluded by name—whether *ex majore cautela* or why otherwise. However this may be this difficulty appears to their Lordships to afford no ground for holding that the words are to be applied to another and distinct class of officers viz. "Crown prosecutors." The learned Judge was of opinion it was the class of Crown prosecutors that was aimed at in Clause 3, and not the class named. If such surmise is to be entertained it is sufficient to say the aim has not been attained. Their Lordships cannot adopt such a rule of construction as the Supreme Court have adopted in the present case. One distinct well known class of official is stated to be excluded in plain

unmistakeable language. Why should such exclusion in consequence of its inapplicability to the class named be transferred to another class not named ?

Their Lordships are of opinion the fact that the Appellant held his office during pleasure cannot affect the question of superannuation. His term of office is determined by the will of the Crown. That does not affect his right to superannuation allowance for the term he held office. Their Lordships will humbly advise Her Majesty that the Judgment of the Full Court and the Order of the Supreme Court of the 8th November 1897 ought to be reversed and that in lieu thereof the Appellant be declared entitled to superannuation allowance. The Appellant will also be entitled to his costs in the Courts of the Colony and of this appeal.